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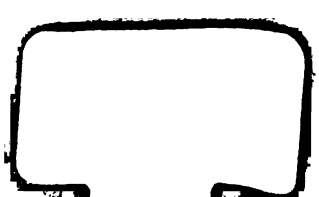

REPORTS

OF

All the Cases decided by all the Superior Courts

RELATING TO

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REPORTS OF ALL THE CASES

DECIDED BY THE

Supreme Court of Judicature

RELATING TO THE

LAW ADMINISTERED BY MAGISTRATES

AND TO

PAROCHIAL AND MUNICIPAL LAW.

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, May 12, 1885.

(Before Brett, M.R., Baggallay and Bowen, L.JJ.)

The Guardians of the Holborn Union (apps.) *v.* The Guardians of the Chertsey Union (resps.). (*a*)

Poor law — Settlement — Legitimate child under sixteen—Residence away from parent—Divided Parishes Act 1876 (39 *&* 40 *Vict. c.* 61), *s.* 34—*Practice—Appeal—Case stated under* 12 *&* 13 *Vict. c.* 45, *s.* 11.

Two pauper children, upon the death of their mother in the year 1877, *they being then under six years of age, were placed by their father under the care of K. and his wife, who resided at Chertsey within the respondent union, and they remained there until they became chargeable in the year* 1883. *The paupers' father resided within the appellant union from* 1877 *until* 1881, *and thereby acquired a settlement therein; he died in* 1883. *After they went to Chertsey the children were only visited three times by their father, and they never visited him nor ever left the parish of Chertsey; but he paid a certain sum quarterly for their clothing, and agreed to pay a certain sum weekly for their maintenance, which latter sum was paid either by him or by his employer.*

The Court of Quarter Sessions ordered the removal of the paupers to the appellant union, and the Divisional Court reversed that order.

Held, that there was evidence on which the justices might find that the father had never given up the intention that his children should return to him when he was able to receive them, and that therefore the order of the justices should stand.

Judgment of Hawkins and Smith, JJ. reversed.

The Divisional Court refused leave to appeal.

Held, that nevertheless an appeal lay.

This was an appeal from a judgment of Hawkins and Smith, JJ., upon a case stated by consent under 12 & 13 Vict. c. 45, s. 11, reported at 52 L. T. Rep. N. S. 102.

The material parts of the special case were as follows:—

1. On the 20th Oct. 1883 Amy Kelly, aged eleven years, and Wallace Kelly, aged nine years, became chargeable to the respondent union.

2. On the 20th Feb. 1884 an order was made by two justices of the county of Surrey adjudging the said Amy Kelly and Wallace Kelly to be legally settled in that part of the parish of St. Andrew, Holborn, which is comprised in the appellant union, and the said order was appealed against.

3. The paupers, Amy Kelly and Wallace Kelly, were the lawful children of Thomas William Kelly and Sarah Ann, his wife.

4. The parents of the paupers were both deceased. The mother, Sarah Ann Kelly, died in childbirth in Feb. 1877, and the father, Thomas William Kelly, committed suicide, it is believed, in Feb. 1883.

5. The paupers in the month of Feb. 1877, on the death of their mother, were placed by their father in the care of Samuel and Ann King, who were then residing, and still resided, at Addlestone, in the parish of Chertsey, in the respondent union, and the paupers still remained in the care of the said Samuel and Ann King.

6. From Feb. 1877 up to Feb. 1883 the father's visits to the children were as follows: the last time on Boxing-day 1880, and twice previously. He came down on each of these occasions by the midday train, and left on each evening early. The sum agreed upon for the children's maintenance (10*s.* per week) was remitted through the father's employer, who paid absolutely out of his own pocket the said sum of 10*s.* per week from Feb. 1877 to May 1879. The father then paid half that sum and the father's employer the other half, and the father's half was stopped out of his wages by his employer. In Feb. 1883, after Kelly the father disappeared, the employer kept up the 10*s.* per week out of his own pocket until the children became chargeable, and paid 6*s.* per week up to the end of March 1884. The sum agreed upon for the children's clothing (9*s.* per quarter) was paid or remitted to the foster-parents regularly

(*a*) Reported by A. A. Hopkins, Esq., Barrister-at-Law.

by the father from Feb. 1877 until Christmas 1880.

7. The paupers' father resided from March 1877 until the month of May 1881 in the parish of St. Andrew, Holborn, in the appellant union, under such circumstances as to gain a settlement in the said parish of St. Andrew, Holborn, by virtue of the provisions of 39 & 40 Vict. c. 61, s. 34.

8. The appellants contended that the paupers had resided from Feb. 1877, and still continued to reside in the parish of Chertsey, and thereby had acquired a settlement in their own right in the parish of Chertsey, in the respondent union, as their actual bodily residence for the period, and under the circumstances above mentioned came within and satisfied the meaning of the residence prescribed by sect. 34 of the Act 39 & 40 Vict. c. 61.

9. The respondents, on the other hand, contended that the paupers under the above circumstances were constructively resident from Feb. 1877 to the commencement of the year 1883 with their father, the said Thomas William Kelly; that they were, therefore, unable to acquire any settlement in their own right in the respondent union under the statute 39 & 40 Vict. c. 61, s. 34, or otherwise during such period, and were settled in the appellant union by reason of their said father's residence therein from March 1877 to May 1881 as aforesaid.

10. The question for the opinion of the court was, whether the paupers were, at the time of the making of the order of removal, settled in the parish of Chertsey in the respondent union.

11. If the court should answer that question in the affirmative, the said order was to be quashed with costs; if in the negative, the said order was to be confirmed with costs.

39 & 40 Vict. c. 61, s. 34:

Where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed without such corroboration as the justices or court shall think sufficient.

The above case was stated by consent before the appeal to quarter sessions from the order of the justices was heard, and it was agreed between the parties that a judgment in conformity with the decision of the court might be entered on motion by either party at the Surrey Quarter Sessions next, or next but one, after such decision should have been given.

The Divisional Court were of opinion that, upon the above facts, there was no evidence of any intention on the father's part to receive the children back again, and that the pauper children's place of residence was Chertsey, and that they had acquired a settlement there, and that therefore the order of removal was wrong. They refused leave to appeal.

The respondent union (the guardians of the Chertsey Union) appealed.

Charles, Q.C. and *Poland*, for the guardians of the Holborn Union, took a preliminary objection. —Leave to appeal was refused, and therefore no appeal to this court lies. The case was stated under 12 & 13 Vict. c. 45, s. 11, after notice of appeal to quarter sessions from the order of the justices had been given. The case is therefore in effect an appeal from petty sessions, and the judgment of the Divisional Court is final, under the Judicature Act 1873, s. 45, unless leave to appeal is given, and here it was refused. They referred to

Hinton v. *Swindon New Town Local Board*, 42 L. T. Rep. N. S. 614;
Reg. v. *Savin*, 6 Q. B. Div. 309;
Overseers of Walsall v. *London and South-Western Railway Company*, 41 L. T. Rep. N. S. 106; 4 App. Cas. 30.

Bosanquet, Q.C. and *R. C. Glen* for the guardians of the Chertsey Union.—This is not an appeal from quarter sessions, or from petty sessions; it is a case stated for the opinion of the court, not stated by quarter sessions, or by petty sessions, but by consent. It is therefore not within sect. 45 of the Judicature Act 1873. The case of the *Corporation of Peterborough* v. *Overseers of Wilsthorpe* (50 L. T. Rep. N. S. 189; 12 Q. B. Div. 1) is in point. [He was stopped by the Court.]

BRETT, M.R.—I give my judgment upon the words of sect. 45 of the Judicature Act 1873. This case was stated by consent of parties under sect. 11 of Baines's Act (12 & 13 Vict. c. 45). There was a decision of justices in petty sessions, and from that decision an appeal to quarter sessions was pending, and whilst that appeal was pending the power was exercised, which is given by sect. 11 of 12 & 13 Vict. c. 45, of stating a case for the opinion of the Divisional Court. But when the Divisional Court had given their opinion the case was not to go back to petty sessions for the justices to rectify their judgment, if necessary, but it was to go to quarter sessions, where it had never in fact been heard, in order to have the judgment there entered as the judgment of the quarter sessions. It is therefore impossible to call this an appeal from petty sessions, because an appeal to quarter sessions is pending; and further, the justices in petty sessions are not to alter their judgment in conformity with the decision of the High Court. It is equally impossible to call it an appeal from quarter sessions, because no judgment has ever been given by that court. There is, however, an order of the Divisional Court within the words of the judgment in *Corporation of Peterborough* v. *Overseers of Wilsthorpe* (*ubi sup.*), which, though not technically a judgment, is an order binding on the parties, and is an order within sect. 19 of the Judicature Act 1873, and therefore subject to appeal. I have already shown why I do not think it is an order within sect. 45. I therefore think we ought to hear this appeal.

BAGGALLAY, L.J.—I am of the same opinion. By the 45th section of the Judicature Act 1873 it is provided that all appeals from petty or quarter sessions to the Divisional Court shall be final in the absence of leave to appeal. Then, if we turn to 12 & 13 Vict. c. 45, we find that a case may be stated by consent during the progress of an appeal from the petty to the quarter sessions, and this has been done in this case. The judgment of the Divisional Court on a case so stated is, in my opinion, a judgment or order within the 19th section of the Judicature Act 1873, and the case cannot, I think, be called an

appeal from either petty or quarter sessions within sect. 45 of that statute.

BOWEN, L.J.—I agree, though, I must say, not very confidently.

The appeal was then heard.

Bosanquet, Q.C. and *R. C. Glen* for the guardians of the Chertsey Union.—The children did not reside at Chertsey so as to gain any settlement there of their own; they only remained there at their father's cost until he could find it convenient to find a home for them. It cannot properly be said that there is no evidence of any intention on the father's part to have them back again; there is ample evidence from which the justices might infer that intention, and they must be taken to have done so from the making of the order of removal. They cited

Reg. v. *St Mary, Islington*, 22 L. T. Rep. N. S. 654; L. Rep. 5 Q. B. 445;
Reg. v. *St Mary Arches*, 5 L. T. Rep. N. S. 637; 31 L. J. 77, M. C.;
Reg. v. *Much Hoole*, 31 L. J. 1, M. C.;
Guardians of Salford v. *Overseers of Manchester*, 48 L. T. Rep. N. S. 119; 10 Q. B. Div. 172;
Reg. v. *St. Olave's*, 29 L. T. Rep. N. S. 426; L. Rep. 9 Q. B. 38;
Reg. v. *Leeds Union*, 40 L. T. Rep. N. S. 521; 4 Q. B. Div. 328.

Even if they can properly be said to have resided in Chertsey, yet they are within the proviso of 11 & 12 Vict. c. 111, s. 1.

Charles, Q.C. and *Poland* for the guardians of the Holborn Union.—The right inference to be drawn from the facts is, that the father intended the children to remain at Chertsey, and had no intention of having them back to live with him. We do not contend that there is no evidence to justify the contrary inference.

BRETT, M.R.—I cannot agree with the severity of the judgment of the Divisional Court. The meaning of that judgment is that, upon these facts, there is, as a question of law, no evidence to justify any other inference but that this father intended to desert his children. In this case the pauper children resided in Chertsey parish under these circumstances: While they were of tender age their mother died, and their father, who was then living in London, found himself in a position of difficulty as to keeping them in his home, and he put them out to live with some people out of London; but I see nothing to show that he was not willing and expecting to have them back again with him when, at some future time, they grew up, or he should be able to keep them. By his agreement with the people with whom he placed his children, he became liable to pay 10*s.* a week for their maintenance, and the fact that his employer assisted him to make those payments makes, to my mind, no difference as far as regards any inference to be drawn as to his intentions towards his children. The only question for us is, what the proper inference as to that intention is which is to be drawn from these facts? The father must have known that if he failed to make the weekly payments he would have the children sent back again on his hands. He kept up the payments, and did apparently what he was able to do until his death; and I cannot see anything to justify the contention that there is no evidence from which any inference can be drawn but the inference that he had no intention of ever having them back to live with him. It was urged that he did not visit them very often, but I do not know enough about the whole facts of the case to attach any great importance to that. Now, if, on these facts, a reasonable person could come to the conclusion that the father had the intention of having his children to live with him when they grew older, or when he was better able to receive them, then that is enough to overrule this judgment, because the justices made the order of removal, and in that view their order would be right. I, however, cannot help thinking that that is putting the case too low, and that the evidence does actually point pretty plainly to that conclusion. I, therefore, am of opinion that the order of the justices was right and should not have been disturbed. I agree with Hawkins, J. that the case is not well stated. The duty of the justices is to draw the inference of fact, and then to ask, as matter of law, whether the facts show any evidence from which such inference may legally be drawn, whereas upon this case we are in effect asked what is the proper inference from the facts set out.

BAGGALLAY, L.J.—I am of the same opinion. I think all the facts are quite consistent with the view that the father looked upon the Kings' house at Chertsey as merely a temporary, and not a permanent home for his children.

BOWEN, L.J.—I agree. It is hard to say what is the true inference to be drawn from imperfectly stated facts, but I think it plain that the justices, whose business it was to draw the inference, thought that the father had not intended to part with the control over his children so as to break their legal residence at his home. If that is so, then I think the Divisional Court were wrong in reversing the magistrates' order, for it seems to me impossible to say that, on these facts, there is no evidence to justify such an inference.

BRETT, M.R.—We give no opinion on the point raised on 11 & 12 Vict. c. 111, s. 1.

Appeal allowed.

Solicitors for appellants (Chertsey), *W. H. Francis*, for *Paine* and *Brettell*.

Solicitor for respondents (Holborn), *Rexworthy*.

Oct. 28 *and Nov.* 16, 1885.

(Before Lord ESHER, M.R., COTTON and LINDLEY, L.JJ.)

REG. *v.* CHRISTOPHERSON. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Poor rate—Liability of parson—Rate on house property—Payment in lieu of tithes—43 *Eliz. c.* 2—3 *& 4 Vict. c.* 89.

The rector of a parish was entitled by a local statute to an annual payment called "Rector's rate," assessed on house property in a town.

Held (affirming the judgment of Lord Coleridge, C.J. and Smith, J.), that this "rector's rate" was not an annual payment in lieu of tithes, and therefore the rector was not liable to poor rates in respect thereof.

THE Rev. Brian Christopherson, the rector of Falmouth, appealed to quarter sessions against

(*a*) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law

two poor rates. The sessions dismissed his appeal, but stated the following special case :—

1. The parish of Falmouth (which comprises within it the town of Falmouth) originally formed part of the parish of Gluvias, but was separated therefrom and created a district parish under two Acts of Parliament, viz., the 16 Car. 2, entitled "An Act for the making of the church erected at Falmouth a parish church, and no part of the parish of Gluvias or chapelry of St. Buddock;" and the 22 & 23 Car. 2, entitled "An Act for the better explanation of an Act made in the present Parliament, entitled 'An Act for the making of a church at Falmouth a parish church, and no part of the parish of Gluvias or chapelry of St. Buddock.'"

2. Provision was made in the said Act 16 Car. 2 for the collation and admission to the church at Falmouth of one fit and sufficient person, and that he and his successors should be parsons or rectors of the parish church of Falmouth, and should be called parsons or rectors of the said parish church of Falmouth.

3. It was also provided by the said Act that the vicar and curate of the parish of Gluvias and chapelry of St. Buddock and their successors should be from thenceforth for ever discharged, debarred, and excluded from all rights, interests, pensions, portions, tithes, oblations, and all other profits whatsoever, to the said vicarage and church of Gluvias and the chapelry of St. Buddock, or either of them, formerly belonging within the said parish of Falmouth, and that the parson of the said parish church of Falmouth and his successors should for ever, by force and virtue of that Act, have, hold, receive, perceive, take, and enjoy all such tithes, oblations, hereditaments, mortuaries, and other parochial rights, profits, and privileges whatsoever, within the limits, bounds, and precincts of the said parish of Falmouth, which the vicar or curate of the said parish church of Gluvias and chapelry of St. Buddock should or might have had, held, received, taken, or enjoyed in right of the said vicarage as in case that Act had never been made.

4. It was also provided by the said Act that the parson of the said parish church of Falmouth and his successors should have the same remedy to recover all tithes and other ecclesiastical rights and duties within the said parish of Falmouth as fully as the vicar or curate of the said church of Gluvias and chapelry of St. Buddock had, or ought to have had, if that Act had never been made.

5. It was also provided by the said Act that the mayor and aldermen of Falmouth aforesaid for the time being, or any three of them, should thereby be empowered from time to time equally to rate and assess all and every the houses, shops, warehouses, cellars, and outhouses, with the appurtenances, then being, or which thereafter at at any time should be, built in the town and precincts of Falmouth aforesaid, according to the true yearly rent or value of the said houses, shops, warehouses, cellars, and outhouses, with the appurtenances, after the rate of 16*d.* in the pound, to be paid by the several and respective owners of the said houses, shops, warehouses, cellars, and outhouses, with the appurtenance, at the four most usual feasts in the year, by even and equal portions, unto to the parson of Falmouth and his successors for ever. The said Acts accompany and form part of this case.

6. The appellant, who is the present rector of Falmouth, was inducted in the month of Dec. 1882, and took up his residence on the 18th April 1883.

7. On the 31st Oct. 1882 the mayor and two aldermen of the town of Falmouth, in accordance with the provisions set out, rated and assessed all the houses, shops, warehouses, cellars, and outhouses, with the appurtenances, in the town and parish of Falmouth, at 16*d.* in the pound on the rateable value which, for the purposes of this case, is admitted to be the correct basis. (A copy of the rate was here set out.)

8. On the 25th June 1883 the following rate was made for the relief of the poor in the town of Falmouth. (A copy of the rate was here set out, from which it appeared that the defendant was rated in respect of property described as the "rector's rate.") The town of Falmouth is part of the ecclesiastical parish of Falmouth, as created by the said Acts of Parliament of 16 Car. 2 and 22 & 23 Car. 2, but separately maintains its own poor.

9. On the 11th Aug. 1883 the following rate was made for the relief of the poor in the parish of Falmouth. (A copy of the rate was here set out, showing that the defendant was rated in respect of the "rector's rate.")

10. The rector's tithes in the parish of Falmouth were in the year 1841 duly commuted and awarded by an assistant commissioner, under the Act for the Commutation of Tithes in England and Wales, at the sum of 140*l.* When houses, shops, warehouses, cellars, and outhouses, with the appurtenances, have been built on land liable to tithe, tithe has not been collected in respect thereof.

11. On the 11th Aug. 1883 the said tithes were separately rated to the relief of the poor in the parish of Falmouth.

12. Against the two said rates referred to in paragraphs 8 and 9 of this case the appellant appealed to the quarter sessions, where the said assessment committee duly appeared in the name of the guardians to support the rates. It was contended on behalf of the respondents that the rector was liable to be rated to the poor rates referred to in respect of the rector's rate, which was levied and paid over to him, as before stated, and that such liability was created by the statute 43 Eliz. c. 2, s. 1. It was contended on behalf of the appellant that he was not liable to be rated to the poor rates referred to in respect of the rector's rate, and that such rector's rate was not liable to be assessed or charged to or with the said rates for the relief of the poor. After hearing evidence and arguments on behalf of the appellant and the respondents, the following order was made as to the appeal against the rate in the town of Falmouth: "That the said appeal be dismissed, the court being of opinion that there is no evidence that the tithe on houses has been extinguished in the town of Falmouth, and that the 16*d.* in the pound leviable as the parson's rate in the said town of Falmouth is a rate levied on real property, and as such is assessable to the poor rate." And as to the appeal against the rate in the parish of Falmouth, the following order was made: "That the said appeal be dismissed, the court being of opinion that there is

no evidence that the tithe on houses has been extinguished in the parish of Falmouth, and that the 16*d.* in the pound leviable as the parson's rate in the said parish of Falmouth is a rate levied on real property, and as such is assessable to the poor rate."

The question for the opinion of the court was, whether the appellant was liable to be rated to the parochial rates of Falmouth town and Falmouth parish, or of either of them, in respect of the said parson's or rector's rate received by him in the said town and parish of Falmouth.

Lord COLERIDGE, C.J. and SMITH, J. gave judgment quashing the orders of sessions, and from this judgment the prosecutors (the assessment committee of the Falmouth Union) appealed.

Sir *F. Herschell*, Q.C. (*Poland* with him), for the assessment committee, argued in support of the appeal.

Charles, Q.C. (*Fraser Macleod* with him), for the rector, supported the judgment of the Divisional Court.

The following authorities were referred to:

Rann v. *Pickin*, Caldecot, 196;
R. v. *Toms*, 1 Doug. 401;
Lowndes v. *Horne*, 2 W. Bl. 1252;
R. v. *The Churchwardens and Overseers of Great Hambleton*, 1 A. & E. 145;
R. v. *Skinqle*, 1 Strange, 100;
R. v. *Lambeth*, 1 Strange, 525;
R. v. *Wilson*, 5 Nev. & Man. 119;
Reg. v. *The Inhabitants of Sherford*, 16 L. T. Rep. N. S. 663; L. Rep. 2 Q. B. 503;
Powell v. *Bull*, 1 Comyns, 265;
Viner's Abridgment, "Poor" (F.), p. 427;
Dalton's Justice, "Poor," pp. 231, 254 (edit. of 1727);
Phillimore's Ecclesiastical Law, p. 1592; and the following statutes:
39 Eliz. c. 3 (repealed by Statute Law Revision Act 1863);
45 Eliz. c. 2;
3 & 4 Vict. c. 89 (continued by Expiring Laws Continuance Acts).

Sir *F. Herschell*, Q.C. replied.

Cur. adv. vult.

Nov. 16.—Lord ESHER, M.R.—The question to be decided is whether the defendant, who is the rector of Falmouth, is liable to be rated in respect of a certain payment payable to him under a local Act of Parliament. In order to decide the case, we are asked to consider the construction of the statute 43 Eliz. c. 2. In construing that statute we must take into account the interpretation which has been placed upon it by numerous decisions from the time of its enactment down to the present time. In my opinion, if we now had to construe the Act for the first time, we should be obliged to construe it in the same way. The statute uses large words, and it is apparent that they must inevitably be limited. In the first place, it deals with parishes, and in dealing with a parish alone it is clear that, in rating the inhabitants according to the ability of the parish, the overseers could not look outside the parish, or deal with the ability of the inhabitants elsewhere. To look at the general ability everywhere of the inhabitants would be to consider, not the ability of the parish, but the general ability of the inhabitants as rich men. A second objection is that the overseers can have no means of acquiring knowledge of a man's ability elsewhere. If everyone were to be rated in the parish of which he was an inhabitant according to his general ability, he might also be rated in the same way as an inhabitant of some other parish, and so be rated twice over. Therefore it is obvious that, in considering the ability of the parish, which must involve the ability of each rateable inhabitant, it is necessary to consider the ability of each person as an inhabitant of the parish in respect of which he was rated. Therefore the ability of the inhabitant in that respect arises from what he obtains as income in and by the parish. The next thing to be considered is in respect of what within the parish the overseers are to rate the inhabitants, and here again, if all money received in the parish from every source were to be taken into account, the overseers could have no means of learning what that was. Suppose that a man carried on an extensive business in the parish, the overseers would have had no means of knowing the profits of the business; for in the time of Queen Elizabeth there was no power of asking for a return of property or income. It seems to me, therefore, from the very nature of the thing, besides looking at the instances given in the statute, which are all properties which might easily be known to the overseers, that the ability in respect of which an inhabitant is rateable is that arising from such property in the parish as the overseers could easily estimate. It is true that Lord Kenyon objected to the use of the expression "visible property." In one sense the objection is well founded, for visible property does not comprise every hereditament—as, for instance, tithes, which are not payable in kind. But, looking at the kinds of property enumerated in the statute, and considering that there was no power to obtain any return of income, it seems to me that, even if the statute were to be construed for the first time, it should be treated as dealing only with the ability arising from such property in the parish as would be easily cognisable by the overseers. If the word "visible" is incorrect, I would substitute "tangible"; but I can see no objection to either word. The result is, that the words used in the statute were enlarged so as to comprise any tenement or hereditament within the parish. The rate is at the outside annual, though by the terms of the statute it was weekly or otherwise. The result is, that the overseers are to consider the ability of the inhabitants in respect of such property as the overseers might easily estimate—that is, in respect of the annual value of all the tangible property of the inhabitants which is in the parish. The measure is not what is actually received for the property; for an inhabitant cannot escape rating because he does not choose to use his property in such a manner as to make it profitable to himself. With regard to tithes, only some particular kinds are mentioned in the Act. But tithes were held to be hereditaments, for they could easily be estimated by the overseers when they were paid in kind, and when by custom or statute an annual payment was received instead of tithes in kind it was held that parsons could not thereby escape rating. Thus, tithes were held rateable, and also money payments taken in lieu of tithes, unless made under an Act of Parliament which provided that they are not to be rateable. If therefore this money payment to the defendant is in lieu of tithes, then, according to all the authorities, he must be rated. But if it is not in lieu of tithes, to hold that it is rateable would

be to go beyond any construction of the statute which has hitherto been adopted, for it is neither a tenement nor a hereditament. The payment is made by the occupiers of houses, and therefore is not a payment in lieu of tithes, for if land is built upon it is no longer tithable, because no tithe is payable in respect of house property. If the payment were not made, the property in respect of which it is now made would not pay tithe. In the case of *Rex* v. *Carlyon* (3 T. R. 385) Lord Kenyon said that oblations and other offerings which constitute the rectorial or vicarial dues were rateable; that statement was not part of the decision. If it was right, either oblations and offerings are exceptions to the general rule, or they were considered to be of the same nature as tithes. Probably they were originally made to the clergy in kind, as tithes were. Therefore it can be seen how it might have been held that they were liable as being of the same nature as tithes, and therefore were held to follow the same rule. For these reasons I am of opinion that, as this payment is not in lieu of tithes, but is a payment made to the defendant by Act of Parliament, and not in respect of anything which he holds as a tenement or hereditament, it is not rateable, and neither 43 Eliz. c. 2, nor any other statute, applies so as to make him liable. For these reasons I am of opinion that the judgment of the Divisional Court is right, and the appeal ought to be dismissed.

Cotton, L.J.—The case depends on the true construction of 43 Eliz. c. 2, taking into account 3 & 4 Vict. c. 89. Under the earlier statute there were two classes of rating: first, "every inhabitant, parson, vicar, and other," is to be rated; and, secondly, "every occupier of lands, houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwoods" in the parish. The sums of money are to be raised in each parish "according to the ability of the same parish." That involves this proposition, that the persons rated as inhabitants should be rated in proportion to their means arising within the parish, for it would be extraordinary that in every parish the inhabitants should be rated according to the ability of the parish, if that which arises entirely out of the parish is to be taken into account. But we are relieved from that difficulty by decisions from which, unless they were clearly erroneous, it would, in my opinion, be wrong to depart. Parsons are in a peculiar position. They are specially named amongst inhabitants, probably in order to prevent any difficulty arising on the point that they could not be properly charged under the statute. It was said by Littledale, J. in *Rex* v. *Boldero* (4 B. & C. at p. 473) that "the statute 43 Eliz. c. 2 makes a parson liable in respect of the profits which he receives as parson," restricting, therefore, his liability as inhabitant to that of which he received the profits as parson. Of course, if he occupies under the second subdivision I have referred to, he is rateable as occupier; but, when he is considered as an inhabitant, we have to consider whether the words of the statute can be relied upon without some limitation. The Act 3 & 4 Vict. c. 89, after reciting 43 Eliz. c. 2 and 14 Car. 2, c. 12, provides that from and after the passing of the Act, "it shall not be lawful for the overseers of any parish . . . to tax any inhabitant thereof as such inhabitant in respect of his ability derived from the profits of stock-in-trade, or any other property for or towards the relief of the poor; provided always, that nothing in this Act contained shall in anywise affect the liability of any parson, vicar, or of any occupier of lands, houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwood to be taxed under the said Acts for or towards the relief of the poor." This statute leaves the liability of the parson named in the previous Act just as it was. It does not add to his liability, and does not throw upon him any burden to which upon the true construction of the statute of Elizabeth, as interpreted by the courts, he was not liable. But I think this exemption bears upon the subsequent decisions, because it exempts an inhabitant from being rated in respect of his ability derived from the profits of stock-in-trade or any other property. That shows what it was in respect of which inhabitants as such had been rated. It was stock-in-trade, that being the matter of the greatest importance as regards property in respect of which they were rated as inhabitants, *i.e.*, property which was not a tenement or hereditament, or in respect of which they were not rated as occupiers. It shows that inhabitants, as such, were liable to be rated in respect of that which was visible and tangible which the overseers could get at. Parsons have been rated in respect of tithes, but not as occupiers, for the only occupiers of tithes mentioned in 43 Eliz. c. 2, are occupiers of tithes impropriate and propriations of tithes which had been taken from the parsons. But the tithes were the ostensible and tangible means of support of the parson, because, when they were paid in kind, there was a tenth to which he was entitled which was the tangible and visible property which he had for his support. Therefore that seems to follow the lines of the occupation part of the section, and to show that the means regarded in rating were the tangible means, which could be touched and handled by the overseers. No doubt, when there has been a composition, that has been taken into account, and also where a rent has been created by some instrument or Act of Parliament which at some time put an end to the tithes; that is, where there was a sum of money payable annually to the parson in lieu of tithes, in the sense that the very grant of that payment involved the absolute cesser of tithe, and substituted for it a sum of money. That was by a sort of equitable construction of the Act that the inhabitants should be rated according to their means. In the case of *Rex* v. *Carlyon* (3 T. R. 385) the tithe was of fish. The fishermen were not rateable in respect of the fish they got, but the parson was entitled to a tenth of the fish. That resembled tithes, for it was a tenth of the produce of the sea, and was just as tangible and visible as ordinary tithes. I can find no case where a parson has been rated in respect of an annual payment of a sum of money unless it was a payment in lieu of tithes in the sense I have mentioned. Although in *Rex* v. *Carlyon* (3 T. R. 385) Lord Kenyon refers to oblations and other offerings as being rateable, no case has been found where they have been decided to be rateable. If they were rateable, there would be no definite sum in respect of which the parson could be rated, but he could only be rated in respect of oblations and offerings

actually made. Therefore that would really be visible and tangible, and not something to be inquired into without its coming into the light of day. It must also be remembered that, in several cases, and in particular in *Rex* v. *Hambleton* (1 A. & E. 145), where it was held that parsons were to be rated in respect of annual payments, stress was laid on the fact that the tithes were extinguished, and that the payment was in lieu of tithes in the sense I have explained. That is very strongly in support of the judgment now appealed from. Therefore, in my opinion, the judgment was right, and the appeal must fail.

LINDLEY, L.J.—I am of the same opinion. In considering what it is in respect of which it is sought to rate this rector, it is necessary to look at the Act of Parliament which created the rate in question. The corporation was empowered to raise a rate upon houses, shops, warehouses, cellars, and outhouses, built and to be built, and to pay to the rector the sum mentioned in the Act. This rate is not laid on tithes or on anything specified in 43 Eliz. c. 2. It is therefore impossible to rate the defendant as an occupier of anything that is mentioned in the second part of the statute. If he were rated at all he would be rated under the first part. The Act 43 Eliz. c. 2, specifies two classes of persons who are to be rated: first, "every inhabitant, parson, vicar, and others;" and, secondly, "every occupier of lands, houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwood in the said parish." It is said that the defendant comes within the first class, because he is a parson. I have had extreme difficulty in ascertaining the theory upon which parsons were rated to the relief of the poor. Dalton misquotes 43 Eliz. c. 2, and treats parsons as rated to the poor in respect of tithes because they were occupiers of tithes. At p. 186 (ed. 1742) he says: "Every clergyman is to be rated for his glebe and tithes according to their yearly value, so long as they are in his own occupation, because the statute charges every occupier of tithes, &c., and the clergy are contained under those general words unless particularly exempted." There is evidently some confusion here; the only occupiers of tithes mentioned in the statute are occupiers of tithes impropriate or of propriations of tithes. So that rectorial or vicarial tithes are excluded. So far as I can make out, the parson was held rateable to the poor because he was specially named in the statute, and he was held rateable in respect of tithes because they were the only visible means which he had arising within the parish, and in respect of which the overseers could rate him. It appears to me that the parson was rateable because he was named, and because the tithes formed those visible means in respect of which the inhabitants were to be rated. I cannot find that parsons were ever rated in respect of anything except tithes and that which has been substituted for them by statute or custom. Lord Kenyon, in *Rex* v. *Carlyon* (3 T. R. 385), also mentions oblations and other offerings constituting the rectorial or vicarial dues. In my opinion, having regard to the statutes relating to the parish of Falmouth, it is impossible to look upon this payment as a payment in lieu of tithes. As houses increase tithes diminish in value, and for that reason this payment was created; but it cannot be treated as substituted for tithes, because the rector has tithes as well. The result appears to me to be, that the rate in question is not one of the things alluded to in the second part of 43 Eliz. c. 2, s. 1, dealing with occupiers, nor is it a tithe or payment in lieu of tithe within the meaning of the decisions, nor an oblation or offering. It therefore does not come within the meaning of the statute as construed by the courts. To hold otherwise would, in my opinion, be to put a new construction on the statute.

Appeal dismissed.

Solicitors for appellants, *Bolton, Robbins, Busk,* and *Co.*, for *Glen* and *Nalder*, Falmouth.

Solicitors for respondent, *Gregory* and *Co.*, for *Appleby Jenkins*, Penryn.

Nov. 20 and Dec. 18, 1885.

(Before Lord ESHER, M.R., COTTON and BOWEN, L.JJ.)

MELLISS AND PIM *v.* THE SHIRLEY AND FREEMANTLE LOCAL BOARD OF HEALTH. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Local government—Local authority—Contract with local board—Interest of officer of board in contract—Statutory prohibition—Invalidity—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *s.* 193.

Where a statute subjects persons making certain contracts to penalties, if it is apparent that the intention of the Legislature was to prevent the making of such contracts, they are invalid.

By the Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *s.* 193, *officers or servants employed by a local authority shall not be concerned or interested in contracts made with such authority, and, if they are so concerned or interested, they become incapable of continuing in their employment, and are subject to pecuniary penalties.*

Held (reversing the judgment of Cave, J.), that the consequences of a breach of the provisions of this section were not limited to loss of employment and liability to the penalties, but the effect of the section is to make void a contract entered into between an officer employed by a local authority and such local authority, so that the officer could not recover for work done under the contract.

THIS was an appeal by the defendants from the judgment of Cave, J., which is reported 14 Q. B. Div. 911.

The facts, so far as they were material to the point decided by the Court of Appeal, were as follows:—

The plaintiffs Melliss and Prin carried on business in partnership as civil engineers.

The defendants were a local authority within the meaning of the Public Health Act 1875.

The plaintiff Pim was appointed surveyor to the defendants, and was paid by salary.

While the plaintiff Pim held this appointment a contract was entered into between the plaintiffs and the defendants, whereby the plaintiffs undertook to execute certain drainage and sewage works for the defendants.

The action was brought to recover for work done by the plaintiffs under this contract.

At the trial before Cave, J. without a jury it was objected that the plaintiffs were not entitled

(*a*) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

to recover, on the ground that the contract was invalid, because it was contrary to the provisions of, first, sect. 174, and secondly, sect. 193 of the Public Health Act 1875.

Cave, J. overruled both objections, and gave judgment for the plaintiffs.

The defendants appealed.

As the Court of Appeal gave no decision as to the point on sect. 174, the arguments on that point are omitted.

By the Public Health Act 1875 (38 & 39 Vict. c. 55), s. 193:

Officers or servants appointed or employed under this Act by the local authority shall not in anywise be concerned or interested in any bargain or contract made with such authority for any of the purposes of this Act. If any such officer or servant is so concerned or interested, or, under colour of his office or employment, exacts or accepts any fee or reward whatsoever other than his proper salary, wages, and allowances, he shall be incapable of afterwards holding or continuing in any office or employment under this Act, and shall forfeit and pay the sum of 50*l*., which may be recovered by any person, with full costs of suit, by action of debt.

By 47 & 48 Vict. c. 74, proceedings for the recovery of the penalty cannot be taken without the consent of the Attorney-General.

Charles, Q.C. and *Bankes* (*Crump*, Q.C. with them), for the local board, in support of the appeal.—The contract is void, and the plaintiffs are therefore not entitled to recover. The true principle is, that where an intention to prohibit the making of a contract is apparent from the terms of a statute, the effect of that statute is to avoid all contracts made in contravention of its provisions. Here there are words at the beginning of sect. 193 expressly prohibiting such a contract as this, and the imposition of the penalty cannot alter the effect of these words. Otherwise the section would afford no sufficient protection to local authorities, for in many cases the profit which would be derived from the contract, if it could be enforced, would make it worth the contractor's while to forfeit his office and pay the penalty.

F. Meadows White, Q.C. and *Muir Mackenzie* for the plaintiffs.—Where a statute prohibits anything not otherwise illegal, and provides a remedy in case of disobedience, the remedy so provided is the only remedy available. Here there are no words in the statute expressly avoiding such a contract as the present, and therefore the only consequences of entering into such a contract are loss of office and liability to the penalty. The following authorities were referred to in the argument on this point:

Taylor v. *The Crowland Gas and Coke Company*, 10 Ex. 293;
Cope v. *Rowlands*, 2 M. & W. 149;
Foster v. *The Oxford, Worcester, and Wolverhampton Railway Company*, 13 C. B. 200;
Barton v. *Piggott*, 31 L. T. Rep. N. S. 404; L. Rep. 10 Q. B. 86;
Todd v. *Robinson*, 52 L. T. Rep. N. S. 120; 14 Q. B. Div. 739;
Burgess v. *Clark*, 14 Q. B. Div. 735.

Charles, Q.C., in reply, referred to 48 & 49 Vict. c. 53.

Cur. adv. vult.

Dec. 18.—Lord Esher, M.R.—This is an appeal by the defendants (the Shirley Local Board) from the judgment of Cave, J. in favour of the plaintiffs. It was contended on behalf of the appellants that the plaintiffs were not entitled to recover, on the ground that the contract under which they claimed did not comply with the provisions of sect. 174 of the Public Health Act 1875 (38 & 39 Vict. c. 55); and a further objection was taken, which was that the contract could not be sued upon because it was void by sect. 193 of the same statute. I have carefully considered the case, and I regret to say that I feel obliged to come to the conclusion that the contract is void by sect. 193, on the ground that one of the plaintiffs who was interested in the contract was a servant of the board. It was contended on behalf of the plaintiffs that, although what has been done is prohibited by sect. 193, nevertheless the consequences of disobedience to the provisions of the section are enacted, which are not that the contract shall be void, but that the officer or servant interested in it shall be liable to a penalty. It is true that sect. 193 does not in terms provide that the contract shall be void; but, on looking at the cases, I am of opinion that they establish this rule, that, although there may be no express words in a statute making a particular contract void, yet where a penalty is imposed on persons entering into such a contract, it is necessary to consider the whole scope of the Act in order to decide as to its effect. The context and the subject-matter dealt with must be considered in order to ascertain the object of the particular provision in question. Now, the contracts to which this section applies may be very large, and where a servant of the local board is interested in any large contract, if the only consequences were the loss of his office and the pecuniary penalty, which is limited to 50*l*., such consequences would be quite inadequate to prevent the mischief at which the enactment is aimed. Considering the subject-matter dealt with, it is obvious that the intention of the Legislature was that such contracts should not be entered into. The first words of the section are prohibitory, and the subsequent imposition of a penalty does not detract from their effect. I come to this conclusion with regret in the present case, because the local board have accepted the contract; but I am clear that it is a void contract, and therefore one on which the plaintiffs are not entitled to recover. This view renders it unnecessary to decide the question which has been raised as to the effect of sect. 174. For the reasons I have given I am of opinion that the judgment ought to be reversed.

Cotton, L.J.—I am also of opinion that the 193rd section of the statute is fatal to the plaintiffs' claim. The rule applicable to such cases was laid down by Parke, B., in delivering the judgment of the Court of Exchequer in *Cope* v. *Rowlands* (2 M. & W. 149), in the following terms: "It is perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition" (p. 157). In *Smith* v. *Mawhood* (14 M. & W. 452) Alderson, B. said: "The question is, does the Legislature mean to prohibit the act done or not? If it does, whether it be for the purposes of revenue or otherwise, then the doing of the act is a breach of the law, and no right of

action can arise out of it" (p. 464). These authorities show that, where a penalty is imposed, the question to be considered is whether the statute was intended to prohibit the contract. In the present case, looking at the first part of the section, which contains words of express prohibition, I have come to the conclusion that the Act prohibits the contract. In my opinion the section was intended to prevent officers or servants of a local board from entering into contracts from which they themselves would derive profit, but which otherwise they would advise against in the interest of the board. That, I think, is the obvious intention. Although there may be hardship in particular cases, the conclusion at which I have arrived is, that although a penalty is imposed, that is not all which is intended to be the result of a breach of the provisions of the section, for the first words expressly prohibit such contracts. If an officer or servant of the board were to acquire an interest in a contract already entered into, I do not think that would necessarily avoid the contract. I agree with the Master of the Rolls that is unnecessary to give any opinion as to the effect of sect. 174.

BOWEN, L.J.—I am of the same opinion, and I have no doubt about the question. It is an established rule that no action can be successfully brought on an agreement which is prohibited either by the common law or by statute. This is clearly established by the decisions in *Law* v. *Hodson* (11 East, 300) and *Taylor* v. *The Crowland Gas and Coke Company* (10 Ex. 293). In the present case we have to consider whether the contract is prohibited by the common law or by statute, and whether the action is brought to enforce it. The contract is not prohibited by the common law, so the question is, whether it is prohibited by sect. 193 of the Public Health Act 1875. We must consider whether on its true construction the Act of Parliament prohibits the contract, for, if it does, the rule applies that a man cannot recover on an agreement which is based on the breach on his part of the provisions of a statute. Some other cases which have been referred to are not in point. I am of opinion that the language of sect. 193 contains a plain prohibition, and that the further fact that a penalty is imposed does not make this the less plain. What would happen if an officer became interested in a contract after it had been made is a different question. In that case I think the language of the section would not apply so as to make the contract void. Here, however, there are express words of prohibition showing a clear intention that such contracts should not be entered into. As to the point raised on sect. 174, I agree that we need not discuss it.

Appeal allowed.

Solicitors for plaintiffs, *Keen, Rogers,* and *Co.*

Solicitors for defendants, *Speechly, Mumford,* and *Landon,* for *Lamport* and *Trimnell,* Southampton.

Monday, Dec. 21, 1885.

(Before Lord ESHER, M.R., COTTON and BOWEN, L.JJ.)

LIGHTBOUND v. THE HIGHER BEBINGTON LOCAL BOARD. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Local government—Streets—Expenses of sewering and paving—Premises "fronting, adjoining, or abutting on" street—Public Health Act 1875 (38 & 39 *Vict. c.* 55), *s.* 150.

Certain land and cottages built thereon were separated from a street by a wall, which, with the land on which it stood, belonged to another owner. The only access from the cottages to the street was by going along a public footpath through an opening in the wall, or by going round the end of the wall.

Held, that the cottages were not premises "fronting, adjoining, or abutting on" the street within the meaning of sect. 150 *of the Public Health Act* 1875, *and therefore the owner was not liable to contribute to the expenses of sewering and paving the street.*

Judgment of Mathew and Smith, JJ. affirmed.

THIS was an appeal by the Local Board of Higher Bebington from the judgment of Mathew and Smith, JJ. (reported 14 Q. B. Div. 849) on a special case stated at quarter sessions by justices of the county of Chester.

The question was whether the respondent on the present appeal was liable, under sect. 150 of the Public Health Act 1875 (38 & 39 Vict. c. 55), to contribute to certain expenses incurred by the local board, as the urban authority, in sewering, paving, and channelling part of a street at Higher Bebington, called School-lane.

The respondent was the owner of two plots of ground, and of certain cottages built thereon.

The two plots were separated from School-lane by a wall five feet high, which, with the strip of land on which it was built, belonged to a Major Orred. The plots were separated from each other by a footpath, which went into School-lane through an opening in the wall. The only mode of access from the respondent's property to that part of School-lane on which the works in question were executed was either by going along the footpath between the two plots, or by going round the end of the wall.

R. Henn Collins Q.C. and *Clement Higgins,* for the local board, in support of the appeal.—The respondent is the owner of "the premises fronting, adjoining, or abutting on" the part of School-lane which has been sewered and paved, and is therefore liable by the Public Health Act 1875 (38 & 39 Vict. c. 55), s. 150, to contribute to the expenses of the works which have been executed by the local board. As between the respondent and Major Orred, who owns the wall and the strip of land on which it stands, it is more reasonable that the respondent should be liable, for the works are beneficial to him, but are of no benefit to the owner of the wall. This is a test which has been applied in several of the cases. The decisions on this and other similar statutes show that actual physical contact of the premises with the street is not necessary in order to make the owner or occupier liable:

Wakefield Local Board v. *Lee,* 35 L. T. Rep. N. S. 481; 1 Ex. Div. 336;

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

London, Brighton, and South Coast Railway Company v. *Vestry of St. Giles, Camberwell*, 41 L. T. Rep. N. S. 162; 4 Ex. Div. 234;
Newport Urban Sanitary Authority v. *Graham*, 47 L. T. Rep. N. S. 98; 9 Q. B. Div. 183;
London School Board v. *Vestry of St. Mary, Islington*, 33 L. T. Rep. N. S. 504; 1 Q. B. Div. 65;
Great Eastern Railway Company v. *Hackney District Board of Works*, 49 L. T. Rep. N. S. 409; 8 App. Cas. 687;
London and North-Western Railway Company v. *St. Pancras Vestry*, 17 L. T. Rep. N. S. 654.

Bigham, Q.C. and *Bankes*, for the respondent, were not called upon.

LORD ESHER, M.R.—The question to be decided here is whether the respondent on this appeal is liable to contribute to the expenses incurred by the local board in sewering, paving, and channelling a street called School-lane, and this depends on whether the cottages, in respect of which it is sought to make him liable, front, adjoin, or abut on School-lane within the meaning of sect. 150 of the Public Health Act 1875 (38 & 39 Vict. c. 55). This must be a question of fact in each case, depending on the facts of the particular case, and the application to those facts of the rules which have been laid down in other similar cases. In the present case the cottages do not front, do not adjoin, and do not abut on the street in the ordinary sense, for they do not touch the street, being separated from it by a wall belonging to a different owner. But, as has been pointed out in some of the cases, this circumstance is not necessarily conclusive. The largest rule appears to be that laid down by Cockburn, C.J. in *London School Board* v. *Vestry of St. Mary, Islington* (33 L. T. Rep. N. S. 504; 1 Q. B. Div. 65), which would seem to show that if, although the houses do not actually touch the street, there is access which gives them the advantages of abutting on the street, they might be rateable. If they have not such access they certainly would not be rateable. In my opinion the reasonable inference from the facts of this case is, that the cottages in question get no substantial advantage from the use of the pavement in School-lane. I give my decision on the ground that on all the facts of the case these cottages neither front, adjoin, nor abut on School-lane, and they have no such beneficial use of the works executed by the local board as to bring the case within the rules laid down in the decisions. For these reasons I am of opinion that the judgment of the court below was right, and ought to be affirmed.

COTTON, L.J.—The question for decision in this case turns on sect. 150 of the Public Health Act 1875, and is whether the cottages described in the special case front, adjoin, or abut on that part of School-lane where the works have been executed by the local board, so as to be liable under that section to contribute to the expenses of the works. The rule laid down by Cockburn, C.J. in *London School Board* v. *Vestry of St. Mary, Islington* (33 L. T. Rep. N. S. 504; 1 Q. B. Div. 65), may help us in arriving at a conclusion, but cannot govern the decision here, for in that case the words of the Act of Parliament were different; the words there were "houses forming the street," and the owners of the building in question had their sole access to it from the street, so the building might well be held to form part of the street. Here, on the contrary, the wall prevents the cottages from abutting on the street, and therefore, in my opinion, the case does not come within sect. 150 of the Public Health Act 1875. The case might be different if the property sought to be charged belonged to the owner of the wall; for, whenever he chose, he could pull down the wall or open a gate through it, and so get the benefit of the works executed by the local board. In the present case access to the cottages from the external world is obtained entirely without touching the part of School-lane where the works were executed, and this shows that the property does not front, adjoin, or abut on that part of the lane, for I cannot say that the mere fact that the footpath between the two plots of ground communicates with the paved part of the lane ought to make us hold otherwise. As to whether Major Orred's land may be liable to contribute to these expenses, I give no opinion.

BOWEN, L.J.—I agree with the other members of the court. The question for decision is, whether these premises front, adjoin, or abut on that part of School-lane which has been paved, sewered, and channelled, so as to be liable to contribute to the expenses of the works under sect. 150 of the Public Health Act 1875. Several authorities have been referred to, but most of them were cases decided on other Acts of Parliament; and it seems to me that all they came to is this, that, when houses do not actually form part of the street in the ordinary sense, one must look at the circumstances and see whether they do not constructively form part of the street. In *London School Board* v. *Vestry of St. Mary, Islington* (33 L. T. Rep. N. S. 504; 1 Q. B. Div. 65), Cockburn, C.J. said: "I think it cannot be said that physically and actually a house standing in the position of this school can form part of the street. But, looking to what I cannot help thinking, amid the varying terms and varying phraseology of these Acts, was the intention of the Legislature, we are entitled to say that the houses may constructively form part of the street which physically is not included by them:" (1 Q. B. Div. at pp. 72, 73.) This passage is no authority on the words of the Act now before us, but is only useful as illustrating the manner of construing words imposing such a liability; it is only an example. I agree that, in order to come within the words "fronting, adjoining, or abutting on" the street, the premises need not touch the street. The decision in *Wakefield Local Board* v. *Lee* (35 L. T. Rep. N. S. 481; 1 Ex. Div. 336) shows that this is so. We must look at the subject-matter of the section, and see what the scope and object of the Act is. It seems to me that it was intended to charge those persons who benefit by the works executed by the local board. Here I cannot say that the cottages front or abut on the street. It is not necessary to decide, but I am inclined to prefer the opinion of Cleasby, B. to that of Grove, J. in *Wakefield Local Board* v. *Lee* (*ubi sup.*). It seems to me that to have the benefit of access is not the same as to adjoin; but it is an important element for consideration, for, if the houses get a substantial advantage from the works executed in the street, that may possibly make them adjoin the street within the meaning of the statute, although they do not

actually touch it. Here I cannot say that the houses adjoin the street.

Appeal dismissed.

Solicitors for the appellants, the local board, *Burton, Yeates*, and *Hart*, for *Tyrer, Kenion, Tyrer*, and *Simpson*, Liverpool.

Solicitors for the respondent, *Chester, Mayhew, Broome*, and *Griffiths*, for *Walter Weld*, Liverpool.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Nov. 30 *and Dec.* 1, 1885.

(Before NORTH, J.)

MAYOR, &c., OF PRESTON *v.* FULLWOOD LOCAL BOARD. (*a*)

Highways — Water pipes — Nuisance — Licence to commit nuisance — Presumption of grant — Prescription.

The corporation of P., who had no parliamentary powers for the purpose, supplied water to the adjoining urban district of F., and claimed the right to enter upon and break up the streets of F. whenever occasion should require for the purpose of repairing their water pipes, relying, as regarded some of the streets, on alleged irrevocable licences granted by the predecessors of the local board of F. (i.e., the surveyors of highways), and as regarded other streets on prescription.

Held, (1) *that the claim of the corporation was to commit a nuisance;* (2) *that it was not in the power of the surveyors of highways to grant the alleged licences;* (3) *that therefore, as a grant could not be presumed, the corporation could not obtain the right claimed by prescription.*

THE plaintiffs, who were the corporation of the borough of Preston, claimed an injunction restraining the defendants from stopping, taking up, or otherwise interfering with the mains, pipes, valves, and works of the plaintiffs by which the plaintiffs supplied water to the district of Fullwood, a suburb of Preston, of which the defendants were the urban sanitary authority.

The defendants put in a defence and counter-claim. By their defence they stated that, except so far as they claimed the right sought by their counter-claim, they did not threaten or intend to interfere with the plaintiffs' pipes, &c. By their counter-claim they stated that they were the urban sanitary authority of their district, and were authorised by statute, and were willing to supply water to their district; that the plaintiffs had no such parliamentary power, and had without authority laid down pipes, &c., in the streets of defendants' district, and were in the habit of breaking up the streets for purposes of repairs, and they counter-claimed an injunction against the plaintiffs. They also alleged that hindrance and nuisance were caused in respect of certain hydrants of the defendants.

By their reply to the counter-claim the plaintiffs alleged that the defendants or their predecessors in title irrevocably authorised or licensed the plaintiffs to lay down the pipes, &c., under the streets, or some of them, and to enter upon and break up the streets for the purposes of enabling the plaintiffs to supply water to the district; that as to the streets not included in the licence, the plaintiffs had for more than twenty years before action brought, as of right and without interruption, entered upon and broken them up for all purposes necessary for so supplying water; and that they intended to continue to exercise the rights which they had acquired by licence and prescription. They denied that the hydrants caused any obstruction or were a nuisance.

Pursuant to an order of Kay, J. certain admissions were signed by the parties under Order XXXIV., r. 2, for the purpose of enabling the court to decide the preliminary question of law, "Whether the plaintiffs have any legal right to break up the streets vested in the defendants."

The admissions were as follows:

1. Irrevocable licences have been in fact granted by the defendants, or their predecessors in title, to the plaintiffs to do the acts complained of by the defendants hereinafter specified in some of the streets now vested in the defendants.

2. The plaintiffs have for a period of twenty years and upwards before action done the acts complained of and hereinafter stated without interruption on all of the said streets now vested in the defendants, to which the said licences do not extend.

3. The plaintiffs have no parliamentary powers which enable them to do any of the acts complained of.

4. All the streets referred to in clause 1 were at the date of the said licences, and all the streets referred to in clause 2 were at and before the acts complained of were first done therein, public highways duly dedicated to the public and vested in the defendants or their predecessors as highways.

5. The acts complained of are as follows:—The plaintiffs enter upon and break up the said streets, and do all other things in and under the said streets requisite to enable them to lay down, repair, and restore mains and water-pipes. They also fix and use hydrants in the said streets. About once a month the plaintiffs screw a stand pipe to the hydrants and attach a hose to the stand pipe, carrying the other end of the hose to the channels down which the water runs, and thus draw off water from their mains and pipes. It is left to the court to determine whether the said acts do or do not amount to an obstruction of the said highways and a nuisance.

Then followed a clause stating that the admissions were made solely for the purpose of raising and determining the preliminary question of law as on demurrer.

The question of law now came before the court for decision, being argued as a demurrer to the plaintiffs' reply and defence to the counter-claim.

Robinson, Q.C. and *Farwell* for the defendants. —The question of law is, whether the plaintiffs are authorised to break up the street in the defendants' district, either by virtue of the alleged irrevocable licence granted by the defendants' predecessors, who at the time of the alleged grant were the surveyors of highways, or on the ground of a right acquired by prescription. It is clear that the acts themselves of the plaintiffs amount to a nuisance:

Reg. v. *Longton Gas Company*, 2 L. T. Rep. N. S. 14; 2 E. & E. 651; 29 L. J. 118, M. C.

As to the defence of licence and prescription we say that the predecessors of the defendants had no power to grant licences for the purpose under the Public Health Act of 1848, and that therefore their successors, the local board, are not bound, and the effect is that the plaintiffs cannot rely on prescription, because no grant can be presumed. They cited

Proprietors of Staffordshire, &c., Canal v. *Proprietors of Birmingham Canal*, L. Rep. 1 Eng. & Ir. App. 254;

(*a*) Reported by F. GOULD, Esq., Barrister-at-Law.

Proprietors of Rochdale Canal v. *Radcliffe*, 19 L. T. Rep. O. S. 163; 18 Q. B. 287;
National Manure Company v. *Donald*, 28 L. J. 188, Ex.;
Reg. v. *Sheffield Gas Company*, 21 L. T. Rep. O. S. 153; 18 Jur. 146, n.;
Weld v. *Hornby*, 7 East 195;
Mott v. *Shoolbred*, L. Rep. 20 Eq. 22;
Rex v. *Cross*, 3 Camp. 224.

Karslake, Q.C. and *Geo. Henderson* for the plaintiffs.—We submit it was within the power of the plaintiffs' predecessors to grant licences to the plaintiffs to break up the streets for their purposes, so that it was done in a manner that would avoid a nuisance. *Edgware Highway Board* v. *Harrow District Gas Company* (31 L. T. Rep. N. S. 402; L. Rep. 10 Q. B. 92) shows that such an interference with the road does not necessarily constitute a nuisance, and the admissions show that the licence was to do the very act the plaintiffs have done. If then a grant of licence in the first instance could be made as to some of the streets, we can rely on prescription as to the others. The defendants have stood by, and are now barred by acquiescence:

Duke of Devonshire v. *Eglin*, 14 Beav. 530.

[NORTH, J. referred to the judgment of Fry, J. on the subject of acquiescence in *Willmott* v. *Barber* (43 L. T. Rep. N. S. 95; 15 Ch. Div. 96-105), and observed that estoppel by conduct was not pleaded.] The *Rochdale Canal case*, the *Staffordshire Canal case*, and *National Manure Company* v. *Donald*, all turned on the construction of Acts of Parliament. The defendants are, in fact, rival traders, showing no such private injury as entitles them to interfere:

Pudsey Coal Gas Company v. *Corporation of Bradford*, 28 L. T. Rep. N. S. 11; L. Rep. 15 Eq. 167.

The Public Health Act 1875, ss. 51 and 153, implies that the local board have authority to allow the street to be broken up from time to time, and contemplates that there may be pipes in existence under the streets when the Act comes into operation. The licences granted to the plaintiffs may have been in pursuance of some contract between them and the surveyors of highways.

Robinson, Q.C. in reply.—*Edgware Highway Board* v. *Harrow District Gas Company* (*ubi sup.*) cannot overrule the decision in *Reg.* v. *Longton Gas Company* (*ubi sup.*). Although the *Staffordshire Canal case*, the *Rochdale Canal case*, and the *National Manure Company's case* were decided on the Acts of Parliament, the *ratio decidendi* of those cases applies here.

Dec. 1.—NORTH, J.—This is an action nominally set down for trial; but really only for trial on one of the questions at issue in it, and it comes on to be tried on that preliminary question by virtue of an order made by Kay, J., which has not been drawn up, and which I do not think it necessary to require to be drawn up, because the question is sufficiently formulated in the title to the admissions. The question is this: "Whether the plaintiffs have any legal right to break up the streets vested in the defendants." [His Lordship then stated the case on the pleadings, and, after reading the admissions and stating that he passed over the case as regarded the complaint of the hydrants, proceeded:] Now, that being so, the question of law is, whether the corporation of Preston have any legal right to break up the streets vested in the Fullwood Local Board. *Primâ facie* they have none. They are a common law corporation, and, so far as I am aware, no common law corporation has, merely from the fact of its being so, a right to break up the streets vested in a local board not within their borough but somewhere outside. The question is not whether what has been done is such that a court of equity would interfere by injunction; the question is, whether there is or is not this legal right. Now, independently of the suggestions as to licence or prescriptive right, what power is there? None is attempted to be shown. If the charter of the municipal corporation could contain any such powers, the charter has not been produced, and I am satisfied that this case does not depend upon any powers contained in the charter itself. In the next place, there is no private Act suggested enabling the corporation to do these Acts; in fact, it is admitted that they have no parliamentary powers. In the next place, if they could do this in the district of a neighbouring local board, I do not see what there is to limit it to the district of a neighbouring local board, or why, if it exists at all, they have not a right to what they claim at any place in the kingdom. In my opinion a municipal corporation has not at common law any right to do any such acts as are here complained of, though I do not say there might not be such rights contained in their charter which might give them a right over a neighbouring district. But, independently of any such proof, I am of opinion there is no such right in a municipal corporation. It seems to me not only to be so on principle, but to have authority in support of it, and the case to which I will refer is one cited by Mr. Karslake, which seems to me to make against him rather than in his favour. It is the case of *Pudsey Coal Gas Company* v. *Corporation of Bradford (ubi sup.)*, which was also a case of a municipal corporation. [His Lordship, after referring to the facts, argument, and judgment in that case, continued:] I am not satisfied that the case of *Stockport District Waterworks Company* v. *Corporation of Manchester* (7 L. T. Rep. N. S. 545; 9 Jur. N. S. 266), cited by Malins, V.C., was exactly the same as the case he was deciding, because the company referred to there was not a municipal corporation, but a company formed in another way; but the company with which Malins, V.C. had to deal was a municipal corporation, and he expressed his opinion clearly that they had no power to do the acts complained of outside their district. That confirms therefore the view I take here, that there is nothing at common law entitling this corporation to do what it is said they have done. But then the plaintiffs say they are justified in what they have done, as to part of the ground by licence, and as to part by prescription. Licence, of course, is equivalent to a grant; prescription comes really to the same thing, because it is founded upon a presumed or implied grant. To take the question of the licence first: What power was there to grant to the corporation of Preston any such right as they claim here? The admission is, that before the acts complained of were done all the streets were public highways, and dedicated to the public, and vested in the defendants or their predecessors in title as highways. I do not understand that to mean that the soil was vested in them at the time those

acts were done, because they are all admitted to have been done upwards of twenty years ago, and the law at that time did not vest in the surveyors, as the Public Health Act does now, in a local board, the soil of highways. Since 1875 the law has been different, no doubt, under the Public Health Act 1875. Therefore, it does not appear to me that in the character of owners of the soil the defendants' predecessors had any right to grant these licences. Then it is suggested that, as surveyors of highways, or that as a local board, they could do this. In the first place, that assumes that, more than twenty years ago, there was some local board that had power over this district. Whether that is so or not, I do not know, but of course surveyors of highways existed before that time. I am not aware of any power in surveyors of highways to give such a licence as is here alleged to have been given. No Act of Parliament conferring such a right on surveyors of highways has been referred to, and, as far as my knowledge goes, they had not any such right. And there would be this difficulty further, that what are alleged to have been granted here are irrevocable licences How such licences could be granted by surveyors of highways I do not know. By irrevocable licences I understand this, not a licence given at a particular time, to go into a particular street and do certain works there; but by irrevocable licences I understand a right to do it from time to time, and in fresh streets as occasion arises. That is the only meaning, as I understand, the phrase "irrevocable licence" has here, and that is what I understand, not only by the admissions, but by the passages in the reply put in by the corporation of Preston in answer to the counter-claim. Their claim is a right to do these acts from time to time for the purpose of supplying water. In the next place, the licence is said to be a general licence. It is suggested that it is a licence to do it provided they do not occasion a nuisance; but the licence is general, and, as put in the pleadings, the corporation claim a right to act from time to time in such a way as is reasonable for the purpose of doing what they want to do in pursuance of what they allege to be their power. Several cases were cited as showing that no valid grant can be made by a corporate body in excess of their powers. It was said on behalf of the plaintiffs, and I think correctly, that the three cases that were cited, namely, the *Staffordshire Canal case*, the *Rochdale Canal case*, and the *National Manure Company's case* (*ubi sup.*), were all decided on special acts. That remark is perfectly true so far as it goes, but the principle for which those cases are cited is that where a grant is made beyond the power of the parties making it that grant has no effect. It is true that in each of those cases the preliminary question had to be decided whether the act complained of was beyond the power of the body, and that that depended upon the special act in each case, and the preliminary questions in each case differed, and all differed from the present. But the principle decided is, that where it is once shown that the act done is beyond the power of the corporate body, the grant to do it does not confer any right to do it. There is this further to be said, that a licence of this sort, in my opinion, could not confer on the corporation under any circumstances a power to do what they have no power to do without it. If they have power to break up the streets on getting leave, a licence to do it might supply the leave necessary, but it could not confer the power to do it where the corporation have no power to do it, whether they have leave or not. It appears to me in this case that the Public Health Act confers powers on local boards to contract for the supply of water within their district. My impression is that that is an old power existing before the Public Health Act; but, assuming it is so, it does not seem to carry the case any further, because what is done here is not suggested to have been done by virtue of any contract between the corporation and the surveyors of highways, but entirely without it. When I say it is not suggested, I do not forget that one of the counsel for the plaintiffs suggested that the licence, if granted, might have been in pursuance of some agreement or contract between them; but I cannot act upon any such assumption. If there was any such agreement it ought to have been proved if the plaintiffs are to have the benefit of it to support their case. It appears to me, therefore, that in this case there could not be any grant to the corporation which would be a good grant, and enable the corporation to do the act. Then, as regards the streets which are not the subject of an alleged licence, but the subject of the alleged prescriptive right, it is not necessary to refer to any of the cases cited except the decision of the House of Lords in the *Staffordshire Canal case*, in which Lord Westbury says this (L. Rep. 1 E. & I. App. at p. 278): "But if the Prescription Act had been at all applicable it would be incumbent on the appellants to prove that the right founded on the claim by user might, at the beginning of, or during that user, have been lawfully granted to them by the respondents' company. No such proposition can be maintained. Had any grant been made at any time by the respondents' company of the right, now alleged by the appellants to have been acquired against them by user, such grant would have been *ultra vires* and void, as amounting to a contract by the respondents not to perform their duty by improving their navigation, and conducting their undertaking with economy and prudence." That is only one of many authorities on the same point, and it shows that the parties could be no better off in relying on a user founded upon an assumed or implied grant than if they rely upon an express grant. But then, further, it is said that there is another ground on which no grant, express or implied, could exist, namely, that it would be illegal as being an authority to commit a nuisance. Now, on that point, the admissions say it is left to the court to determine whether the said acts do or do not amount to an obstruction of the said highways and a nuisance. The acts, or rather the act, I rely on, omitting the hydrant question, is this, that "the plaintiffs enter upon and break up the said streets, and do all other things upon, in, and under the said streets requisite to enable them to lay down, repair, and restore mains and water-pipes." "Laying down" I understand to mean laying down afresh; "repairing and restoring" I understand to mean opening the streets for the purpose of making good defects in what had been laid some time before; and the pleadings, as I pointed out, seem to be addressed, not to justifying a particular

case, but to a claim to do what the plaintiffs do on all occasions necessary to carry out the purpose they say they are justified in carrying out. It is on that alone I have to say whether doing such an act as they do, and claim the right to do, does or does not amount to an obstruction to the highways. In my opinion, it certainly does, and that seems to me to be settled by authority. Whether a particular act done on a particular occasion would or would not be a nuisance is not the point left to me to decide. Three cases were cited on that point, and the first I will refer to is the case of *Reg.* v. *The Longton Gas Company* (*ubi sup.*). The important part of that judgment was read yesterday, and I am not going to read it again; but my special reason for referring to it is, that I find in the case which was brought before the court stating the facts this statement (2 E. & E. 662-3): The defendants were an unincorporated gas company, and they were indicted for having unlawfully broken up the streets for the purpose of laying gas pipes. It was clear they had power to do those acts for the purpose of the public lighting of the streets; but the point decided was that they had not power to do so with respect to lighting private houses and buildings as distinguished from the streets. The passage I refer to is this: "The defendants used all reasonable despatch in digging the said trenches and laying down the said mains and service pipes, both for the public and private lighting of the town, and in restoring the said footpaths and pavements, and the said streets and highways; and during the time that the said trenches were being dug and were open, and the said mains and pipes were being laid, the said footpaths and pavements, and the said streets and highways, were not otherwise interfered with than was necessary for digging the said trenches and laying the said mains and pipes. Before the trenches for public or private lights were dug and the several mains and service pipes were laid the said Longton Gas Company Limited had obtained the consent of the board of surveyors of highways of the town of Longton, and the approval and consent of the inhabitants of Longton in public meeting and convened by the chief bailiff 'to consider and determine on the best measures to be taken to promote the establishment of the Longton Gas Company,' to the said trenches being dug, and mains and pipes being laid for both public and private lights;" and it also appeared that the lord of the manor had been applied to, and that he, in consideration of a certain payment, had authorised the laying down of these pipes in the street; from which I infer that the lord of the manor in that case was the owner of the soil of the streets. Every consent, therefore, was given in that case that could be got, and further than that it was found that the defendants did what they did reasonably, and I take for granted that the corporation, in entering upon and breaking up the streets, would only do reasonably what they considered necessary for carrying out the powers they claim to have, and therefore, I am acting on the assumption, would act reasonably in the step they took to effect the purposes in question. But, notwithstanding all that, it was held that it clearly was an indictable nuisance. I need not give the reasons of the learned judge, because, as I have said, they were read fully yesterday, and will be in the recollection of counsel. For the same reasons I do not refer to the case of *Reg.* v. *Sheffield Gas Consumers Company* (*ubi sup.*). For the reasons given in that case it appears to me to be a strong authority. The only other authority on that point I propose to refer to is the case of *Attorney-General* v. *The Cambridge Gas Consumers Company* (19 L. T. Rep. N. S. 508; L. Rep. 4 Ch. App. 71-80), and in the judgment, Lord Hatherley says this: "Nothing that we are now doing, nor any sanction which we are now giving to that decision"—that was the decision in *Attorney-General* v. *Sheffield Gas Consumers Company* (21 L. T. Rep. O. S. 49; 3 De G. M. & G. 304)—"holds out anything in the least contrary to that which was decided in *Reg.* v. *Longton Gas Company*, where it was held, upon grounds in which I entirely acquiesce, that to say that any private individual or company may break up the pavement for the purpose of laying down gas pipes or water pipes, or of making communication with the gas pipes or water pipes of another company without subjecting themselves to an indictment, would be to create confusion and discomfort to the inhabitants of a town." That is an express recognition by the Court of Appeal of the decision in *Reg.* v. *Longton Gas Company*. It seems to me, therefore, upon what is found in those cases to be a nuisance, that what the corporation claim to do in this case would be an obstruction to the highway and a nuisance. But a case was cited by the plaintiffs of *Edgware Highway Board* v. *Harrow Gas Company* (*ubi sup.*). There the highway board agreed with the defendants, that if the plaintiffs would give the defendants a licence to open a highway in their jurisdiction, the defendants would make good the surface of the road and would pay to the plaintiffs 1*s.* per yard of the highway so broken up. What happened was this: that in consideration of that the defendants were allowed to break up the highway, and they did break up the highway; and after it had been done the plaintiffs claimed 1*s.* per yard. The defence was, that there was no consideration for the agreement. That was the first point put forward. There was also a second point put forward, which was this: that the agreement was illegal; that it was an agreement to commit a nuisance on the highway: to obstruct a highway by breaking up the surface: which is an indictable offence, and therefore illegal. No doubt the defendants had the benefit of the contract entered into, but they objected to pay the price stipulated for; and the question was whether they could get off the payment. The declaration was admitted by the demurrer. The declaration stated that the company was formed to supply certain places with gas, and that afterwards "it was agreed between the plaintiffs and the company that if the plaintiffs would give to the company their licence to open a certain public highway within the jurisdiction and management of and vested in the plaintiffs as the Edgware Highway Board, the company would make good the surface of the road which might be disturbed or damaged thereby, and would pay to the plaintiffs 1*s.* per yard of the highway so opened." That is the whole statement, and what the court was asked to decide was that this could not possibly be under any circumstances an interference without a nuisance being committed, independently of all considerations of

where the highway was and under what circumstances it was to be opened. Blackburn, J. said: "It is quite possible to open the highway within the terms of the agreement without creating a nuisance. It is true that the public cannot use the spot opened, and if the defendants opened too much of the road at one time it might be a nuisance, but they cannot take the objection that they themselves by their own fault might create a nuisance. I am of opinion that there is nothing to show that the bargain is tainted with illegality." Mellor, J. says, "I am satisfied that the allegations on the record do not show that necessarily the licence is one to commit an indictable offence;" and Lush, J. says: "It was said that the agreement is illegal, that the plaintiffs are authorising an indictable offence. But there is nothing to show that this is so, and even if it were, as at present advised, I doubt if the defendants could set up as a defence that the contract is illegal." Therefore he relies upon a second ground, as Blackburn, J. did, for he refers to the doubt as to the defendants being able to take the objection that they themselves might not occasion a nuisance. That case seems to have turned on its special facts, and the grounds of the decision have no application to a case where it is not a question of committing a particular act on a particular highway at a certain time, but a question as to the right to enter on the highway and do these acts. Then it was said that that case was inconsistent in some way with the other cases. I do not think it is so in any way. *Reg.* v. *Longton Gas Company* (*ubi sup.*) was cited, and was not dissented from in the slightest degree by the learned judges who made the remarks I have read, and in fact it was an authority they could not have overruled if they had wished. Besides, the same principle is acted on in the case of *Reg.* v. *Sheffield Gas Company* (*ubi sup.*); and it is recognised by the Court of Appeal in the other case to which I have referred. It seems to me, therefore, there is nothing in that case to prevent my coming to the conclusion to which, as I have already said, the other cases to which I have referred lead me. Then it was said that the defendants are really only rivals in trade of the plaintiffs, and that they want to supply water themselves to the district which the corporation now supplies. In the first place, it does not appear to me that that is so. They are a local board to whom certain statutory rights are given, and it is their duty to look after the highways in the district. But, independently of that, and putting it at the strongest, that they are a mere competing company who are attempting to stop the corporation supplying water to the district, it does not seem to me that that would have any effect on the only question I have to decide, which is whether the plaintiffs have a legal right to do these acts. Their right must depend on other considerations altogether than the question *quo animo* the defendants are opposing them. One other thing was suggested by the plaintiffs' counsel as in their favour. It was said that this has gone on so long that, in some way or other, the defendants, the Fullwood Local Board, have acquiesced in such a way that they cannot be heard to complain of what has been done. In other words, that there has been some acquiescence or estoppel by conduct on their part which prevents their contesting the right claimed by the plaintiffs. Now, in the first place, this is not raised by the pleadings, and that seems material for this reason, that, if it had been set up that the defendants had assented to what was done, it might have been said in answer, they never did, they protested every time. Therefore that point is not before me, and I could not deal with it in the absence of pleading raising the point. In the next place, the same remark applies to this defence as applied to the last I dealt with, that any amount of acquiescence could not confer a legal right on the plaintiffs, although it might prevent the defendants getting an injunction. Again, it has been decided in a case in which the corporation of Preston were defendants that a local board could not be bound by acquiescence, and, if that is so, I do not see how the Fullwood Local Board could be bound. I refer to the case of *Kerr* v. *The Corporation of Preston* (6 Ch. Div. 463). Then there is this further observation to be made, that, putting the suggested acquiescence at the highest, it does not amount to anything like what is necessary to found a defence on the grounds which are fully stated by Fry, L.J. in the case of *Willmott* v. *Barber* (*ubi sup.*). Under these circumstances I have no difficulty in answering the question, "Whether the corporation of Preston have any legal right to break up the streets vested in the defendants," by saying that they have not shown anything to satisfy me that they have any such legal right, and that, in my opin on, they have none.

Robinson, Q.C.—Does your Lordship determine the last point, "Whether the said acts do or do not amount to an obstruction of the said highways and a nuisance?"

NORTH, J.—No; as to the hydrants, I have left that out of the case altogether. As to the other, I thought I had decided that by saying that such right as the plaintiffs claim must, in my opinion, necessarily be a nuisance. That was the last ground of the decision.

Solicitors for plaintiffs, *Hume, Bird,* and *Eldridge*, for *Henry Hamer*, Preston.

Solicitors for the defendants, *Gregory* and *Co.*, for *W. A.* and *R. Ascroft*, Preston.

QUEEN'S BENCH DIVISION.

Tuesday, Nov. 17, 1885.

(Before POLLOCK, B. and MANISTY, J.)

LEA v. ABERGAVENNY IMPROVEMENT COMMISSIONERS. (a)

Water rate—Proceedings to recover rate—Dispute as to annual value of premises—Separate inquiry — Jurisdiction of justices — Railway Clauses Consolidation Act 1845—*Waterworks Clauses Act* 1847, 8 *Vict. c.* 20, *s.* 142—10 *Vict. c.* 17, *ss.* 68 *and* 74.

The appellant in this case was summoned for the nonpayment of two quarters' water rates in respect of premises occupied by him in Abergavenny, which were rated at the annual value of 13*l. The annual value of the premises was disputed by the appellant. The water charges were made under and by virtue of the Abergavenny Improvement Acts, which incorporated the Rail-*

(a) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

ways Clauses Consolidation Act 1845 *and Waterworks Clauses Act* 1847.

The summons in this case was heard before four justices; and the appellant contended before the justices that, as there was a bonâ fide dispute between himself and the water authority as to the annual value of his premises, a separate and preliminary inquiry as to their value was a condition precedent to the enforcement of the claim of the water authority. The justices were of opinion that they could, on the hearing of the summons, determine the dispute and assess the value of the premises; and made an order that the premises were properly assessed, and that the appellant should pay the amount claimed.

Held, on appeal by way of case stated, that the decision of the justices was correct, and that they had jurisdiction to determine the dispute as to the annual value on the summons to enforce the payment of the rates, and that a separate and preliminary inquiry as to the value was not a condition precedent to the exercise of their jurisdiction.

THIS was a case stated by justices under 42 & 43 Vict. c. 49, s. 33, of which the following are the material parts:—

The appellant was summoned to appear before a court of summary jurisdiction consisting of four justices to answer the claim of the respondents, the following particulars of which were annexed:

	s.	d.
1884, Sept. 30.—Charge for water supply to house in your occupation in Western-road, Abergavenny, during quarter ended this day	4	10
Dec. 31.—The like for quarter ended this day	4	10
	9	8
Summons	1	6
	11	2

After hearing the parties and the evidence adduced by them respectively, the justices adjudged that the respondents should recover against the appellant the sum of 9*s.* 8*d.* for water charge and 3*s.* 6*d.* for costs, making together the sum of 13*s.* 2*d.* which the appellant was ordered to pay.

Upon the hearing of the summons it was proved that the respondents were the Commissioners for executing the Abergavenny Improvement Act 1854, and were a local authority within the meaning of the Public Health Act 1875, and by virtue of the provisions contained in such Acts and in the Acts incorporated therewith supplied the inhabitants of the Improvement Act district of Abergavenny with water.

That the appellant during the six months ended on the 31st Dec. 1884, occupied a dwelling-house and premises situate within the said district, and that during the said period the respondents supplied the said premises with water for domestic purposes, and for a water-closet, and that for four days during the said period the said water supply wholly failed, and was intermittent on other occasions, and that it was in respect of such supply the present claim had been made.

That the respondents during the said period charged for the water supply for domestic purposes by virtue of the Abergavenny Improvement Acts 1854, 1860, and 1871, and that the appellant was charged on a sum of 13*l.* as being the rateable value of his premises.

That the rateable value, as forming the basis of the water charge, was the net annual value upon which the occupiers of houses were during the said period assessed to the poor rate within the said district, and during the said period the net annual value of the appellant's premises was 13*l.*, and the appellant was charged for water supply at the rate of 1*s.* 6*d.* per annum upon the said sum of 13*l.* per annum.

That the appellant had not paid the amounts claimed, nor any part thereof, and that during the said period, and previous to the issue of the summons, he had disputed the correctness of the annual value upon which the said amounts were based.

The appellant (*inter alia*) contended that there was a *bonâ fide* dispute between himself and the respondents as to the annual value of the said premises the justices had no jurisdiction to adjudicate on the summons, and that before the respondents could recover the water rates in question they should obtain a decision of justices on the dispute as to value under sect. 68 of the Waterworks Clauses Act 1847.

The appellant, on the justices overruling his objection, refused to tender any evidence upon the question of value.

The respondents, on the other hand, contended (*inter alia*) that there was no *bonâ fide* dispute as to value, as the charge was based on the then existing poor rate assessment which had been the assessment during the period for which the charges had been claimed; and that, as the Bench consisted of more than two justices, and had all the parties before it, it could, if necessary, fix the value.

The justices were of opinion, and decided:

That, as the respondents had supplied the water in the capacity of a local authority acting under the provisions contained in the Public Health Act 1875, the annual value upon which they were to charge for such supplies had been fixed by the union valuation list for the time being in force, and therefore that there could be no *bonâ fide* dispute between the parties as to the annual value; but that if such annual value had not been so fixed, and that there had been therefore a *bonâ fide* dispute with regard thereto, they could, on the hearing of the said summons, determine such dispute, and assess the value of the said premises, and they accordingly, having as evidence the valuation list for the time being in force during the said period before them, assessed the annual value of the said premises at the sum of 13*l.*

They, therefore, gave judgment for the respondents.

The opinion of the court was asked whether their judgment was correct in point of law. If the court should be of opinion that it was correct, then their order was to stand; but otherwise, it was to be set aside.

17 & 18 Vict. c. xlix. (Abergavenny Improvement Act 1854), s. 31:

The Waterworks Clauses Act 1847, except the clauses with respect to the amount of profit to be received by the undertakers when the works are carried on for their benefit, is incorporated with this Act.

By 10 Vict. c. 17, s. 68:

The water rates, except as hereinafter and in the special Act mentioned, shall be paid by and be recoverable from the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water, and if any dispute arise as to such value the same shall be determined by two justices.

By sect. 74:

If any person supplied with water by the undertakers, or liable as herein or in the special Act provided to pay the water rate, neglect to pay such water rate at any of the said times of payment thereof, the undertakers may stop the water from flowing into the premises in respect of which such rate is payable, by cutting off the pipe to such premises, or by such means as the undertakers shall think fit, and may recover the rate from such person, if less than twenty pounds, with the expenses of cutting off the water, and costs of recovering the rate, in the same manner as any damages, for the recovery of which no special provision is made, are recoverable by this or the special Act.

Sect. 85:

If the waterworks be in England or Ireland, the clauses of the Railway Clauses Consolidation Act 1845, with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, shall be incorporated with this and the special Act.

8 Vict. c. 20, s. 140:

And with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, it is enacted as follows: In all cases where any damages, costs, or expenses are by this or the special Act, or any Act incorporated therewith, directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount in case of dispute shall be ascertained and determined by justices.

By sect. 142:

Where in this or the special Act any question of compensation, expenses, charges, or damages, or other matter is referred to the determination of any one justice or more, it shall be lawful for any justice upon the application of either party to summon the other party to appear before one justice or before two justices as the case may require, at a time and place to be named in such summons; and upon the appearance of such parties, or in the absence of any of them, upon proof of due service of the summons, it shall be lawful for one such justice or such two justices, as the case may be, to hear and determine such question, and for that purpose to examine such parties, or any of them, and their witnesses on oath; and the cost of every such inquiry shall be in the discretion of such justices, and they shall determine the amount thereof.

Ram for the appellant.—It is contended that the magistrates in these proceedings had no jurisdiction to make the appellant pay the amount of the water charges claimed by the commissioners. There was a dispute as to the annual value of the appellant's premises, and that dispute ought to have been settled in an independent and preliminary proceeding; there should have been a definitive decision of justices on the question of the annual value of these premises. The decision on the question of value was a condition precedent to the entertaining of the proceedings to enfore the payment of the rates in arrear:

New River Company v. *Mather*, 32 L. T. Rep. N. S. 658; L. Rep. 10 C. P. 442.

The fact of these proceedings being entertained by more than two justices does not confer upon them jurisdiction. Here there was a *bonâ fide* dispute, and the appellant did not offer evidence as to the value of his tenement on the ground of want of jurisdiction. It was clearly contemplated by sect. 68 of the Waterworks Clauses Act 1847 that any dispute as to value of premises should be determined independently by two justices. Here there was no such determination, and the justices were wrong in determining the question of value and making the order to pay in one and the same proceedings; for two are contemplated by the statute.

R. Cunningham Glen for the respondents.—The justices had jurisdiction in one and the same proceeding to adjudicate on the question of the annual value of the premises, and to make the order on the appellant to pay the amount of his rates in arrear. The previous ascertaining of the annual value of the premises was not a condition precedent to the justices' order to pay. The *New River Company* v. *Mather* (*ubi sup.*) is not in point so as to be an authority in favour of the appellant. All it decided was that where there was a *bonâ fide* dispute between a water authority and a consumer as to the value of the premises rated, the water authority could not sue for the rate before obtaining a decision of justices on that point under sect. 68 of the Waterworks Clauses Act 1847, and that the County Court judge who had determined the question of the annual value had no jurisdiction to do so. Sect. 68 of the Waterworks Clauses Act 1847 enables two justices to hear and determine disputes as to annual value; and sect. 142 of the Railway Clauses Consolidation Act 1845 gives them power to hear and determine questions of charges, damages, and other matters in dispute between the parties. There is nothing in these Acts to make the investigation as to annual value a preliminary and separate proceeding. The observations of Chitty, J. in *Haywood* v. *East London Waterworks Company* (52 L. T. Rep. N. S. 175; 28 Ch. Div. 138) are favourable to this view; so are those of Bacon, V.C. in *West* v. *Downman* (42 L. T. Rep. N. S. 340; 14 Ch. Div. 111). The appellant has not suffered any hardship; he came into court aware of the dispute as to the annual value, for he had raised it himself; under the statute the justices, being more than two in number, had jurisdiction to decide on the question. The appellant was not taken by surprise, and if he had alleged that he had been and required witnesses to support his contention, he could have obtained an adjournment. In a word, the justices clearly had power to decide the question of annual value when the proceedings were before them.

Ram in reply.

POLLOCK, B.—With regard to the main objection, namely, against the jurisdiction of the magistrates who heard this summons, which summoned the defendant to appear before certain magistrates to answer a claim, the particulars of which were annexed, the claim being a charge for water supplied, the objection raised against the procedure was this—that, whereas it appeared that there had been a dispute between the commissioners and the appellant in respect of the rateable value of his house, and that such dispute had not been determined by any separate determination by the magistrates, therefore until that determination took place as a condition precedent to the power of the magistrates they had no power to make an order for the payment of the rate. This matter is in rather a confused state; but I think the later statute was passed in con-

sequence of the changes in the number of the justices who should entertain such applications, namely, from one to two; however that may be, I think it is perfectly open to any consumer of water to apply to the magistrates in order to have the question of the amount at which his house should be rated determined by magistrates upon a separate inquiry. When I come to decide whether it is necessary that that should be done at a separate and independent inquiry where two magistrates are sitting to hear the case generally against the person who refuses to pay the water rate demanded, and has a dispute between the water company and himself so as to make it a question between them, it seems to me that the words of the Act are satisfied by the same two justices, at the same inquiry, entering into that dispute and determining it, for sect. 68 of the Waterworks Clauses Act 1847 provides that the water rate shall be payable according to the annual value of the tenement supplied with water, and that if any dispute shall arise as to such value, the same shall be determined by two justices. There is nothing in that section to prevent these two justices being the persons to determine it, or to make it necessary that there should be a separate inquiry. As I said before, there may be a separate inquiry if it is requisite; but I do not think myself that that excluded the justices, when they were met for the one purpose, from entering upon the other question; and the only ground for saying that the contrary is so is that case which was cited by Mr. Ram, and which appears at first sight no doubt to be very much in point, the case of the *New River Company* v. *Mather* (32 L. T. Rep. N. S. 658; L. Rep. 10 C. P. 442). But there the real question before the court was whether a County Court judge who had not only made an order for payment, but had settled a *bonâ fide* dispute as to the annual value, had exceeded his jurisdiction. It is clear beyond all doubt on reading these statutes, that a County Court judge or any other tribunal would have no power to enter into that question; and the only tribunal that can do so is the tribunal appointed by the Act, namely, two justices. No doubt there are some dicta of the learned judges who decided that case which seem to look as if they thought that there must be upon all the cases a separate finding; but really there the court had not before them the case of a water company or commissioners, as in the present case, who were seeking to enforce their rate against a consumer before justices. On comparison of the sections it is tolerably clear to my mind that there should not be an independent inquiry, because it would be unnecessary, both parties being before the same tribunal. There is only one further observation I wish to make. No doubt it might be very hard upon a consumer when summoned on one ground to have placed before the tribunal another case against him which he did not expect to be gone into. Of course, if our construction is right as to the law, he stands in no different position from others, for he is supposed to know the law. But with regard to the practical hardship, I cannot doubt but that, in the present case, if the appellant had informed the justices that he was unaware that they were going into the other part of the case, and applied for an adjournment, the adjournment would have been granted in order to allow him to get his necessary witnesses. We have to decide upon the proper construction of these Acts of Parliament, and though they are not so clearly expressed as they might be, yet I am of opinion that it was within the jurisdiction of these magistrates to inquire into that question in order to grant the necessary order; and they being willing to do so, and the appellant not having given any evidence, they were entitled to deal with the matter, and I think they properly decided the question.

MANISTY, J.—I am of the same opinion. As to the main question of jurisdiction, it is to be observed that, by the Railway Clauses Consolidation Act 1845, and the Waterworks Clauses Act 1847, wherever there was any question with regard to any matter which referred to an examination before any one justice, it would have been lawful for any one justice to hear it, either before himself, or before two others or any other justice. But it seems to have been thought fit in 1847 that a dispute with respect to the annual value of tenements ought to be decided by two justices; and that seems to me the only interest affected by the Waterworks Clauses Act 1847. The matter stands thus: Under the Act of 1845 parties may go before one justice; under the Act of 1847, if there is a question of value, they must go before two justices. What was the summons in this case? It called upon the appellant to show cause generally against the respondents' claim for two rates in arrear. The appellant knew he was disputing the value; that is found as a fact. The appellant disputed the value, and consequently disputed the amount, yet he claims to have been taken by surprise when they went into the question of value. It was the chief question, and the very ground on which he had been mainly disputing the rate; it is therefore impossible to conceive that he was taken by surprise, but even if he had been, he could have obtained an adjournment. I am clearly of opinion that the magistrates had jurisdiction. The decision of Bacon, V.C. in *West* v. *Downman* (42 L. T. Rep. N. S. 340; 14 Ch. Div. 111) shows that, upon an application of this sort, if the question of value arises, and also the question whether or not the rate ought to be paid, the justices may at the same time decide the dispute as to value, and make the order for payment. It is simply an order to pay. If the justices had decided the question of value, and left the rate standing, he would be ordered to pay: and I do not know that he is injured or prejudiced in any way because he is ordered to pay the amount. It is not like issuing a distress warrant, it is simply an order to pay.

Order of justices affirmed.

Solicitors for the appellant, *Sandys* and *Trevenen*, for *L. D. Brown*, Abergavenny,
Solicitor for the respondents, *Iltyd Gardner*.

CROWN CASES RESERVED.

March 21, *June* 13, *and Dec.* 5, 1885.

(Before Lord COLERIDGE, C. J., GROVE and DENMAN, JJ., POLLOCK, B., FIELD, J., HUDDLESTON, B., MANISTY, HAWKINS, STEPHEN, MATHEW, CAVE, SMITH, DAY, and WILLS, JJ.)

REG. *v.* ASHWELL. (*a*)

Larceny—Money given by mistake—Innocent receipt—Mutual mistake—Animus furandi on first ascertaining mistake—Felonious taking—24 & 25 Vict. c. 96, s. 3.

A. was indicted for larceny under the following circumstances:—K., intending to lend A. a shilling, handed him a sovereign, believing it to be a shilling. A., when he received the shilling, believed it to be a shilling, and did not know until subsequently that it was not a shilling. Immediately A. became aware that it was a sovereign, and although he knew that K. had not intended to part with the possession of a sovereign, but only with the possession of a shilling, and although he could easily have returned the sovereign to K., fraudulently appropriated it to his own use.

Held (per Lord Coleridge, C.J., Grove and Denman, JJ., Pollock and Huddleston, BB., Hawkins and Cave, JJ.), that the taking was not complete when the sovereign was handed to A., and that there being an animus furandi on his part at the time when the taking was completed by his becoming aware of what it was which he had received, he was guilty of larceny at common law.

Held (per Field, Manisty, Stephen, Smith, Day, and Wills, JJ.), that the taking was complete at the time when K. handed the sovereign to A., and, therefore, as at that time there was not any animus furandi on A.'s part, he was not guilty of larceny at common law.

Held, further, by a majority of the court, that A. was not guilty of larceny as a bailee within 24 & 25 Vict. c. 96, s. 3.

CASE reserved for the opinion of the court by Denman, J., at the January Assizes 1885 for the county of Leicester, which stated the following facts:—

On the 23rd Jan. 1885 Thomas Ashwell was tried for larceny of a sovereign, the money of Edward Keogh.

Keogh and Ashwell met at a public-house on the 9th Jan.

At about eight p.m. Ashwell asked Keogh to go into the yard, and when there requested Keogh to lend him a shilling, saying that he had money to draw on the morrow, and that then he would repay him. Keogh consented, and, putting his hand into his pocket, pulled out what he believed to be a shilling, but what was in fact a sovereign, and handed it to Ashwell, and went home, leaving Ashwell in the yard. About nine the same evening Ashwell obtained change for the sovereign at another public-house.

At 5.20 the next morning (the 10th) Keogh went to Ashwell's house, and told him that he had discovered the mistake, whereupon Ashwell denied having received the sovereign, and on the same evening he gave false and contradictory accounts as to where he had become possessed of the sovereign he had changed at the second public-house on the night before. But he afterwards said, "I had the sovereign, and spent half of it, and I shan't give it him back, because I only asked him to lend me a shilling."

Mr. Sills, for the prisoner, submitted that there was no evidence of larceny, no taking, no obtaining by trick or false pretence, no evidence that the prisoner at the time he received the sovereign knew it was not a shilling. He referred to *Reg.* v. *Middleton* (L. Rep. 2 C. C. R. 43, 45).

Mr. A. K. Loyd, for the prosecution, called my attention to Stephen's Criminal Law Digest, art. 299, and to the cases relating to larceny of property found.

I declined to withdraw the case from the jury, thinking it desirable that the point raised should be decided by the Court of Criminal Appeal. The passage in Stephen's Digest referred to is as follows: "Theft may be committed by converting property which the owner has given to the offender under a mistake which the offender has not caused, but which he knows at the time when it is made, and of which he fraudulently takes advantage. But it is doubtful whether it is theft fraudulently to convert property given to the person converting it under a mistake of which that person was not aware when he received it."

The jury found that the prisoner did not know that it was a sovereign at the time he received it, but said they were unanimously of opinion that the prosecutor parted with it under the mistaken belief that it was a shilling, and that the prisoner having soon after he received it discovered that it was a sovereign, could have easily restored it to the prosecutor, but fraudulently appropriated it to his own use and denied the receipt of it, knowing that the prosecutor had not intended to part with the possession of a sovereign but only of a shilling. They added that, if it were competent to them consistently with these findings and with the evidence to find the prisoner guilty, they meant to do so.

I entered a verdict of guilty, but admitted the prisoner to bail, to come up for judgment at the next assizes if this court should think that upon the above facts and findings the prisoner could properly be found guilty of larceny.

March 21.—Before Lord Coleridge, C.J., Grove, Lopes, Stephen, and Cave, JJ.

Sills on behalf of the prisoner.—Here there was no taking, and therefore no larceny. In Coke upon Littleton, ch. 19, sect. 1, p. 399, it is laid down that all felony does not include tres pass; and Mr. Justice Stephen in his Digest says: "Theft may be committed by converting property which the general or special owner has given to the offender under a mistake which the offender has not caused, but which he knows to be such at the time it is made, and of which he fraudulently takes advantage;" and he adds, "But it is doubtful whether it is theft fraudulently to convert property given to the person converting it under a mistake of which that person was not aware when he received it." [STEPHEN, J.—The reason why I expressed a doubt was because there are two notes about bureau cases which appear to contradict themselves, and I do not see how to reconcile them.] In *Rex* v. *Mucklow* (1 Moo. C. C. 160) and *Reg.* v. *Davies* (Dears. 640; 7 Cox C. C. 104), where letters containing cheques had been received by the prisoners innocently, but, upon the discovery that a mistake had been made,

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

the cheques were converted by them to their own use, the convictions were quashed, and it was held that the subsequent conversion could not make the offence larceny. The two cases which are supposed to contradict those cases do not really do so. They are the cases of *Cartwright* v. *Green* (8 Ves. 405) and *Merry* v. *Green* (7 M. & W. 623). In the former case, referred to at p. 628 of the latter case, Lord Eldon said: "To constitute felony, there must of necessity be a felonious taking. Breach of trust will not do. But from all the cases in Hawkins, there is no doubt, this bureau being delivered to the defendant for no other purpose than repair, if he broke open any part which it was not necessary to touch for the purpose of repair, but with an intention to take and appropriate to his own use what he should find, that is a felonious taking within the principle of all the modern cases, as not being warranted by the purpose for which it was delivered." [STEPHEN, J.—That doctrine leads to an extraordinary result, that if the whole bureau were stolen there would be no larceny, but if a secret drawer be opened there would be.] The question turns upon whether there was innocent possession of the article stolen, and here there was admittedly innocent possession of the sovereign. A man who obtains money is not bound to return the identical money. [CAVE, J.—If you give a man money to purchase something for you, and he converts that money to his own use, that is within the Act, is it not?] In *Reg.* v. *Middleton* (L. Rep. 2 C. C. R. 38; 28 L. T. Rep. N. S. 777; 12 Cox C. C. 260, 417) it is expressly held that there must be an *animus furandi* at the time of the taking; there the cabman saw that it was a sovereign which had been given him by mistake for a shilling at the time he took it. In *Reg.* v. *Peters* (1 C. & K. 245) and *Reg.* v. *Glyde* (L. Rep. 1 C. C. R. 139; 18 L. T. Rep. N. S. 613; 11 Cox C. C. 103, it was held not to be larceny where a man finds a bank-note in the road, and, although he hears subsequently who the owner is, appropriates the note. This cannot be a case of larceny by a bailee, because it is of the essence of a bailment that the intention to pass the possession of the particular property must exist in the minds of both parties. In *Merry* v. *Green* the trespass was the opening the purse which belonged to another person, and of which the defendant was not in the lawful possession; here the prisoner was in lawful possession of the sovereign. [STEPHEN, J.—If there was no larceny here at common law, may not the prisoner be guilty under the Bailee Act? The jury have found him guilty if the facts are sufficient.] Bailment means the delivery of the article bailed for a particular purpose, and without such a delivery there can be no bailment. In *Reg.* v. *Hassall* (L. & C. 58; 4 L. T. Rep. N. S. 561; 8 Cox C. C. 58) it was held that the bailment intended by the statute is a deposit of something to be returned in specie, and, therefore, that one with whom money has been deposited, and who is under an obligation to return the amount, but not the identical coin deposited, is not a bailee of the money within the statute. It was because the taking by a bailee was not a felonious taking that the refinement of the law was introduced with regard to the breaking of bulk by a bailee. Here the possession was in its inception innocent, and, although there was a subsequent appropriation, that was no larceny as in *Reg.* v. *Preston* (2 Den. C. C. 353; 5 Cox C. C. 390), where it was held that where a bank-note is lost and is found by a person who appropriates it to his own use, the jury are not to be directed to consider at what time after taking it in his possession the prisoner resolved to appropriate it to his own use, but whether at the time he took possession of it he knew, or had the means of knowing, who the owner was, and took possession of it with the intent to steal it, for if his original possession of it was an innocent one, no subsequent change of his mind or resolution to appropriate it to his own use would amount to larceny.

A. K. Loyd in support of the conviction.—Larceny is defined to be the unlawful taking and carrying away of things personal with intent to deprive the right owner of the same: (4 Steph. Com. 116.) And if at any time there is an unlawful taking it is larceny at common law. It is not right to look only at the time of the mere manual possession, for actual physical possession is not taken until the prisoner is able to know what it is he is taking and is or is not able to exercise an *animus furandi*. There are three classes of cases where there may be an unintentional delivery: first, where there is a mistake on the part of the owner as to the identity of the receiver; secondly, where there is a mistake as to the subject-matter; and, thirdly, the cases of finding, in all of which the possession falls involuntarily upon the person receiving; and where the receiver originally had an innocent mind, the law will not make a subsequent fraudulent animus affect the previous animus; that is all. An original innocent keeping and a subsequent fraudulent keeping is not larceny; but where immediately the receiver is capable of having an animus he exercises that fraudulently, then, no matter how lawful his possession previously, it becomes fraudulent. *Reg.* v. *Preston* is not against me, for there the prisoner had the power to exercise an animus one way or the other immediately he found the note, while here there was no such power until the prisoner knew he had the sovereign; and in *Reg.* v. *Preston* Alderson, B. during the argument said: "When the finder first takes it into his possession, in order to constitute larceny, there must be an intention of 'taking' the moment he knows what it is." If that be the law, then there was a fraudulent taking here. [Lord COLERIDGE, C.J.—In *Reg.* v. *Thurborn* (1 Den. C. C. 396) is a passage in Parke B.'s judgment which I think is the law, namely: "The result of these authorities is, that the rule of law on this subject seems to be, that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny."] But immediately previous to that his Lordship had referred to his dictum in *Merry* v. *Green* (7 M. & W. 623), and, although he limited it to cases where the property found could be identified, he did not alter it further; and, therefore, here the trespass must be taken to have been

committed not at the time of the manual taking, but afterwards, when it was appropriated *animo furandi*. In *Reg.* v. *Davies* (1 Dears. 641) Erle. C.J. endeavoured to apply the same principle to the case of a mistake as to the person, and failed merely because the court considered they were bound by *Rex* v. *Mucklow* (1 Moo. C. C. 160). The true test is whether at the time the prisoner has the opportunity of making up his mind he does so fraudulently or not. The sovereign here contained in it, besides the one shilling intended to be given, nineteen other shillings, and was, therefore, within the case of *Cartwright* v. *Green* (8 Ves. 465), where the bureau which was sold contained nine hundred guineas.

Sills in reply.—In the bureau case there was a trespass for the first time when the purse and money were found. In *Reg.* v. *Middleton* (L. Rep. 2 C. C. R. 61) Brett, J. said: "According to the common law, if the owners had not parted with the property, but only with the possession of them, the question of larceny remains open, and depends on the fact whether, at the time of the alleged felonious taking, the owner parted with the possession of the goods in such a manner and to such an extent as to exclude the idea of trespass. If the possession be obtained without fraud, the taking by which the possession is obtained cannot be treated as a taking by trespass, and consequently not as a taking without the consent of the owner." There must, therefore, be a trespass and felonious intent at the same time. There was no trespass here, and therefore there could be no larceny.

As there was a difference of opinion among the learned judges who formed the court, it was intimated that judgment would be reserved, in order that the case might be reargued before the full court.

June 13.—This case was reargued before the following learned judges:—Lord Coleridge, C.J., Grove and Denman, JJ., Pollock, B., Field, J., Huddleston, B., Manisty, Hawkins, Stephens, Mathew, Cave, Day, Smith, and Wills, JJ.

Sills, for the prisoner, repeated the arguments used by him on the preceding occasion, and contended that where a man loses property and another finds it, if the finder is in lawful possession of the property for an appreciable time there can be no larceny, for in such a case an action for trespass would not lie, and in order to recover the property the owner would have to bring an action of conversion or some action inconsistent with the notion of trespass; and that the analogy of such a case applied here, for the prisoner was in lawful possession of the sovereign when he first had it. In *Reg.* v. *Moore* (L. & C. 1) the finder of a bank-note was convicted of larceny only because he believed at the time he found it that the owner could be found, and was therefore never for a single moment in lawful possession of it. To constitute larceny, there must be a taking *invito domino*, and parting with goods by mistake is not sufficient, unless that mistake be brought about by the conduct of the prisoner. In *Reg.* v. *Prince* (L. Rep. 1 C. C. R. 150; 19 L. T. Rep. N. S. 40, 365; 11 Cox C. C. 193), a wife by a forged order obtained money standing to her husband's credit at his bankers, but it was held to be no larceny from the bankers, because the cashier had a general authority to part with the bankers' money; and Bovill, C.J. said: "The distinction between larceny and false pretences is material. In larceny the taking must be against the will of the owner. That is of the essence of the offence." And Blackburn, J. said: "As the law now stands, if the owner intended the property to pass, though he would not so have intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny." First, therefore, there was here no larceny at common law; and secondly, there is no statute law applicable to the case. That being so, the prisoner being lawfully in possession for one hour, there was no trespass; there being no trespass there could be no taking, and since there was no taking there was no larceny.

A. K. Loyd, for the prosecution, also repeated his previous arguments, and stated that his proposition was, that where property innocently comes into the hands of a transferee under a mistake as to the subject-matter of the transfer, there was no such delivery as would prevent a subsequent taking from being larceny. In support of this he further contended that the whole character of the taking ought to be considered, and that so far from *Reg.* v. *Middleton* and the other cases cited against him being conclusive, he really prayed them in aid as showing that where a transferee has the means of knowing what he is doing, and takes *animo furandi*, he is guilty of larceny, and here there was an *animus furandi* found as soon as the prisoner had the means of knowing he had received a sovereign. In *Reg.* v. *Longstreeth* (Moo. C. C. 137) it was held, that a carrier was not sufficiently authorised to deliver goods so as to pass property, and therefore a delivery by mistake was not such a delivery as to prevent larceny. Therefore delivery by mistake does not necessarily give a ground for acquittal. Suppose an eyeglass to be accidentally dropped into a stranger's pocket, could that be held to be a delivery; or a cricket-ball involuntarily caught to save oneself, would the receiver in either case be at liberty to refuse to return what he had received? If the decisions upon the question of finding property should be applied, care should be taken to apply those principles at the right time; and to apply them not to the time of receiving the property, but to the time when the nature of the property is ascertained, and if at that time there is *animus furandi*, then those decisions support the conviction. In *Reg.* v. *Wells* (1 F. & F. 109) a carrier who retained money given to him to procure goods, which goods he duly delivered, was held guilty of larceny as a bailee. The original doctrine of larceny by a bailee was, that the goods must be returned in specie, otherwise no larceny: see also *Reg.* v. *Hoare* (1 F. & F. 647) and *Reg.* v. *Garrett* (2 F. & F. 14); but that has been held too narrow a definition of the crime: see

Reg. v. *Richmond*, 29 L. T. Rep. N. S. 408; 12 Cox C. C. 495;
Reg. v. *Aden*, 29 L. T. Rep. N. S. 467; 12 Cox C. C. 512;
Reg. v. *Oxenham*, 35 L. T. Rep. N. S. 490; 13 Cox C. C. 349;
Reg. v. *Tomkinson*, 44 L. T. Rep. N. S. 821; 14 Cox C. C. 603;
Reg. v. *Macdonald*, 52 L. T. Rep. N. S. 583.

There was no delivery here, merely a bare custody

of the sovereign; and if there was a delivery, it was for a specific purpose—the loan of 1*s.*—and therefore the fraudulent dealing with the 19*s.* was larceny. The delivery was either valid or void: if valid, there was a bailment; and if void, there was larceny:

Reg. v. *Robson*, 9 Cox C. C. 29.

If there was no delivery at all, then there was a taking; if there was delivery, it was a conditional delivery, and in either case the prisoner can be convicted.

Cur. adv. vult.

Dec. 5.—SMITH, J. read the following judgment:—The prisoner in this case was indicted for the larceny of a sovereign, the moneys of Edward Keogh. The material facts are as follows: Keogh handed to the prisoner the sovereign in question, believing it was a shilling, and not a sovereign, upon the terms that the prisoner should hand back a shilling to him when he (the prisoner) was paid his wages. At the time the sovereign was so handed to the prisoner he honestly believed it to be a shilling. Some time afterwards the prisoner discovered that the coin he had received was a sovereign and not a shilling, and then and there fraudulently appropriated it to his own use. Is this larceny at common law or by statute? To constitute the crime of larceny at common law, in my judgment there must be a taking and carrying away of a chattel against the will of the owner, and at the time of such taking there must exist a felonious intent in the mind of the taker. If one or both of the above elements be absent there cannot be larceny at common law. The taking must be under such circumstances as would sustain an action of trespass. If there be a bailment or delivery of the chattel by the owner, inasmuch as, among other reasons, trespass will not lie, it is not larceny at common law. In chap. 19, sect. 1, at p. 142, of vol. 1 of Hawkins' Pleas of the Crown, it is stated: "It is to be observed that all felony includes trespass, and that every indictment of larceny must have the words *felonicè cepit* as well as *asportavit*. Whence it follows that if the party be guilty of no trespass in taking the goods he cannot be guilty of felony in carrying them away." As I understand, the counsel for the Crown did not really dispute the above definition, and indeed, if he had, upon further referring to the 3rd Institutes, chap. 47, p. 107, and the 1st Hale's Pleas of the Crown, p. 61, it would be found to be fully borne out by those writers. The two cases cited in argument, *Rex* v. *Mucklow* (1 Moody's Crown Cases, 161) and *Reg.* v. *Davies* (Dears. 640), are good illustrations of what I have enunciated; and if other cases were wanted, there are plenty in the books to the same effect. In the present case it seems to me, in the first place, that the coin was not taken against the will of the owner, and if this be so, in my judgment it is sufficient to show that there was no larceny at common law; and, secondly, it being conceded that there was no felonious intent in the prisoner when he received the coin, this, in my judgment, is also fatal to the act being larceny at common law. As to this last point, the law laid down by Cockburn, C.J., Blackburn, Mellor, Lush, Grove, Denman, and Archibald, JJ., in the case of *Reg.* v. *Middleton* (Law Rep. 2 C. C. 45) is very pertinent; it is as follows: "We admit that the case is undistinguishable from the one supposed in argument of a person handing to a cabman a sovereign by mistake for a shilling; but, after a careful weighing of the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and the question whether the cabman was guilty of larceny or not would depend upon this, whether at the time he took the sovereign he was aware of the mistake, and had then the guilty intent, the *animus furandi*." I believe the above to be good law. The contention, however, of the Crown was, that, although the above might be correct, yet the present case was to be likened to those cases in which finders of a lost chattel have been held guilty of larceny. The principle upon which a finder of a lost chattel has been held guilty of larceny is that he has taken and carried away a chattel, not believing that it had been abandoned, and at the time of such taking has had the felonious intent. The proper direction to be given to a jury being, as I understood, "Did the prisoner at the time of finding the chattel intend to appropriate it to his own use, then believing that the true owner could be found, and that the chattel had not been abandoned." See *Reg.* v. *Thurborn* (1 Denison's Crown Cases, 388) and *Reg.* v. *Glyde* (Law Rep. 1 C. C. 139). If he did, he would be guilty of larceny; *aliter* he would not. Then it was argued, as argued it was by the counsel for the Crown, that the prisoner in this case was on the same footing as a finder of a chattel. In my judgment the facts do not support him. Keogh, in the present case, intended to deliver the coin to the prisoner, and the prisoner to receive it. The chattel, namely the coin, was delivered over to the prisoner by its owner, and the prisoner received it honestly. He always knew he had the coin in his possession after it had been delivered to him. The only thing which was subsequently found was that the coin delivered was worth 240*d.* instead of 12*d.*, as had been supposed. This argument, as it seems to me, confounds the finding out of a mistake with the finding of a chattel. In some cases, as above pointed out, the finder of a chattel may be guilty of larceny at common law; but how does that show that the finder out of a mistake may also be guilty of such a crime? A mistake is not a chattel. The chattel (namely the coin) in this case never was lost; then how could it be found? In my judgment the argument upon the point for the Crown is wholly fallacious and fails. It was further urged for the Crown that the present case was covered by authority, and the cases of *Cartwright* v. *Green* (8 Ves. 405) and *Merry* v. *Green* (7 M. & W. 623) were cited in this behalf. I fail to see that either case is an authority for the point insisted upon by the Crown. In the first case (*Cartwright* v. *Green*, 8 Ves. 405) the question arose upon demurrer to a bill in Chancery as to whether a felony was disclosed upon the face of the bill. Lord Eldon, as he states in his judgment, decided the case upon the ground that, inasmuch as the bureau in question had been delivered to the defendant for no other purpose than repair, and he had broken open a part of it which it was not necessary to touch for the purpose of repair with the intention of taking and appropriating to his own use whatever he should find therein, it was larceny. I conceive this to be distinctly within the principle I have

above stated—there was the taking against the will of the owner with the felonious intent at the time of taking. The other case, namely, *Merry* v. *Green* (7 M. & W. 623), which was also the case of a purse in a secret drawer of a bureau which had been purchased at a sale, was clearly decided by Parke, B., who delivered the judgment of the court, upon the principles applicable to a case of finding. The learned Baron says: "It seems to us that though there was a delivery of the secretary and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it, nor the vendee to receive it, both were ignorant of its existence, and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a case of simple finding, and the law applicable to all cases of finding applies." I understand the learned Baron, when he says "the law applicable to all cases of finding applies," to mean the law applicable to the cases of finding a chattel; for there are no cases extant as to finding out a mistake to which his remark could apply. That, too, is the distinction between the present case and that before Parke, B. In *Merry* v. *Green* (7 M. & W. 623) no intention to deliver the chattel (namely, the purse and money) at all ever existed, whereas in the present case there was every intention to deliver the chattel (namely, the coin), and it was delivered and honestly received. In my judgment, a man who honestly receives a chattel by delivery thereof to him by its true owner, cannot be found guilty of larceny at common law, and, in my opinion, the prisoner in this case is not guilty of that offence. The second point has now to be considered, namely, was he guilty of larceny as a bailee within the true intent of sect. 3 of 24 & 25 Vict. c. 96? To constitute a person bailee of a chattel there must be a bailment and not a mere delivery of the chattel. There must be a delivery of a chattel upon contract, express or implied, to return them or obey the mandate with which the delivery is clogged, or, in other words, a delivery upon condition. The question, as it seems to me, is this, is the law in the present case to imply a condition when we know perfectly well that at the time of the delivery of the coin no condition at all was in the contemplation of the parties, excepting that a coin of like value should be returned to Keogh when the prisoner had drawn his wages. No condition to return the coin delivered to the prisoner was ever thought of, and, in my judgment, such a condition cannot be implied. Should, however, any condition be implied as to what was to be done if or when any mistake not then contemplated should be discovered, my opinion is that the only condition, if any, which could be implied would be that the prisoner would not spend or use for his own purposes 19*s.* out of the 20*s.*, and I am of opinion that, if the prisoner had, upon the finding out the mistake, taken to Keogh 19*s.* he would have been strictly within his rights. The case of *Reg.* v. *Hassall* (L. & C. 58) is an express authority to the effect that a person is not a bailee within the statute unless he is under obligation to return the identical chattel deposited with him. In my judgment, the prisoner was not a bailee of the sovereign for the reasons above given. I am fully alive to the remark which has been made, that if the present case is not one of larceny, it should be. Whether this remark is well founded or not I do not pause to inquire; but it seems to me that the observations of Bramwell, B. in *Reg.* v. *Middleton* (L. Rep. 2 C. C. 38) on this head, are well worthy of consideration. Believing, however, as I do, that, according to the law of England as administered from the earliest times, the present case is not a case of larceny at common law, I cannot hold otherwise than I do, and, as for the reasons given above, the prisoner is not, in my opinion, guilty of larceny as a bailee, my judgment is that the conviction should be quashed.

CAVE, J.—(As the learned judge was unable to attend, the following judgment, written by him, was read by Lord Coleridge, C.J.:)—The question we have to decide is whether, under the circumstances stated in the case, the prisoner was rightly convicted of larceny, either at common law or as a bailee. It is, undoubtedly, a correct proposition that there can be no larceny at common law unless there is also a trespass, and that there can be no trespass where the prisoner has obtained lawful possession of the goods alleged to be stolen; or, in other words, the thief must take the goods into his possession with the intention of depriving the owner of them. If he has got the goods lawfully into his possession before the intention of depriving the owner of them is formed, there is no larceny. Applying that principle to this case, if the prisoner acquired lawful possession of the sovereign when the coin was actually handed to him by the prosecutor, there is no larceny, for at that time the prisoner did not steal the coin; but, if he only acquired possession when he discovered the coin to be a sovereign, then he is guilty of larceny, for at that time he knew that he had not the consent of the owner to his taking possession of the sovereign as his own, and the taking under those circumstances was a trespass. It is contended that, as the prosecutor gave and the prisoner received the coin under the impression that it was a shilling and not a sovereign, the prosecutor never consented to part with the possession of the sovereign, and consequently there was a taking by the prisoner without his consent; but, to my mind, it is impossible to come to the conclusion that, at the time when the sovereign was handed to him, the prisoner, who was then under a *bonâ fide* mistake as to the coin, can be held to have been guilty of a trespass in taking that which the prosecutor gave him. It seems to me that it would be equally logical to say that the prisoner would have been guilty of a trespass if the prosecutor, intending to slip a shilling into the prisoner's pocket without his knowledge, had by mistake slipped a sovereign in instead of a shilling. The only point which can be made in favour of the prosecution, so far as I can see, is that the prisoner did not actually take possession until he knew what the coin was of which he was taking possession, in which case, as he then determined to deprive the prosecutor of his property, there was a taking possession simultaneously with the formation of that intention. Had the coin been a shilling, it is obvious that the prisoner would have gained the property in and the possession of the coin when it was handed to him by the prosecutor; as there was a mistake as to the identity of the coin no property passed, and the question is whether the possession passed when the

coin was handed to the prisoner, or when the prisoner first knew that he had got a sovereign and not a shilling. There are four cases which it is important to consider. The first is *Cartwright* v. *Green* (8 Ves. 405), which, however, differs slightly from the present, because in that case there was no intention to give the defendant Green either the property in or the possession of the guineas, but only the possession of the bureau, the bailor being unaware of the existence of the guineas. If the bailee in that case had, before discovering the guineas in the secret drawer, negligently lost the bureau with its contents, it is difficult to see how he could have been made responsible for the loss of the guineas. In *Merry* v. *Green* (7 M. & W. 623) the facts were similar to *Cartwright* v. *Green* (8 Ves. 405), except that the bureau had been sold to the defendant. In that case Parke, B. says, that though there was a delivery of the bureau to the defendant, there was no delivery so as to give a lawful possession of the purse and money in the secret drawer. If these cases are rightly decided, as I believe them to be, they establish the principle that a man has not possession of that of the existence of which he is unaware. A man cannot without his consent be made to incur the responsibilities towards the real owner which arise even from the simple possession of a chattel without further title, and if a chattel has, without his knowledge, been placed in his custody, his rights and liabilities as a possessor of that chattel do not arise until he is aware of the existence of the chattel, and has assented to the possession of it. A case much urged upon us on behalf of the prisoner was *Rex* v. *Mucklow* (1 Moody's Crown Cases, 160). In that case a letter containing a draft for 10*l.* 11*s.* 6*d.* had been delivered to the prisoner, although really meant for another person of the same name, and the prisoner appropriated the draft, and was tried and convicted of larceny. The conviction, however, was held wrong on the ground that he had no *animus furandi* when he first received the letter. Here, as in the two previous cases, the prisoner was not at first aware of the existence of the draft, and when he became aware of it he must have known that it was not meant for him, yet the judges seem to have held that he got possession of the draft at the time when the letter was handed to him. In *Reg.* v. *Davies* (Dearsley's Crown Cases, 640) the facts were similar to those in *Mucklow's case* (1 Moody's Crown Cases, 161), and Erle, C.J., then Erle, J., who tried the case, directed the jury that if, at the time the prisoner received the order, he knew it was not his property but the property of another person of known name and address, and nevertheless determined to appropriate it wrongfully to his own use, he was guilty of larceny, and that, in his opinion, the prisoner had not received it until he had discovered by opening and reading the letter whether it belonged to him or not. "I considered," says the judge, 'that the law of larceny laid down in respect of articles found, was applicable to the article here in question." The court, however, quashed the conviction on the authority of *Mucklow's case* (1 Moody's Crown Cases, 160). In *Reg.* v. *Middleton* (L. Rep. 2 C. C. 38), in which it was held by eleven judges against four that, where there was a delivery of money under a mistake to the prisoner, who received it *animo furandi*, he was guilty of larceny, there occurs a passage in the judgment of some of the judges who formed the majority, which is as follows: "We admit that the case is undistinguishable from the one supposed in the argument, of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this, whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent, the *animus furandi*. For my part I am quite unable to reconcile the cases of *Rex* v. *Mucklow* (1 Moo. C. C. 161) and *Reg.* v. *Davies* (Dears. C. C. 640) and the passage I have cited from *Reg.* v. *Middleton* (L. Rep. 2 C. C. 38) with those of *Cartwright* v. *Green* (8 Ves. 405) and *Merry* v. *Green* (7 M. & W. 623); and, being compelled to choose between them, I am of opinion that the law is correctly laid down in *Merry* v. *Green* (7 M. & W. 623), for the following reasons: The acceptance by the receiver of a pure benefit unmixed with responsibility may fairly be, and is in fact, presumed in law until the contrary is shown; but the acceptance of something which is of doubtful benefit should not be and is not presumed. Possession unaccompanied by ownership is of doubtful benefit; for although certain rights are attached to the possession of a chattel, they are accompanied also by liabilities towards the absolute owner which may make the possession more of a burden than a benefit. In my judgment, a man cannot be presumed to assent to the possession of a chattel; actual consent must be shown. Now, a man does not consent to that of which he is wholly ignorant; and I think, therefore, it was rightly decided that the defendant in *Merry* v. *Green* (7 M. & W. 623) was not in possession of the purse and money until he knew of their existence. Moreover, in order that there may be a consent, a man must be under no mistake as to that to which he consents; and I think, therefore, that Ashwell did not consent to the possession of the sovereign until he knew that it was a sovereign. Suppose that, while still ignorant that the coin was a sovereign, he had given it away to a third person who had misappropriated it, could he have been made responsible to the prosecutor for the return of 20*s.*? In my judgment, he could not. If he had parted with it innocently, while still under the impression that it was only a shilling, I think he could have been made responsible for the return of a shilling and a shilling only, since he had consented to assume the responsibility of a possessor in respect of a shilling only. It may be said that a carrier is responsible for the safe custody of the contents of a box delivered to him to be carried, although he may be ignorant of the nature of its contents; but in that case the carrier consents to be responsible for the safe custody of the box and its contents whatever they may happen to be; and, moreover, a carrier is not responsible for the loss of valuable articles, if he has given notice that he will not be responsible for such articles unless certain conditions are complied with, and is led by the consignor to believe that the parcel given to him to carry does not contain articles of the character specified in the notice: (*Batson* v. *Donovan*, 4 B. & A. 21.) In

this case, Ashwell did not hold himself out as being willing to assume the responsibilities of a possessor of the coin whatever its value might be; nor can I infer that at the time of the delivery he agreed to be responsible for the safe custody and return of the sovereign. As, therefore, he did not at the time of delivery subject himself to the liabilities of the borrower of a sovereign, so also I think that he is not entitled to the privileges attending the lawful possession of a borrowed sovereign. When he discovered that the coin was a sovereign, he was, I think, bound to elect, as a finder would be, whether he would assume the responsibilities of a possessor; but, at the moment when he was in a position to elect, he also determined fraudulently to convert the sovereign to his own use; and I am therefore of opinion that he falls within the principle of *Reg.* v. *Middleton* (L. Rep. 2 C. C. 45), and was guilty of larceny at common law. For these reasons I am of opinion that the conviction was right.

MATHEW, J. read the following judgment.—I concur in the judgment delivered by Smith, J., and I desire to add the following observations in support of the conclusion at which we arrived. The definitions of larceny at common law which have hitherto been accepted, and which I understand are not now disputed, show that it is of the essence of the offence that there should be a felonious taking of the property of another without the consent of the owner, and that it must be an actual taking and not a conversion following upon a bailment or delivery by the owner. The taking must be a trespass. In this case, if the defendant had undertaken to get a sovereign changed for the prosecutor and to bring him back 19*s.*, he would not, if he failed to keep his word, have been guilty of larceny at common law. This, I presume, cannot be disputed. His misconduct would have been a private injury and not a public wrong punishable as a crime. I am wholly unable to see any difference in the moral delinquency of the recipient in that case and in this. In the one case the sovereign is received upon an express promise to account for the change; in the other case it is received upon a promise to the same effect which the civil law of England implies. In neither case would possession of the coin have been obtained by a trespass. In both cases the misappropriation would follow upon a delivery by the owner of that which is said to have been feloniously taken. But it is said, I understand, that, although the possession of the coin may, in the first instance, have been innocent, the taking occurred when it was changed, and that the felonious intention to take may be inferred from the dishonest conduct of the defendant in spending afterwards the 19*s.* which he ought to have returned to the prosecutor. This means that, though the defendant did not take in point of fact, he ought by a fiction to be treated as having done so in point of law, in order that he may be punished as a thief. I do not think this reasoning satisfactory. But suppose there may be a taking in some legal sense, which common sense repudiates, is there any evidence of a felonious taking? Now, suppose the sovereign had been handed in mistake to the defendant, not by way of loan or gift, but in payment of a debt of 1*s.*, and the defendant had changed the sovereign, taken a shilling, and offered the remaining change to the prosecutor, could he have been convicted of larceny of the sovereign? The answer, I presume, would be no; because his conduct would have shown that he had no felonious intention when he changed the coin. But supposing that, yielding to temptation, he had misappropriated one other shilling, and was prepared to hand back 18*s.*, would there then have been evidence against him that he had changed the sovereign with a felonious intent? If not, at what point of misappropriation would the evidence of a felonious purpose in the original changing of the coin commence? In my judgment, the subsequent dishonesty of the defendant is no more evidence of a felonious intent when the coin was changed in this case than it would be where the coin was received upon an express promise, which was afterwards broken, to account for the change. I think, if this conviction be affirmed, any dishonest dealing with the property of another, by whatever means possession of the property may have been acquired, may be made the ground for a prosecution for larceny. Dishonest conduct like the defendant's ought perhaps to be punished; but, if it must, it should be under a statute passed for that purpose by the Legislature, and not by the extension or development of the criminal law by means of judicial decision. The highly technical reasoning upon which this conviction has been sought to be upheld should have no place, in my judgment, in the interpretation of the criminal law. Upon such a subject as theft, where the law is administered by magistrates as well as judges, it seems to me desirable that the rules by which guilt and innocence are to be determined should be susceptible of ready comprehension and easy exposition. I think the conviction should be quashed.

STEPHEN, J.—Before reading this judgment, I may observe that my brothers Day and Wills desire me to say that they agree with it. The facts of this case are as follows: Keogh, intending to lend Ashwell a shilling, gave him a coin which he supposed to be a shilling, but which in fact was a sovereign. At the time when he received it Ashwell supposed it to be a shilling, but after about an hour he discovered that it was a sovereign, and fraudulently applied it to his own use. The question whether this was larceny was argued, first before five judges, who differed in opinion, and afterwards before fourteen. The arguments used to show that it was not larceny were as follows: From the earliest times it has always been held that a felonious taking is essential to larceny, and that a fraudulent conversion of property after an innocent taking, though in some particular cases criminal by statute, does not amount to larceny at common law. It was further argued that there was in this case no such bailment of the sovereign as would make the prisoner guilty of larceny as a bailee under the 3rd section of the Larceny Act of 1861. I think that these arguments are well founded and ought to prevail; but, as a difference of opinion exists on the subject, I will give my reasons fully, noticing as I give them what I understand to be the arguments put forward in support of the opposite view. The history of the law relating to theft, from the earliest times to the present day, shows that, from the very first notices of the law of theft, it was always con-

sidered that the crime involved a taking against the will of the owner. Glanville says (bk. 10., c. 13) that a person who does not return what is lent (commodatum) to him, "a furto omnimodo excusatur, per hoc quod initium habuerit suæ detentionis per dominum illius rei." Bracton defines theft as "contrectatio rei alienæ fraudulenta, cum animo furandi, invito illo domino cujus res illa fuerit." This in itself is ambiguous, as the word "contrectatio" might refer, as it certainly did in Roman law (Digest, XLVII. tit. 2, 48, s. 4; XLVII. tit. 2, 52, s. 19; and XLVII. tit. 2, 54, s. 1), to a fraudulent dealing with the thing stolen after a delivery by the owner, but other ancient authorities make it probable that this was not Bracton's meaning. It will be sufficient for this purpose to quote two cases from the Year Books, each of which lays down the same doctrine at a considerable interval of time. The first is in 2 Edw. 3, 1, No. 3. A man was indicted in the sheriff's tourn because he "felonice ab duxit unum equum rubrum." The indictment was removed to the King's Bench, and it was said that it was insufficient, because it did not say that the person indicted had taken the horse feloniously (pur ceo que il ne dit pas que vous le emblastes felonice). This was in 1328. In 1474 (13 Edw. 4, 9, No. 5) was decided the famous case of the carrier, who, having received goods to be carried to Southampton, carried them elsewhere, opened the bales, and stole the contents. This case has been generally understood to decide that a bailee who steals the whole of the goods bailed to him commits no offence at common law, but that if he breaks bulk and steals part of them he is guilty of theft. Although this view has been generally entertained and is embodied in 20 & 21 Vict. c. 54, now represented by the 3rd section of the Larceny Act of 1861, it is not specifically put forward as the reason of the decision in the report in the Year Books, and two judges give a different reason for their decision, namely, that the original taking was felonious, as the carrier meant not to carry the goods according to the contract but to steal them. The case undoubtedly established the rule, whether or not it established the exception. The case was argued twice—first in the Star Chamber before the Privy Council, and afterwards before the judges in the Exchequer Chamber. The Chancellor stated in the Star Chamber that the suit was brought by an alien merchant who had come into England with a safe-conduct, and who, he said, "is not bound to sue according to the law of the land, and to abide the trial by twelve men and other solemnities of the law of the land; but he ought to sue here, and it must be determined according to the law of nature in Chancery." He added that the law merchant was "ley universal par tout le monde," and was the law applicable to the case, and said that a misappropriation of goods in the possession of the offender was as felonious as if they were not in his possession. This reasoning appears to confound the criminal liability of the carrier, which must have depended on the law of England, with the civil remedy of the owner of the goods, and admits that by the law of England a felonious taking was essential to larceny. But it must be observed that the Chancellor in 1474 was Booth, then Bishop of Durham, of whom Lord Campbell says: "His appointment turned out a great failure; he was equally inefficient in the Court of Chancery and in Parliament. Except that he did not take bribes, he had every bad quality of a judge:" (Camp. Lives of Chancellors, 5th ed., vol. 1, p. 336.) He was, in a few months after this case, "dismissed from his office of Chancellor" on account of his incompetency. When the matter was discussed in the Exchequer Chamber, it was held by all the judges, except Nedham, that if goods are bailed to a man he cannot take them feloniously. The judges reported to the Chancellor and the Council that the majority of them thought a felony had been committed. Their reasons are not given in the report. It thus appears that, whatever may be the exact effect of the case, all the judges except one considered that a felonious taking was essential to larceny, and that if the original taking was innocent, no subsequent fraudulent dealing with the thing taken would amount to larceny. If the effect of the case is that a fraudulent breaking of bulk by a carrier amounts to a felonious taking, it established at most a special, anomalous, and highly technical exception to a rule which the exception itself emphatically recognises. There are other cases on the subject in the Year Books, but it is not necessary to go through them. The rule that in every theft there must be felonious taking, or, in other words, a trespass, and that a fraudulent conversion after an innocent taking is not theft, is laid down by every text-writer who has dealt with the subject—Coke (3rd Institutes, 107), Hale (1 Hale's Pleas of the Crown, 504), Hawkins (bk. i., chap. 19), Foster (Criminal Law, 123), and others, down to our time—and has been recognised by many statutes which make exceptions to it in the case of embezzlement by servants, misappropriation by agents, and especially in the case of larceny by bailees. Indeed, my only reason for going so fully into the matter is to show how characteristic and well-established a part of law the proposition in question is. The application of this principle to the present case appears to me direct and obvious. Ashwell received the sovereign innocently, though he dealt with it fraudulently an hour afterwards, when he became aware of its value. The inference that he committed no felony at common law appears to me to follow of necessity. There are two ways in which it is sought to avoid this inference. It is said, first, that the delivery being made under a mistake, passed neither the property in the sovereign nor the right to a possession of it, and that the prisoner must be regarded as having taken it, not when he accepted it under a mistake as to its value, but when knowing its value he determined to appropriate it to himself, or when he did so appropriate it by getting it changed and keeping the change. It is also said that even if no offence at common law was committed, the prisoner was guilty of larceny as a bailee under the 3rd section of the Larceny Act. I am unable to concur with either of these views. The first view is, I think, contrary to principle, because it evades by a legal fiction the principle that a fraudulent appropriation consequent upon an innocent taking is not larceny. The guilt of the prisoner would follow easily and immediately from the principle that such a taking is larceny, and this second principle is in effect substituted for the first by an artificial interpretation either

of the word "possession" or of the word "taking." If the word "possession" is chosen to be interpreted, this is done by explaining it to mean something beyond actual control over the thing possessed, namely control coupled with knowledge which may or may not exist. If the word "taking" is chosen to be interpreted, it is in this case interpreted to mean not an actual physical taking but a subsequent change of mind relating back to such physical taking. I know of no authority for either of these fictions. The word possession is indeed used in many senses, some of them highly artificial, but that is a bad reason for adding a new artificial meaning to it. Its plain meaning in this case is the reception of the coin by Ashwell from Keogh. The interpretation suggested appears to me to be one against which there is express authority, which I now proceed to examine. The cases which set the matter in the clearest light are those which relate to the finding of lost property, particularly those which have been decided in modern times. The earlier authorities laid down in general terms that to take lost goods fraudulently was not felony. Coke says (3rd Institutes, 108), "If one lose his goods and another finde them, though he convert them *animo furandi* to his own use, yet it is no larceny, for the first taking is lawfull." Hale (1st Pleas of the Crown, 506) says: "If A. finds the purse of B. in the highway, and takes it and carries it away, and hath all the circumstances that may prove it to be done *animo furandi*, as denying it or secreting it, yet it is not felony." The generality of these expressions was long afterwards qualified by cases which decided that if the owner was known to the finder at the time when he took the goods, the offence was larceny, and various distinctions and refinements were added to this general doctrine by five modern cases. These are *Reg.* v. *Thurborn* (1 Den. C. C. 387), decided in 1849; *Reg.* v. *Preston* (2 Den. C. C. 353), decided in 1851; *Reg.* v. *Christopher* (Bell C. C., 27), decided in 1858; *Reg.* v. *Moore* (L. & C. 1), decided in 1861; and *Reg.* v. *Glyde* (L. Rep. 1 C. C. 139), decided in 1868. These cases taken together appear to me to establish, with the utmost possible clearness, the proposition that in order to justify a conviction for larceny, the original taking, in the ordinary sense of the word, must be felonious, that a fraudulent misappropriation after an innocent taking is not theft, and that a change of mind after an innocent taking does not relate back to the innocent taking and make it felonious. In *Reg.* v. *Thurborn* (1 Den. C. C. 387) the prisoner found a bank-note and took it, intending to usurp the entire dominion over it, but at the time there was nothing to show him to whom the note belonged, nor had he any reason to suppose the owner knew where to find it. Next day he heard and believed that the note belonged to the prosecutor, and after this he changed it and appropriated the money to himself. It was unanimously held by seven judges that this was not larceny, though the first taking was "not innocent in one sense." The effect of the judgment is summed up at page 397 as follows:—"If he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny, nor would it, we think, if he had done so knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense; and the question is, does that make a difference? We think not." If this case is good law, and if the present case is to be decided against the prisoner, we shall have the following result: If A. finds a sovereign in the road not knowing to whom it belongs, and appropriates it to himself after discovering the owner, he is not guilty of theft; but if A. innocently receives a sovereign from the owner believing it to be a shilling, and appropriates it to himself after discovering its value, he is guilty of theft. This can hardly be the law. When Ashwell received the coin and put it in his pocket, and for an hour afterwards, he did not know that Keogh was the owner of it in any sense whatever. He believed it to be his own, and that on the reasonable ground that Keogh had lent it to him, thereby passing to him an absolute property in the coin itself. When he discovered its value he had the lawful possession of it, at all events as against everyone except Keogh; and if his subsequent conversion of it to his own use amounted to a felonious taking, *Reg.* v. *Thurborn* (1 Den. C. C. 387) was wrongly decided. In one or two of the latter cases some dissatisfaction has been expressed at *Reg.* v. *Thurborn* (see the observations of Martin, B. and Blackburn, J. in *Reg.* v. *Glyde*, L. Rep. 1 C. C. 139); but this, I apprehend, refers not to that part of the decision which held that a fraudulent conversion after an innocent taking was not larceny, but to that part which held the same as to a fraudulent conversion after a taking which was in itself not innocent. The judges however in *Reg.* v. *Glyde* said that they were bound by *Reg.* v. *Thurborn*, and it is recognised in several other cases as well. The next case is *Reg.* v. *Preston* (2 Den. C. C. 353), decided in 1851, which appears to me to affirm the doctrine as to the necessity for an unlawful taking in the first instance in the most explicit manner. In this case a 50*l.* note had been lost by Collis. It had on it the name of Collis. The prisoner Preston changed the note two days afterwards, having in the meantime had notice that such a note had been lost by Collis. It does not appear how Preston became possessed of the note, whether by finding or otherwise. Mr. M. D. Hill, the Recorder of Birmingham, directed the jury "that the important question for them to consider was at what time the prisoner first resolved to appropriate the note to his own use. If they arrived at the conclusion that the prisoner either knew the owner, or reasonably believed that the owner could be found, at the time when he first resolved to appropriate it to his own use—that is, to exercise complete dominion over it—then he was guilty of larceny. If, on the other hand, he had formed the resolution of appropriating it to his own use before he knew the owner or had a reasonable belief that the owner could be found, then he was not guilty of larceny." This was held by the court to be a misdirection, as consistently with it the jury might have convicted the prisoner, thinking that he had taken the note innocently, and determined afterwards to misappropriate it. The judgments in this case appear to me to apply to the present case so closely that they must, if accepted as good law, be regarded as decisive of it. Lord Campbell, C.J.: "I am of opinion that this conviction connot be supported. Larceny necessarily supposes a taking *animo*

furandi. The rule as to taking is somewhat technical, but it is not likely to be departed from. In the case before us, the direction to the jury is consistent with an honest possession on the part of the prisoner. The recorder says that the question for them to consider was at what time the prisoner first resolved to appropriate the note to his own use. When, then, was the taking? It is supposed to be a thought which passed through the prisoner's own mind; but I do not think that can amount to a taking when nothing was in fact done, and when it may be that the prisoner was lying in bed at a distance from the article. There is no taking *animo furandi* in this case: consequently there is no larceny. It is unnecessary for us now to enter further into the question after the elaborate judgment of my brother Parke on the subject of larceny in *Reg.* v. *Thurborn* (1 Den. C. C. 387)." Alderson, B.: "If there must be both a taking and the *animus furandi* to constitute larceny, the difficulty is, how the changing a man's mind *ex post facto* can render an honest taking larceny. According to the summing-up of the recorder to the jury, if a man gets a note honestly, keeps it for a week with an intention of restoring it to the owner, and then changes his mind and resolves to appropriate it to his own use, it may be, as the Lord Chief Justice remarks, while he is in bed, that converts a lawful taking into a dishonest one. To uphold such a doctrine would be to refine in such a way as to destroy the simplicity of the criminal law." Talfourd, J.: "A mere movement of the mind cannot amount in law to a taking." Platt, B.: "The case where there has been a bailment stands on a different principle—that of breaking bulk, but to constitute larceny, in every other case, something must be taken *animo furandi* and *invito domino*." Martin, B.: "It is of great importance that the rules of the criminal law should be plain and intelligible; and, considering that the prisoner may originally have become innocently possessed of the note, I do not think that this can be held to be a case of larceny." *Preston's case* (2 Den. C. C. 353) seems to me to be in all essential particulars identical with the present. The argument urged in support of the conviction of Preston was substantially the same as the view now under consideration. Lord Campbell states it thus (page 359): "Your position is that the finder, whilst he holds the property honestly, holds it for the right owner, and that when he resolves to appropriate it to his own use there is a new taking, and that he then takes it *animo furandi*." This was the view from which the court dissented. The only difference between the cases lies in the fact that in *Preston's case* (2 Den. C. C. 353) it did not appear how the prisoner got the note; whereas in the present case it appears that the prisoner got the coin from the prosecutor himself, and reasonably believed at the time that the prosecutor meant to give it to him for his own. This difference was surely in favour of Ashwell. In the one case nothing was proved as to the actual taking; in the other it was proved to have been altogether innocent. The judgments are also remarkable because they show that in the opinion of the court the felonious taking must be an actual physical taking, and that a change of mind as to the disposition of the property previously taken is not enough to constitute an unlawful taking. In 1858 *Reg.* v. *Christopher* (Bell, C. C. 27) was decided. It is very like *Preston's case* (2 Den. C. C. 353). The prisoner found a purse and money, and there was evidence that he heard soon afterwards that it was cried in the street. The prisoner afterwards converted the money. It was held that on this evidence he could not be convicted, as there was nothing to show that at the time of finding the purse the prisoner knew whose it was, or that the owner could be found, though soon after taking it he learned who the owner was. The next case is *Reg.* v. *Moore* (L. & C. 1), decided in 1861. In this case the prisoner picked up a bank-note in his shop, intending when he picked it up to take it for his own use and deprive the owner of it, whoever he might be, and believing at the time when he picked up the note that the owner could be found. After picking up the note and before appropriating it, the prisoner discovered the owner. It was held that this was larceny, because when the prisoner picked up the note he had a felonious intention; and the authority of *Reg.* v. *Thurborn* (1 Den. C. C. 387) was relied upon. The last case as to finding is *Reg.* v. *Glyde* (L. Rep. 1 C. C. 139), decided in 1868. In this case the prisoner picked up a sovereign and determined to appropriate it, but there was no evidence to show that at the time he had reason to believe that the true owner could be found, though he discovered her shortly afterwards; and this was held not to be larceny. These cases, no doubt, differ from the present in the circumstance that in all of them the prisoner got possession of the property by finding. Their bearing upon the present case is this: They all proceed upon the principle that in all larceny the actual physical taking must be felonious; and they decide the question whether this was so in particular cases of finding, by reference to the state of the prisoner's mind at the time of finding. They will be found to establish the following proposition: If at the time of taking the lost property the finder intends to appropriate it to himself, and either knows or has the means of knowing the owner, or of knowing that he can be found, and subsequently appropriates the property, he is guilty of larceny; but if at the time of finding he either does not intend to appropriate the property, or does so intend without the knowledge or means of knowledge aforesaid, he is not guilty of larceny because his original taking is not felonious. The question, therefore, reduces itself to this: What difference was there between the taking by a finder and the reception by Ashwell of the coin given him by Keogh? Whatever difference there was appears to me both in law and in common sense to be in Ashwell's favour. A finder must know that the property he finds is not his, whoever may be the owner of it. Ashwell for an hour after he received it reasonably believed that the coin which he received was his own. I cannot see how any taking could be more innocent, and to say that for the first hour his possession was Keogh's possession, and that when he determined to convert it he was guilty of a felonious taking, is expressly to contradict *Reg.* v. *Preston* (2 Den. C. C. 353), and is, I think, inconsistent with the reasons for all the other decisions referred to. There is, however, one short reason which appears to show that it is impossible to regard Ashwell's conduct as felonious at common law. It is argued

that he was a bailee of the sovereign. I do not think he was; but assuming that he was, for the sake of argument, he could not be guilty at common law of larceny of the thing bailed. Assuming, then, that he was not a bailee, could he be guilty of larceny at common law? It seems to me that if a bailee who appropriated the thing bailed was not at common law guilty of larceny, Ashwell was not guilty *à fortiori*. A bailee knows what is bailed to him; he is under a direct obligation to deal with it in a particular way; he knows also who, as against him, is the owner of the goods. Ashwell took the coin under a reasonable belief that it was intended to become his own property, and that he incurred no other obligation to the man who gave it to him than that of paying back its equivalent. His taking was as innocent as a bailee's taking, and it involved no such responsibility as is incumbent on a bailee I may here notice one point which was raised in argument. It was said that the actual time of taking could not be the point at which the guilt or innocence of a finder must be determined, because in most cases a short time must elapse between the actual taking of a note or coin, the discovery of its nature or value, and the determination consequent upon that discovery to appropriate it; and this, it was said, shows that the time to be considered is the time of acquiring knowledge of the property taken, and not the time of taking. If a man picks up a purse containing money some seconds must usually pass before he can open the purse and discover and determine to appropriate the money. I think, however, that for legal purposes it is neither possible nor desirable to attempt to go into such a refinement as this. If a man finds a purse, picks it up, opens it, finds money in it, and thereupon determines to keep it for himself, it appears to me that the whole process ought to be regarded as one action, taking place at one time, as for many purposes the fractional parts of a day are not regarded by the law. If the examination were delayed for a substantial time, I think the question for the jury would be whether at the time of the taking the prisoner intended to keep what he had fonnd, conditionally upon its turning out upon examination to be worth his while to do so, and whether at the time of taking the goods he had the means of knowing the owner. Suppose, for instance, a man found a bank-note bearing the owner's name indorsed on it; suppose he put it in his pocket without examination, and ten minutes afterwards examined it, and after that kept it, it might be a fair inference that when he took it up he meant to examine it and to keep it if it was worth keeping. If by any means he could convince the jury that he took it up only to look at it, and changed his mind ten minutes afterwards, he would, I think, be entitled to be acquitted; but a jury would be likely to require strong evidence to induce them to believe in such a change of mind. In the present case it is admitted that the reception of the coin was quite innocent, and that the dishonest change of mind occurred upon the discovery by Ashwell of the mistake which was common to himself and Keogh. The case is not destitute of authority bearing directly on its peculiar circumstances. In *Reg.* v. *Middleton* (L. Rep. 2 C. C. 38) a depositor in a post-office savings' bank went to withdraw ten shillings from the bank. The clerk by mistake put down before him 8*l.* 16*s.* 10*d.*, which he, though at the time fully aware of the mistake, carried off. This was held to be larceny by eleven judges to four. The four judges who held that the case was not one of larceny did so on the ground that the taking was with the consent of the owner—a ground which certainly covers the present case. Of the eleven judges who confirmed the conviction, seven said, "in the present case the jury have found that the prisoner had *animus furandi* at the moment of taking the money from the counter;" and they added, "the case is undistinguishable from the one supposed in argument of a person handing to a cabman a sovereign by mistake for a shilling. But after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this, whether he, at the time he took the sovereign was aware of the mistake, and had then the guilty intent, the *animus furandi*." Kelly, C.B. and Pigott, B., who delivered separate judgments, did not use this particular illustration, but their judgments proceeded on the same principle. It appears to me, therefore, that, according to the doctrine of all the fourteen judges in *Reg.* v. *Middleton*, the conviction in the present case cannot be sustained at common law. *Reg.* v. *Middleton* appears to me a highly important case, because the judges who decided it seem to have agreed in thinking that it marked the extreme point to which the law could be carried. Lord Bramwell, the present Master of the Rolls, Martin and Cleasby, BB., were of opinion that it was in that case carried too far. The majority decided on the same principle as the minority, but applied it somewhat differently. In *Rex* v. *Mucklow* (1 Moody's C. C. 160), decided in 1827, and *Reg.* v. *Davies* (Dears. C. C. 640), decided in 1856, it was held that it is not larceny to appropriate a security inclosed in a letter which is received by a person for whom it was not intended, but to whom it was accidentally addressed. These are stronger cases than the present one, because the sovereign was intentionally delivered to Ashwell. The only other case to be mentioned is that of *Merry* v. *Green* (7 M. & W. 623). In this case a person purchased a bureau and found in it a secret drawer containing a purse and money, which he appropriated. It was held, that unless he had notice that the bureau was sold with its contents, he was guilty of larceny. This was put upon the ground that, though there was a delivery of the bureau, there was no delivery of the notes in it—a view which hardly seems consistent with the case of *Rex* v. *Mucklow* (1 Moody's C. C. 160), as it is difficult to say why the delivery of a letter should operate as a delivery of notes inclosed in it, whereas the delivery of a bureau does not operate as delivery of its contents. The case of *Merry* v. *Green* seems to suggest the possibility of a kind of double finding; for instance, a man finds a pocket-book on one day, and some days afterwards examines it and finds in it a bank-note with the owner's name. The judgment in *Merry* v. *Green* seems to suggest that the finding of the bank-note would take place when the pocket-book was opened, not when it was found, and that though the posses-

sion of the pocket-book might be innocent, the appropriation of the note might be felonious. However this may be, it has no application to the present case. There is, however, in *Merry* v. *Green* a dictum ascribed to Parke, B., which is referred to and explained by him in *Reg.* v. *Thurborn* (1 Den. C. C. 395). The result of the dictum and the explanation taken together, is, I think, that if a man finds property and takes it to look at it, and afterwards finds marks on it showing who is the owner, the trespass essential to larceny is committed when he discovers the owner, and not when he takes up the property. If this dictum refers to a continuous act, it is in agreement with the whole course of authority. If it is meant to express that when a man innocently takes found property, and afterwards discovers who is the owner, and then converts it, he is guilty of larceny, it is opposed to the cases already noticed, and especially to the judgment in *Reg.* v. *Thurborn* itself. Such as it is, this dictum is the only authority I have found in favour of the view under consideration. For all these reasons, I think that in this case there was no larceny at common law, because the original taking was innocent, and with the consent of the owner, under a mistake made by himself only, and in no way produced by Ashwell. As to the point about bailment, I agree with the judgments which have been already read, which I had not seen at the time I wrote my judgment. I think the conviction should be quashed.

HAWKINS, J.—I concur generally in the judgment of my brother Cave; and it follows that I think this conviction ought to be affirmed.

MANISTY, J.—I almost feel that I may be taking up time somewhat unnecessarily after the elaborate, and, if I may say so, very able judgment pronounced by my brother Stephen; but it is a case of considerable importance, and there are one or two observations which I should like to add. It seems to me that the form of indictment is in accord with all the authorities which have been cited as to the definition of larceny, and that every one of the allegations in that indictment must be proved before the prisoner can be convicted of larceny. The form of indictment, in accord with all those authorities, is, that the prisoner did feloniously steal, take, and carry away the property in question. Now, in this case, the jury have negatived the allegation that he, at the time he took it, did steal, or take it or carry it away feloniously. They have negatived that, because they find that the prisoner did not know it was a sovereign at the time he received it. If those authorities are to prevail, and the decisions founded upon them are to prevail, then it seems to me that in this case the jury could not find the prisoner guilty of larceny properly. And more than that, I think that upon the finding of the jury a verdict ought to have been entered of not guilty, and that the finding of the jury amounted to a verdict of not guilty, because they negatived the essential element in the case, namely, that there was a felonious stealing, taking, and carrying away. They find that after he received it he fraudulently appropriated it. They do not find that he feloniously either took it or appropriated it, but that he took it honestly. It was given under a mistake; he received it honestly, and he afterwards fraudulently appropriated it; and upon their finding it seems to me that the verdict was a verdict of not guilty, and ought to have been so entered. I am not going to take up time by going over all the authorities. They have been well brought before the court; and it seems to me that, unless *Reg.* v. *Middleton* (L. Rep. 2 C. C. 38) is to be overruled, the law has been well settled from the year 1873 to the present time; and that it is a most unfortunate thing if that law, as then expounded and laid down, is to be disturbed. I agree with several of the dicta of the learned judges in that case that it is a most unfortunate thing to depart from that which has been decided solemnly to be the law, especially in a criminal case. Now, in that case, one of the great questions was whether the property passed. I do not repeat what the facts were, because they have been mentioned by my brother Stephen; but the question was whether the property passed in the 8*l.* 16*s.* 10*d.*, which undoubtedly the prisoner took off the counter, and, if the property passed, then that, by all the judgments, puts an end to the case. But the converse does not hold. If the property passes, and afterwards there is an appropriation, then there is an end to larceny; but the converse is not true, that in a case where the possession is taken lawfully, though the property does not pass, and afterwards there is a fraudulent appropriation, as was found in this case, then there is no larceny. It seems to me that the case of *Reg.* v. *Middleton* (L. Rep. 2 C. C. 38), unless it is overruled, covers the whole of this case, because there it was found by the jury that the prisoner took the money and went away, having at the moment of taking it an *animus furandi*, and knowing the money to be the money of the Postmaster-General; and all the judges say that is the question. At the time when the prisoner took the money did he take it having at that moment an *animus furandi?* Then the jury have negatived that; and it resolves itself into a case of fraudulent appropriation after lawful possession. I do not propose to go through this case; but what I have said will be found to be, in every word of it, borne out by the judgments of the several judges in that case; and I do not think that I ought under those circumstances to occupy any more time. I may add this, that the real remedy—and it is a very important part of this case—the real remedy of the prosecutor was to bring an action to recover nineteen shillings out of the twenty as money had and received for his use, and to recover back the shilling as money lent, which the prisoner undertook to repay the next day. With regard to the question of bailment, it seems to me that was subject-matter of a special Act of Parliament. For where a chattel, say a watch, is delivered to a watchmaker to repair, it is bailed to him for that purpose; and if he afterwards fraudulently applies it to his own use, he appropriates it, but it is not larceny at common law. It therefore required an Act of Parliament to make it an offence; and by Act of Parliament it is to be deemed to be larceny, and is declared to be larceny, but, without that, it would not be larceny because there was a lawful possession, and a subsequent fraudulent appropriation. It seems to me, on all grounds, both on principle and authority, this conviction ought to be quashed.

FIELD, J.—I am also of opinion that the conviction cannot be supported, and that, upon the evidence stated in the case, the prisoner has not been guilty of any crime punishable by law. I have had the advantage of reading and considering the opinions and authorities relied upon, as well of my learned brethren who have preceded me in giving their judgment, as that of my Lord, and my brother Cave, whose judgment my Lord has already read. I have for myself, according to the best of my ability, examined and compared the authorities and the arguments on one side and on the other, and, having done that, I have arrived at the conclusion which I have stated. I find the principles and authorities in support of that view have been stated so fully and so clearly by my learned brethren who have adopted the same view in their judgments that I do not think it would be at all to the public advantage that I should go through the same grounds. The prisoner has, undoubtedly, been guilty of very fraudulent conduct, and if by law he ought to be punished, I should, of course, be glad to perform my duty and affirm this conviction; but I must not, because I think he has been guilty of fraudulent conduct, make that a crime which, in my humble judgment, the law has not declared to be a crime. Therefore, for those reasons, I think the conviction cannot be supported.

DENMAN, J.—Having tried this case, I think it right to add a few words, though I might have, probably, equally done my duty by saying that I entirely concur, after full consideration, with the judgment of my brother Cave; and I may also say that I have had the advantage of reading a judgment which has been prepared by my Lord the Chief Justice; and I believe it will be found that that is entirely in accordance with that of my brother Cave, though there are one or two observations in it which I think tend to fortify the conclusion at which my brother Cave has arrived. However I may say that, if I thought that this case was a case covered by authority, by any previous decision of the Court of Criminal Appeal, I should at once bow to that decision: but I think that the judgments that have been delivered are conclusive to show that this was a case open to very considerable doubt until it had been fully discussed, and it is impossible to say that any one case is so in point as to carry this case. The only thing in the case of *Reg.* v. *Middleton* (L. Rep. 2 C. C. 38), which my brother Manisty has cited as conclusive of this case, amounts to a dictum, and it was a dictum in which at the time I concurred, but, for reasons which I will explain in a moment, I do not think that it is at all conclusive of the present case. Now with reference to what my brother Manisty has said about the language of the finding, I think it right, inasmuch as that language was my own, and was put with studious care at the time to the jury, in order not to conclude the question of whether there was a felonious taking or not, to call attention to the language. The jury found that the prisoner did not know that it was a sovereign at the time he received it. Now that was not certainly intended to mean, nor was it understood by the jury to mean, I am quite sure, that there was a taking within the meaning of "taking" where the question is whether it is a felonious taking or not—a "taking" *animo furandi*. It is a neutral word expressly used to indicate only that he had it handed to him. Then the jury said they were unanimously of opinion that the prosecutor parted with it under the mistaken belief that it was a shilling; not that he handed it over in any such sense as to make it a taking one way or the other at that time by the prisoner; that the prisoner having, soon after he received it (in the same sense), discovered that it was a sovereign, could have easily restored it to the prosecutor, but fraudulently appropriated it to his own use; and those studiously neutral words were also used in order that it might be for the court to say afterwards whether there was evidence of felonious taking at that time—at the time of the appropriation. Then he denied the receipt of it, knowing that the prosecutor had not intended to part with the possession of a sovereign, but only of a shilling, and the jury added that, if it were competent to them, consistently with these findings and with the evidence, to find the prisoner guilty, they meant to do so. The very question, therefore, which was intended to be left for the Court of Criminal Appeal was, whether, upon those findings upon the facts of this case, there was evidence upon which the jury might properly find the prisoner guilty of taking *animo furandi*, that is to say, of stealing that sovereign. Now, upon the whole, I cannot, of course, after the judgments that have been delivered, say that this is a question free from doubt; but, upon the whole, I have come to the conclusion that here there was good evidence upon which the jury might do what they did, namely, find the prisoner guilty. At the time when the case was tried I must say that, if I had been compelled off-hand then and there to give my decision, I was inclined to think no—that it was covered by authority; but it was in deference to a doubt expressed by my brother Stephen in his valuable work, in which he says, "it is doubtful whether it is theft fraudulently to convert property given to the person converting it, under a mistake of which that person was not aware when he received it," that I thought it right to reserve a case. Now I wish very shortly to state the ground upon which I think that this was larceny. I quite agree in the definition of larceny; in fact, I do not know that there is any dispute about it. It is a question whether the person charged has feloniously stolen, taken, and carried away property, upon which the whole matter turns, and in this particular case it turns, I agree, upon the question of whether there was a felonious taking. Now my brother Stephen puts it in this way—that there was a fraudulent appropriation after an innocent taking. But I deny that that is the nature of this case. It seems to me not to be the true test to apply in this case, on this ground, that at the time at which the sovereign was mistakenly handed over by the prosecutor to the prisoner it was impossible to say one way or the other, in regard to that sovereign, whether there was innocence or whether there was guilt. The question upon which it turns always is whether there was taking *animo furandi*. The question of *animus furandi* at that time could not be raised either way. It could not be said that he took that sovereign innocently. It could not be said that he took that sovereign *animo furandi*, for the simple reason that the prosecutor never intended to part with a sovereign at all; nor did the prisoner ever believe that he was receiving, or having handed to him by the prose-

cutor, a sovereign at all; and a great deal, I think, of the difficulty of this case has arisen from the use of ambiguous words, such as "it," and "taking," and "receiving," and words of that kind, which in a question of larceny must depend, not upon the mere manual handing over of a thing where the thing is handed over by mistake, but to handing it over where it is impossible to say, upon the handing over itself, whether it is a taking *animo furandi* or not. Now at the time there was nothing to make the prisoner know that he had got a sovereign. There was no intention to part with a sovereign. The thing which came into his pocket he knew nothing of so as to be able to say whether it was a sovereign or not. He did not care to look. He perhaps assumed, and did assume, that it was a shilling, and the prosecutor assumed that it was a shilling. Neither of them knew. That being the state of things, I have come to the conclusion that it does fall within the authority of those cases in which it has been held that where a man finds property, and at the time at which he finds it has the full means of knowing whose it is, with full power at once to disgorge it, and perfect knowledge that it was not intended for him, and then, upon the first opportunity, fraudulently appropriates it the moment he finds that he has got it, that then that is larceny, and that that was the taking—the time at which he found it in his pocket, knowing it was not intended to be there, knowing he was not intended to have it, and then and there fraudulently appropriating it. Now, I see no stretch of the law, it seems to me, in applying the same principle here which was applied in *Reg.* v. *Thurborn* (1 Den. C. C. 387), and in other cases, and that the jury, having their attention directed to those points, intended to find it larceny upon that principle. That being so, I think that the decision can be supported. I do not know that it is necessary for me, after the very full way in which the case has been argued on both sides, to say more. Indeed, I could not add to the weight of the judgment of my brother Cave; nor ought I longer, I think, to detain the court whilst I am giving my own views, knowing that my Lord the Chief Justice has written a judgment on the same subject, and in the same view, I believe, with which I entirely concur.

Lord COLERIDGE, C.J. read the following judgment.—I have had the advantage of reading the judgment prepared in this case by my brother Cave, and in so much of his judgment as relates to the question of larceny at common law I entirely concur. I think it very doubtful, indeed, if this conviction could be supported on the ground that there was any bailment of the sovereign to the prisoner. I much doubt if there was in this case any bailment at all. I was one of a considerable minority of judges on the second argument of *Reg.* v. *Macdonald* (15 Q. B. Div. 323), and my opinion was, and is, that bailment is not a mere delivery on a contract, but is a contract itself. Sir William Jones speaks of it as that contract which the lawyers call bailment: (Sir William Jones on Bailment, 1.) "Bailment or delivery of goods to another person for a particular use," says Sir William Blackstone (2 Bla. Comm. 396). "Bailment is a compendious expression to signify a contract resulting from delivery," says Story on Bailments, 1. Twice over the same writer in his work on Contracts, ss. 680-681, speaks of bailment as itself a contract. "Depositum (that is, bailment) is a contract," says Grotius in his introduction to Roman-Dutch law, Depositum, s. 2. "The contract of bailment" is not a mere loose and common phrase, but is the accurate expression of a legal idea; and I must confess it appears to me to be doing some violence to the plain facts of this case to hold that there was any implied contract (there certainly was no express contract) of bailment between the prisoner and Keogh. On the question as to larceny at common law, I desire to add only a few words, and to call attention to a case to which my attention has been called by a gentleman at the bar, which was not mentioned in the argument, possibly because it was one which did not exactly suit the views of either party to that argument. I assume it to be now established law that where there has been no trespass there can at common law be no larceny. I assume it also to be settled law that where there has been a delivery—in the sense in which I will explain in a moment—of a chattel from one person to another, subsequent misappropriation of that chattel by the person to whom it has been delivered will not make him guilty of larceny, except by statute, with which I am not now concerned. But then it seems to me very plain that delivery and receipt are acts into which mental intention enters, and that there is not in law any more than in sense a delivery and receipt, unless the giver and receiver intend to give and to receive respectively what is respectively given and received. It is intelligent delivery, as I think, which the law speaks of, not a mere physical act, from which intelligence and even consciousness are absent. I hope it is not laying down anything too broad or loose, if I say that all acts, to carry legal consequences, must be acts of the mind, and to hold the contrary, to hold that a man did what in sense and reason he certainly did not; that a man did in law what he did not know he was doing, and did not intend to do—to hold this is to expose the law to very just but wholly unnecessary ridicule and scorn. I agree with my brother Stephen that fictions are objectionable, and I desire not to add to them, but it seems to me, with diffidence, that he creates the fiction who holds that a man does what he does not know he does and does not mean to do, not he who says that an act done by an intelligent being for which he is to be responsible is not an act of that being unless it is an act of his intelligence. If it had been so decided by authority which binds me, of course I should submit; but if it has not been so decided, I take the freedom to say that it is not law—at least yet. In this case, therefore, it seems to me, there was no delivery of the sovereign to the prisoner by Keogh, because there was no intention to deliver, and no knowledge that it had been delivered. Applying the same principles of reasoning, it appears to me that the sovereign was received by the prisoner and misappropriated by him at one and the same instant of time. In good sense it seems to me he did not take it till he knew what he had got: and when he knew what he had got, that same instant he stole it. According to all the cases, if at the very moment of the receipt of a chattel the receiver intends to misappropriate and does misappropriate it, he is guilty of larceny. I think, for the reasons I have given, and in the sense I have defined, the prisoner did so here;

and this seems to me, with great deference to my brother Smith, to be the answer to the exceedingly able and ingenious passage in his judgment in which he says that it is a fallacy to confound two things so utterly different as the discovery of a mistake and the stealing of a chattel. I do not shrink from the conclusion, which seems to me good sense, that sometimes the discovery of a mistake and the stealing of a chattel may be the same, or rather may be two forms of words equally descriptive of the same facts, if, as here, the chattel is really discovered and stolen at one and the same instant of time. This would be my view if the case were bare of authority, and the matter were *res integra*. But it is not *res integra*, and there is abundant authority. On this part of the case I concur with my brother Cave. I think we cannot reverse this conviction without practically overruling Lord Eldon in *Cartwright* v. *Green* (8 Ves. 405), the Court of Exchequer in *Merry* v. *Green* (7 M. & W. 623), and the dicta cited by my brother Cave from the judgment of the majority of the judges in *Reg.* v. *Middleton* (L. Rep. 2 C. C. 38). I can see no sensible or intelligible distinction between the delivery of a bureau not known to contain a sum of money or a purse and the delivery of a piece of metal not known to contain in it 20*s.*; and the passage in the judgment of Sir A. Cockburn, which was assented to by the majority of the judges in *Reg.* v. *Middleton*, appears to me, as it does to my brother Cave, to be decisive of this case. It remains only for me to call attention to *Reg.* v. *Riley* (Dearsley, 149), the case which I mentioned at the beginning of my judgment. In that case a man had without intending it, and innocently, driven off a lamb belonging to another man with a flock belonging to himself. Some time afterwards he discovered the mistake, and sold his own flock and the lamb that was not his own to a purchaser. It was held that he was guilty of larceny of the lamb. The case was tried in 1852, when the law of the *replication de injuriâ* decided in *Cogate's case* (8 Rep. 66 b), and the distinction between case and trespass decided in *Scott* v. *Shepherd* (2 W. Bl. 892), still commanded the assent, indeed the veneration, of Westminster Hall. And the ground on which the conviction was supported was that there had been a trespass in driving off the lamb, however innocently, that by the sale the trespass became felonious, and I suppose felonious *ab initio*, to bring it within the definitions given in *Reg.* v. *Thurborn* (1 Den. C. C. 387). The court there upheld the conviction on a ground extremely technical. If the owner of the lamb had been present when it was driven off, and believed it to be one of the prisoner's flock, according to the present argument the conviction in *Reg.* v. *Riley* (Dears. C. C. 149) must have been quashed. I cannot think it would have made any difference, and the case as it stands is an authority under circumstances hardly different from those in the present case for upholding this conviction. I am therefore of opinion that the conviction was right. In the judgment I have pronounced I am desired to say that my learned brothers Grove, Pollock, and Huddleston concur. There are, therefore, seven for affirming the conviction and seven for quashing the conviction, and by the well-known rule of this court, *præsumitur pro negante*, the conviction stands. *Conviction affirmed.*

Solicitors for the prosecution, *Robinson, Preston,* and *Stow,* agents for *Berridge* and *Miles,* Leicester.

Solicitor for the prisoner, *Solicitor to the Treasury.*

Friday, Dec. 11, 1885.

(Before Lord COLERIDGE, C.J., DENMAN, FIELD, HAWKINS, and WILLS, JJ.)

REG. *v.* ROBSON. (*a*)

Embezzlement—Moneys belonging to copartnership—Association for gain or profit—Young Men's Christian Association—31 & 32 *Vict. c.* 116, *s.* 1.

An association which has not for its object gain or profit is not a copartnership within sect. 1 *of the Act to amend the law relating to Larceny and Embezzlement of* 1868; *and where R., a member of a Young Men's Christian Association, having embezzled money obtained by him on behalf of the association, was indicted for that he, being a member of a copartnership, did embezzle moneys belonging to the copartnership:*

Held, that the object of the association being "the extension of the kingdom of the Lord Jesus Christ among young men, and the development of their spiritual life and mental powers," such association was not a copartnership within the section, and that therefore R. could not be convicted upon such an indictment.

CASE stated for the opinion of the Court for the Consideration of Crown Cases Reserved, by Hawkins, J.:—

The prisoner was tried and convicted before me at the winter assizes for the county of Northumberland on the 31st Oct. 1885, upon an indictment framed under 31 & 32 Vict. c. 116, s. 1, charging that he, being a member of a copartnership called "The Bedlington Colliery Young Men's Christian Association," hereafter called the association, feloniously did in January, March, and May 1885, embezzle three several sums of money of and belonging to the said copartnership.

The only question which I reserve for the consideration of the court is, Whether the association is a copartnership within the meaning of the section above referred to? If it is, the convict's guilt and every other matter necessary to warrant his conviction must be taken as established by the verdict of the jury.

The object of the Bedlington Association is, to use the language of one of its printed rules, "The extension of the kingdom of the Lord Jesus Christ among young men, and the development of their spiritual life and mental powers."

It is composed of members and associates. The number of members does not exceed twenty. Any person is eligible for membership "who gives decided evidence of his conversion to God;" but, before he can become a member, he must be proposed and seconded by two members of the association and elected by the committee on their being satisfied as to his suitability. Trustees for the time being, in whom the real property belonging to the association is vested, become members by virtue of their appointment as trustees. Members are required to subscribe 3*s.* per annum.

It is not material to consider the qualification or status of associates.

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

The affairs of the association are in the hands of a general committee of management, consisting of a president, two vice-presidents, a treasurer, two secretaries, and at least nine members.

The committee have power to suspend or expel any member whose conduct is found, in their judgment, inconsistent with the Christian character.

The agencies for the attainment of the objects of the association are: First, the personal efforts of the members; secondly, devotional meetings; thirdly, social meetings; fourthly, classes for biblical instruction, &c.; fifthly, the delivery of addresses and lectures; sixthly, the diffusion of Christian and other suitable literature.

Before the first of the offences charged against the prisoner was committed, the members of the association proposed to build, and afterwards built, a hall or place of meeting for the purposes of the association, at a cost of nearly 200*l.*, of which about 40*l.* is still owing. To this building every member has the right of entry and is entitled to a latch-key.

The prisoner became a member of the association in 1878, and he has continued to be a member up to the present time.

As and being such member, he solicited and obtained for the association from divers persons many sums of money as donations or subscriptions on account of and for the general purposes of the association towards the building fund, and towards the liquidation of the aforesaid debt of 40*l.*—three of these sums it was that the prisoner was charged with and found guilty of embezzling.

If the association is a copartnership within the meaning of 31 & 32 Vict. c. 116, s. 1, the conviction is to stand affirmed.

If, on the contrary, it is not such a copartnership, the conviction is to be reversed.

By sect. 1 of the Act to amend the Law relating to Larceny and Embezzlement of 1868 (31 & 32 Vict. c. 116) it is enacted that:

If any person, being a member of any copartnership or being one of two or more beneficial owners of any money, goods, or effects, bills, notes, securities, or other property, shall steal or embezzle any such money, goods, or effects, bills, notes, securities, or other property of or belonging to any such copartnership, or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such copartnership, or one of such beneficial owners.

J. L. Walton, for the prisoner, submitted that the word "copartnership" in the section had the sense of an association for the purpose of the acquisition and division of gain or profit. The preamble to the Act recited that, "whereas it is expedient to provide for the better security of the property of copartnerships and other joint beneficial owners against offences by part owners thereof;" and the same words are used in sect. 1. Unless, therefore, it could be said that the members of an association having for its object the mental and spiritual benefit of its members are joint beneficial owners of the property of the association, the case was clearly not within the section at all; and even if it were within the section, inasmuch as the association was described as a copartnership the conviction was clearly bad. The fact of the words "joint beneficial owners" being used showed that "copartnership" was intended to have its ordinary legal sense, with regard to which Lindley, L.J. in the 4th edition of his work on Partnership (vol. 1, p. 1), has collected a great number of definitions, every one of which he points out implies the acquisition of gain or profit.

No one appeared to support the conviction.

Lord COLERIDGE, C.J.—I am clearly of opinion that this association is not a copartnership within the Act, and it appears to me that the conviction must be quashed. I have had an opportunity of looking at the cases referred to by my learned brother Lindley in his valuable work, and nothing in them throws any real doubt upon the language used by him, when he makes participation in some profit an object of the association as included in the idea of an English partnership; and although he says that in old times Lord Hale and older writers use copartnership in the sense of co-ownership, this is no longer customary, and he says that in late years the term has been confined to ownership where the object of the co-ownership is gain, and where the gain is to be shared by the parties. That, he says, is the grand characteristic of every partnership, and is the leading feature of nearly every definition of the term, and a number of definitions are appended by him, into every one of which the idea of profit, or that the partnership is carried on for the sake of gain, enters. That being so, it is clear that this is not a copartnership in that notion of the word into which the idea of gain enters; that we must associate with the word that nature which has been affixed to it by so many authorities, and that this association does not come within the interpretation which has been attached to the word copartnership by the definitions. That being so, I am of opinion that this conviction should be quashed.

DENMAN, J.—I am of the same opinion. I think that the word copartnership in the statute must be construed in its legal sense. Suppose that the section in question had only the word copartnership, and not the words "one of two or more beneficial owners," even then I think it would have been impossible to say that a partnership which is not carried on for the sake of profit or gain was within the section; and it becomes much more impossible when we find words in the statute within which an association which is not carried on for gain might fall. I do not say that, had the indictment been laid for embezzling money belonging to an association, of the property belonging to which the prisoner was a joint beneficial owner, the matter would have been free from doubt; but those words show that the word copartnership should be interpreted in its ordinary legal sense, and I am therefore of opinion that this conviction cannot be sustained.

FIELD, J.—I am of the same opinion.

HAWKINS, J.—I am also of the same opinion. At the close of the case for the prosecution I was strongly of opinion that there was no copartnership here within the section, and I had considerable doubts whether I ought not to stop the case instead of allowing it to go to the jury; and it was only after the strenuous argument made on behalf of the prosecution that I allowed the question of the prisoner's guilt to go to the jury, and reserved this case. I only wish to say that I should certainly not have done so had I thought that counsel would not have been instructed to

argue in support of the conviction. In my opinion this conviction should be quashed.

WILLS, J.—I am of the same opinion.

Conviction quashed.

Solicitor for the prisoner, *Cray*, agent for *Dixon* and *Wall*, Newcastle.

Friday, Dec. 11, 1885.

(Before Lord COLERIDGE, C.J., DENMAN, FIELD, HAWKINS, and WILLS, JJ.)

REG. *v.* WEBSTER. (*a*)

Criminal Law Amendment Act 1885—*Girl under sixteen—Suffering to resort to or be in or upon premises for unlawful purposes—Daughter living with mother—Mother permitting prostitution of daughter*—48 *&* 49 *Vict. c.* 69, *ss.* 6 *and* 12.

Under sect. 6 *of the Criminal Law Amendment Act* 1885 *a mother can be convicted of knowingly suffering her daughter, of the age mentioned in the section, to be in or upon premises for the purpose therein specified, notwithstanding the fact that such premises are those in which the mother and daughter live together, having no other home.*

Sect. 12 *of the Act is not intended to deal with such a case to the exclusion of sect.* 6, *but is intended to enable the court to make an order divesting parents, &c., of authority over girls in respect of whom such parents, &c., have been convicted of an offence under sect.* 6.

CASE reserved by Denman, J. at the Autumn Assizes 1885 for the town of Nottingham as follows :—

Rebecca Webster was indicted under 48 & 49 Vict. c. 69, s. 6, for that "she being the occupier of premises (mentioned) unlawfully and knowingly did suffer one Eliza Ann Webster, then a girl of above the age of thirteen and under the age of sixteen, to resort to and be in and upon such premises for the purpose of being unlawfully and carnally known by a certain man (mentioned)."

Eliza Ann Webster, mentioned in the indictment, was a girl of the age of fourteen, and was known to be of that age by the prisoner, whose illegitimate daughter she was. She lived in the prisoner's house as part of the prisoner's family, and had no other home. There was no evidence that any men had been in the prisoner's house before the night of the 11th Sept. 1885.

On that night, about 11 p.m., Eliza Ann Webster was seen in company with a man in a public-house, and afterwards walking along with him in the street, by a policeman, who lost sight of them for a time, but afterwards entered the house of the prisoner at about twelve o'clock at night, and found the prisoner sitting in a lower room talking to two men. He asked the prisoner, "Who was upstairs?" and the prisoner answered, "Only my daughter." The policeman thereupon went upstairs, and found Eliza Ann Webster in bed with the same man with whom he had first seen her. The man came down, and took his shoes from under a chair directly opposite the place where the prisoner was sitting, and swore, after being cautioned, that he had placed them there before going upstairs in the prisoner's sight, and that he and Eliza Ann left the room together, and went upstairs in the prisoner's sight.

The prisoner's counsel submitted that there was no evidence of a resorting to or being in or upon the premises for the purpose mentioned in the Act, inasmuch as the girl was merely there because it was her home, and that the Act was not intended to cover the case of a single isolated visit.

I told the jury that, if they were satisfied that the girl, being to the prisoner's knowledge only fourteen years old, went upstairs with a man for the purpose of having connection with her, and that the prisoner knew this, and made no objection to it, they might find the prisoner guilty, even in the absence of any proof of any previous misconduct of the girl. The jury found her guilty.

I sentenced the prisoner to be imprisoned and kept to hard labour for five calendar months, but admitted her to bail and respited execution under 11 & 12 Vict. c. 78, s. 1, until the Court for Crown Cases Reserved should have decided the case.

The question for the court is, whether there was evidence of an offence under 48 & 49 Vict. c. 69, s. 6, and whether the above ruling was correct.

By sect. 6 of the Criminal Law Amendment Act 1885 (48 & 49 Vict. c. 69), it is enacted that,

> Any person who, being the owner or occupier of any premises, or having, or acting or assisting in, the management or control thereof, induces or knowingly suffers any girl of such age as is in this section mentioned to resort to, or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally,
>
> (1.) Shall, if such girl is under the age of thirteen years, be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour; and
>
> (2.) If such girl is of or above the age of thirteen and under the age of sixteen years, shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

And by sect. 12 it is enacted that,

> Where, on the trial of any offence under this Act, it is proved to the satisfaction of the court that the seduction or prostitution of a girl under the age of sixteen has been caused, encouraged, or favoured by her father, mother, guardian, master or mistress, it shall be in the power of the court to divest such father, mother, guardian, master or mistress of all authority over her, and to appoint any person or persons willing to take charge of such girl to be her guardian until she has attained the age of twenty-one, or any age below this as the court may direct, and the High Court shall have the power from time to time to rescind or vary such order by the appointment of any other person or persons as such guardian, or in any other respect.

Horace Smith, for the prisoner, submitted that the section was not intended to apply to the case of a girl living at home with her mother or father. The daughter had no other place to be in, and the object of the Act was to protect girls away from their parents. Sect. 6 contemplated persons occupying houses and permitting girls to live in or resort to them for the purposes of prostitution, and not a mother and daughter living in the same house and being immoral. The mother was bound to feed and clothe the daughter, and it was not suffering her to be in

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

her own home. The case was one which was clearly within sect. 12, and a case which was within that section could not be within sect. 6. If the mother suffered the daughter to be in the house at all, it was a suffering her to be there for all the purposes necessary for her living there, and the mother should not be convicted for suffering that which she could not prevent.

H. Y. Stanger, for the prosecution, was not called upon by the court.

Lord COLERIDGE, C.J.—I am clearly of opinion that this conviction must be affirmed. The indictment is laid under sect. 6 of the Criminal Law Amendment Act 1885, which enacts that: "Any person who, being the owner or occupier of any premises, or having, or acting or assisting in, the management or control thereof, induces or knowingly suffers any girl of such age as in this section mentioned to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man," shall be guilty, if the girl is under thirteen years, of felony; and if the girl is of or above the age of thirteen, and under the age of sixteen, of a misdemeanour. Now, in this case the mother of the girl, who was the subject of the offence, lived with her, and the girl brought home a man, who took off his shoes in the presence of the mother, and went up to the bedroom with the daughter. There is no further proof of what happened after they went upstairs, except that shortly after the police constable came in, and the mother then denied that there was anyone in the house. Now, the question is, did the mother, under those circumstances, suffer the daughter to be in or upon the premises for the purpose of being unlawfully and carnally known by a man? I confess that, but for the argument of Mr. Smith, I should have thought that she had committed an offence within the Act was clear. That she is within the words of the section is plain. She suffered her daughter to be on the premises for the purpose of being unlawfully and carnally known by the man who went upstairs with her, because she knew the girl's age, saw her go upstairs, and did not forbid her doing so, or try to prevent her from doing so. It is obvious that they were going upstairs for an unlawful purpose, and the mother might have turned, or at least tried to turn, away the man. Therefore, she without question suffered her daughter to be in such premises for the purpose of being unlawfully and carnally known by a man and knew that her daughter was under the age of sixteen. The case is within the clear words of the Act; but it is said that a mother is not within the spirit of the Act. We know, unfortunately, however, that the relation of parent and child is most grievously abused, and we are asked to suppose that those who are responsible for this Act of Parliament with that knowledge have deliberately left out words which would render this the worst possible kind of case punishable. It is said, but the facts in this case are within sect. 12, and not within sect. 6. Now, what does sect. 12 say? It says: "Where on the trial of any offence under this Act it is proved to the satisfaction of the court that the prostitution of a girl under the age of sixteen has been caused, encouraged, or favoured by her mother, it shall be in the power of the court to divest such mother of all authority over her," and by order the court may direct under whose guardianship she is to be. Mr. Smith, upon that, says it is the only remedy. I do not see that at all. I do not intend what I am about to say as exhaustive of that section, but (*inter alia*) its effect in my opinion is this: It enacts that a father or mother guilty of conduct which is punishable under sect. 6 shall be liable under the 12th section, and liable to be deprived of that control which they have been proved to have been incompetent to exercise and therefore I am of opinion that sect. 6 was intended to cover the case of a parent suffering his or her daughter to be in or upon the premises where they live for the purpose of being unlawfully and carnally known by any man, and that this conviction must be affirmed.

DENMAN, J.—I am of the same opinion. I had no doubt in my own mind when I reserved the case; but I thought it desirable, the question having been very ably put before me, that it should be settled once for all, and as it was just one of those points upon which I could conceive other persons entertaining a different opinion. I cannot say that I ever thought it anything but clear that sect. 6 does apply to mothers and fathers living with their families, and I am of opinion that the conviction was right.

FIELD, HAWKINS, and WILLS, JJ. were of the same opinion.

Conviction affirmed.

Solicitors for the prosecution, *The Solicitors to the Treasury.*

Friday, Dec. 11, 1885.

(Before Lord COLERIDGE, C.J. DENMAN, FIELD, HAWKINS, and WILLS, JJ.)

REG. *v.* BURGESS. (*a*)

Compounding a felony—Indictment—Absence of allegation of abstention from prosecution—Commission of offence by other than owner of stolen property—Theft-bote.

The offence of compounding a felony is complete at the time when the agreement to abstain from prosecuting is made; and it is not necessary therefore in an indictment for such an offence to allege that the prisoner did abstain from prosecuting, and that by reason of such abstention the thief escaped prosecution.

Any person having knowledge that a felony has been committed, and entering into an agreement to abstain from prosecuting, or to hinder the ends of justice, is guilty of the offence of compounding a felony; and that offence is not confined to the owners of stolen property entering into such agreements.

CASE reserved for the opinion of the court by the Recorder of the city of London, as follows:—

At the July sessions of the Central Criminal Court William Henry Burgess was arraigned before me on an indictment of which the following is a copy:

Central Criminal Court to wit. The jurors for our Lady the Queen upon their oath present that heretofore, to wit, in the year of our Lord 1885, one Arthur Bagley feloniously did steal, take, and carry away certain money, to wit, to the amount of 28*s.* of the moneys of Henry Bedford, against the peace of our said Lady the Queen, her Crown and dignity, and that William Henry Burgess, well knowing the said felony to have been done and committed by the said Arthur Bagley as aforesaid,

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

and contriving and intending to pervert the due course of law and justice, and to cause and procure the said Arthur Bagley for the felony aforesaid to escape with impunity, afterwards, to wit, on the 5th day of July in the year aforesaid, in the county of Surrey, and within the jurisdiction of the said court, unlawfully and for gains sake did compound the said felony with the said Arthur Bagley, and did then exact, take, receive, and have from the said Arthur Bagley the sum of 28*s.* for and as a reward for compounding the said felony, and desisting from prosecuting the said Arthur Bagley, and for procuring that the said Arthur Bagley should not be prosecuted for the felony aforesaid, to the great hindrance of justice in contempt of our said Lady the Queen and her laws, and against the peace of our said Lady the Queen, her Crown and dignity.

Before plea pleaded the prisoner's counsel moved to quash the indictment on the ground that, though it professed to charge the prisoner with the offence of compounding a felony, it did not in fact disclose any offence, there being no allegation that the prisoner desisted from prosecuting the felon, which, he contended, was a material part of the offence of compounding a felony, and that if, after receiving money from the felon as an inducement not to prosecute, the prisoner had in fact prosecuted, no offence would have been committed, and he cited *Rex* v. *Stone and others* (4 C. & P. 379).

For the prosecution it was contended that the offence consisted in the corrupt agreement not to prosecute. I declined to quash the indictment, and the prisoner then pleaded not guilty to it. The case proceeded, and it was then proved that at the end of March last the prisoner was employed to levy a distress for two weeks rent, amounting to 28*s.*, on the goods of a Mr. Bedford, and that upon that occasion Arthur Bagley, whilst in possession as the prisoner's assistant, stole the sum of 28*s.* belonging to Mr. Bedford, from a drawer in Bedford's room, and absconded. Prisoner was informed of this fact by Bedford, and urged Bedford to put the matter into the hands of the police, but Bedford told prisoner he would leave it in his hands, and the prisoner on the 3rd April gave information of the theft to the police. The prisoner on the 11th June entered into communication with the stepfather and mother of Arthur Bagley, and suggested to the mother that she should send her son to see him and compromise with him, as Mr. Bedford was willing to take the money by instalments weekly or any how he could pay it, and then he, Bagley, would be perfectly free, and eventually he handed to the mother a paper of which the following is a copy:

I, W. H. Burgess, undertake not to charge Arthur Bagley with any criminal case that I have now against him on the money being provided to pay what he took from Peckham-road whilst in possession, viz., 30*s.*—W. H. Burgess. June 29, 1885.

On the 5th July the stepfather went with Arthur Bagley to the prisoner's house and paid him 1*l.* which he told him he had received from Arthur Bagley, and at the same time signed and gave to the prisoner an I O U for 5*s.* which the prisoner wrote out, and the prisoner wrote a receipt at the foot of the paper above referred to in the following words:

Received the sum 30*s.* as stated above.—W. H. Burgess. July 6, 1885. William H. Hayward.

The prisoner then told Bagley that things were all right, and he was a free man, as he had paid the money. Bagley afterwards paid 5*s.* to the wife of the prisoner, and got back the I O U.

On the 14th July Bagley was arrested by the police upon the information of the offence, and the description of him which had been given by the prisoner in April, and upon the evidence of Mr. Bedford he was convicted summarily before the magistrate. At the close of the case for the prosecution the prisoner's counsel submitted that there was no case to go to the jury; that the owner of the property stolen, or a person whose evidence should be necessary to convict the thief, are the only persons who can compound a larceny, and that in this case the prisoner was not a necessary witness on the trial of Bagley, and that therefore his undertaking not to charge Bagley with a criminal offence could not impede the course of justice. I overruled the objection, and the jury found the prisoner guilty. I reserved judgment, and admitted the prisoner to bail until the case shall have been decided by this court.

The questions for the court are, viz., 1. Whether the indictment was bad on the face of it as not disclosing an offence at law, and ought to have been quashed. 2. Whether there was any evidence to be left to the jury upon this indictment. In the event of the court being of opinion that the indictment was bad, or that there was no evidence against the prisoner of the offence charged in the indictment, the conviction is to be quashed; otherwise it is to be affirmed.

Burnie, for the prisoner, submitted that the indictment was bad, inasmuch as it failed to allege that the prisoner had in fact desisted from prosecuting, and that the thief had thereby escaped prosecution. In *Rex* v. *Stone* (4 C. & P. 379), which was the only reported case upon the subject, it was held that where in an indictment it is averred that the defendant did desist, and from that time hitherto had desisted from all further prosecution, and it appeared that after the alleged compounding he prosecuted the offender to conviction, there must be an acquittal. So here, had the indictment contained the necessary allegations, the fact that it was proved that Bagley was prosecuted would have entitled Burgess to an acquittal. [HAWKINS, J.—The question here is, whether the allegation that Burgess desisted from prosecuting was a necessary allegation.] The offence of compounding a felony does not consist of the taking of the money for the desisting merely, but in actual desisting and allowing the thief to escape punishment as well. To make such an agreement as the prisoner made might be a common law misdemeanour, but that was not the offence of compounding a felony with which he was charged. [WILLS, J.—Compounding a felony is hardly an accurate term; it cannot be more than an attempt to compound, for an effectual compounding cannot take place. According to your contention, if a man makes an illegal agreement, and that agreement is completely carried out, he is guilty, but if he adds to the offence of making that illegal agreement a fraud upon the man with whom he made the agreement by breaking it, he is not guilty. FIELD, J.—Assume such an agreement to be legal, how could the money be recovered? Time would not run against a prosecution, which might take place after proceedings taken to recover the

money.] As to the second question, as no one can be convicted of larceny except on the evidence of the owner of the property stolen, the prisoner not being the owner could not control the prosecution, and therefore could not compound the felony. The old term for this offence was theft-bote, which meant the buying back a theft, and all the text-books and indictments treat the offence as one which could only be committed by the owner of stolen property: (Hawkins, P. C. ch. 7, s. 7; Lord Coke, Inst. 3, c. 61, p. 134.) The owner of the money stolen gave the prisoner no authority to compound the felony, he only asked the pr soner to save him trouble by communicating with the police. The precedent given in 2 Chitty C. L. 1st edit. p. 220, which is repeated in Archbold, contains the allegation that the prisoner is the owner of the goods. The offence here, if anything, was misprision of felony, but of that the prisoner was not indicted.

Poland, on behalf of the Crown, was only called on as to the second question, and submitted that the offence was one against the interest of public justice, and was not to be limited in the way suggested. If a manager of a bank entered into an agreement not to prosecute a clerk who had stolen money belonging to the bank, it could not be said that he was not guilty of compounding a felony because he was only a servant of the bank. Any person could institute a prosecution in the name of the Crown until stopped by the Attorney-General entering a *nolle prosequi*, and there was nothing therefore to have prevented the prisoner here from prosecuting. [He was here stopped by the Court.]

Lord COLERIDGE, C.J.—We are asked two questions, the first of which is, whether the indictment against the prisoner is bad on the face of it because it is said it does not disclose any offence at law; and the second of which is, whether there was any evidence upon the facts stated which ought to have been left to the jury upon the indictment. Now let us take these questions one by one. It is admitted that the indictment does charge a complete offence, if the offence of compounding a felony is complete without it being essential that there should have been an actual abstaining from prosecuting for the felony. The agreement charged here was, that the prisoner for a sum of money would desist from prosecuting, and would promise that the man Bagley should not be prosecuted, and in fact Bagley was prosecuted. It is suggested that the indictment is not good, because it ought to have gone on to say that the prisoner did not abstain from prosecuting, and that if such allegation had been contained therein it would have been negatived by the evidence. Now the question is, when is the offence of compounding a felony completed. If it is not completed until there has been an absolute abstaining from prosecuting, the result would be that a man might abstain from prosecuting for six or seven years, and at the end of all that time, during which the felon is supposed to be innocent, if there were a prosecution there would be no offence of compounding a felony committed; and, therefore, the breach of the agreement is said to make that unindictable which up to that time had been indictable. The result of that argument leads, as was shown by my learned brother Wills during the course of the argument, to a *reductio ad absurdum*. That is to say, that if a man makes an agreement to compound a felony, and the offence of compounding the felony is completed by the fact of his abstaining from prosecuting, he is guilty, but if he adds to the offence which he has committed, by committing a breach of that agreement, he is not guilty of compounding a felony. Therefore you may make an agreement to hinder the course of justice, and if you do not further the ends of justice you are liable to be prosecuted; but if you break that agreement, and you do further the ends of justice, you are not liable to be prosecuted. There can be no doubt, to my mind, that the agreement itself is illegal—authorities as long ago as the last century show that it is so; and it cannot be said not to be indictable because the agreement is subsequently broken. It seems to me that it is sufficient to complete the offence of compounding a felony if you make the agreement not to prosecute, and I am of opinion, therefore, that the indictment is perfectly good in charging that the prisoner received the sum of money for compounding the felony, and for desisting from prosecuting, without charging that he did so desist, and that an offence of compounding a felony is charged by this indictment. The next question is, whether any evidence was given in support of the indictment which ought to have been left to the jury. The evidence was this, that the prisoner not being the owner of the money stolen made an agreement with the thief who stole it that he would not prosecute him if he (the thief) would pay a certain sum of money. That is what was proved, and the only ground which was suggested by the very ingenious argument on behalf of the prisoner was this: that the person who so agreed and so compounded, and but for the breach of his own agreement would have compounded the felony, was not the owner of the money which had been stolen; that the money was Mr. Bedford's, and that he was not the person who made the agreement, nor was he cognisant of the agreement having been made; and the question is whether upon those facts the prisoner can be convicted of compounding a felony. I am clearly of opinion that a common law misdemeanour has both been stated and found against the prisoner. He has hindered, or rather persuaded another man that he intended to do all he could do to hinder the course of justice. Now it has been contended in the argument on behalf of the prisoner that the offence of compounding a felony as alleged here is an innovation, and it is said that this offence is really the offence known in the old days as "theft-bote;" and that of the old crime of theft-bote no one could be guilty except he who was the owner of the goods which had been stolen. Now I do not deny that in the older books, and especially in Lord Coke's work, language is used which seems to imply that the writers considered theft-bote could only be committed by the owner of stolen property, and it is obvious that in almost all cases of theft-bote the party guilty would most probably be the owner of the goods. But it is equally obvious that those writers had not the question present to their minds, whether any person other than the owner of stolen property could also be guilty of the crime. In Stamford's Pleas of the Crown also, under the title "Theft-bote," language will be found which

looks as if that writer meant that the person who is prosecuted for the offence of theft-bote must be the owner of the goods which were stolen; and for this reason, no doubt, that in ninety-nine cases out of every hundred the person prosecuted for the offence would be the owner of the goods. And one can easily see for that reason why the language of these old authorities—great men undoubtedly—when such a question as this was not present to their minds why their language should be such as to appear to limit the commission of the offence to the owner of the property which was stolen. But I observe that in not one case are there any negative words used which have the effect of saying that this offence can alone be committed by the owner of the goods. It is clear that it can be committed by the owner of the goods, and in ninety-nine cases out of a hundred, as I have said, it would in all probability be the owner who would commit it. But at all events the language used by Sir William Blackstone seems to me very clearly to show that in his mind the possibility of the commission of the offence was not limited to the owners of stolen property. I agree that he does not say so, but to my mind the definition of "theft-bote" of Sir William Blackstone (4 Bl. 134) seems to show that that great authority clearly thought that others than owners of stolen property could be guilty of the offence. Now he says—and I need not read the definition given by him of the offence itself, but after stating what the definition is, he goes on to say: "This is frequently called compounding of felony, and formerly was held to make a man an accessory, but is now punished only with fine and imprisonment. This perversion of justice, in the old Gothic constitutions, was liable to the most severe and infamous punishment, and the Salic law, "latroni eum similem habuit, qui justum celare vellet, et occulte sine judice compositionem ejus admittere." Now those words are singularly clear, and are quite general, and Sir William Blackstone seems to have thought that this definition in the Salic law was a sound one, and, as I construe his words, to have thought that the offence of theft-bote on compounding a felony could be committed by others than the owners of stolen property. Other men might draw opposite conclusions, and I admit that it is capable of argument; but to my mind Sir William Blackstone had present to him, when he made use of those words, the possibility of persons other than the owner of the goods compounding the offence, and in my mind his words include anyone who has as here secretly agreed to shield a thief. For these reasons, therefore, I am of opinion that this conviction should be affirmed.

DENMAN, FIELD, HAWKINS, and WILLS, JJ. were of the same opinion.

Conviction affirmed.

Solicitors for the prosecution, *The Solicitors to the Treasury.*

Solicitor for the prisoner, *T. W. Bilton.*

Supreme Court of Judicature.

COURT OF APPEAL.

June 15 *and* 16, 1885.

(Before COTTON, LINDLEY, and FRY, L.JJ.)

HORNER *v.* THE WHITECHAPEL DISTRICT BOARD OF WORKS. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Market rights—Public way across market—Erection of posts to protect public—District board of works—Metropolis Local Management Act 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 91, 108.

The plaintiff, the owner of a market, pulled down certain houses in order to increase the size of the market, and a district board of works gave him notice of their intention, by virtue of the power given to them by sect. 108 *of the Metropolis Local Management Act* 1855, *to place posts by the side of certain public footpaths leading into the market, in order to preserve the rights of the public and insure the safety of foot passengers by preventing carts, &c., from going over what had formerly been the footpath in front of the houses pulled down.*

Held (affirming the decision of Bacon, V.C., 51 *L. T. Rep. N. S.* 414), *that the plaintiff having proved that the posts would interfere with the enjoyment of his market rights, the case came within the exception in sect.* 91 *of* 18 *&* 19 *Vict. c.* 120, *and that the board must be restrained from putting up the posts.*

THIS was an appeal from a decision of Bacon, V.C., granting an injunction restraining the defendants from putting up certain posts, which they alleged were necessary to protect the public footpath. The facts and arguments appear sufficiently from the report of the case in the court below (51 L. T. Rep. N. S. 414), and from the judgments of the Court of Appeal.

Finlay, Q.C., *Colt*, and *Gore*, for the appellants.

Sir *Hardinge Giffard*, Q.C., *Crossley*, Q.C., and *Vernon Smith*, for the respondent, were not called on.

COTTON, L.J.—This is an appeal from a judgment of Bacon, V.C., granting an injunction, at the instance of Mr. Horner, the lessee of the Spitalfields Market, restraining the Whitechapel District Board of Works from putting posts at the edge of what one may call a footway. This market is now held under a franchise in or near a particular square, and in the course of time the shape which the market took was this: There was a block of buildings in a square intersected by four streets, called East-street, West-street, North-street, and South-street, and in the centre was the nucleus of the market. The market, as has been decided, was not confined to that centre, but extended not only to these streets—East-street, West-street, South-street, and North-street—but also into, and could be exercised in, the adjoining streets. Now, the present plaintiff has done this: The accommodation in the market being somewhat restricted, he pulled down certain buildings which belonged to him, and which were in the subsidiary square formed

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

by these streets, which take their names from the points of the compass, and used the vacant space there as a market, using it in conjunction with the centre, so as to make the market in the centre of these streets more convenient, and I understand he is going to put up posts by the market buildings in the centre. Now, what the board of works have done is this: They have declined to accede to the request made by the plaintiff that they should pave that portion of the footway in East-street, West-street, South-street, and North-street, which was left by this operation of pulling down the houses, in such a way that carts, &c., can go over that which was formerly the footway only, and get into what he had made a vacant space to be used for market purposes, but they threatened and intended to put up posts by the side of the old footway where that footway abutted on the carriage or cart way into the central space. This action was commenced to restrain them from so doing, and the injunction was granted. Now, undoubtedly, under the power which this board have, they can, under ordinary circumstances, put up posts at the edge of any footway so as to make it secure for passengers. But here, what is the evidence? It is that the putting up of these posts, when they are put up, will materially interfere with the necessary access of carts to the central square. It is in evidence that the streets are from fourteen to fifteen feet wide, by which I mean the carriage or waggon way; and that railway waggons, particularly, are of such a width that two cannot pass without the boxes of the wheels projecting over the ambit of the footway, and these posts, if put up on the outside, as is proposed, of that which was once the carriage way, would prevent two waggons from passing one another in these streets. That would be, therefore, a material interference with the access to the market and with the exercise by the plaintiff of the franchise which is granted to his lessors. But it does not depend only on the evidence as to the access by the waggons. It is in evidence that the porters who carry heavy weights to and from the central space would be materially incommoded by the posts, if put up in the place intended, and would also be incommoded if they were put up not on that side, but on the other side of the footway. I mention that for this reason: that here the injunction is granted generally—that is to say, not only to restrain them, the defendants, from putting up these posts so as to interfere with the access to the market, but generally; and I mention therefore the fact that whichever side of the pathway these posts are put up, they would interfere with those who have the right of access to the market, and would interfere with the exercise of the franchise. But was the injunction right? The defendants say that they intended to put them up in the exercise of their statutory power. Now, one cannot disregard the 91st section of the 18 & 19 Vict. c. 120, which provides that "Save as regards the appointment of auditors, nothing in this Act shall divest the vestry of any parish, or any commissioners, or any burial board appointed by any vestry, of any powers or property vested in them . . . . and nothing in this Act shall extend to or affect any rights, privileges, powers, or authorities vested in any persons in reference to any market." Now, it was contended before us that the whole section was simply a section to prevent the preceding section having an effect greater than it was intended that it should have; but, if that were so, we should not find "nothing in this Act," but "nothing in this section," or "the powers hereinbefore given or hereby vested shall not affect." But the words of the Act are "nothing in this Act shall extend to or affect any rights, privileges, powers, or authorities vested in any persons in reference to any market." Now, these streets must have been dedicated to the public subject to the rights of the franchise owner to exercise his rights unimpeded and in a way most beneficial to himself; and therefore, in my opinion, having regard to this saving in this clause, the Vice-Chancellor was right in granting this injunction—for these posts, if they are erected, would interfere with and affect the rights and privileges of the market owner. Now, it was said that this would be inconsistent with the decision in the case of the *Attorney-General* v. *The Thames Conservators* (1 H. & M 1). In that case there was a question which arose under the Thames Conservancy Act. The conservators were putting up steamboat piers, and there was a complaint raised at the instance of the Attorney-General, and at the instance of owners of property on the side of the river, complaining that interference with the navigation would be caused by that pier which they were proposing to put up, and the Vice-Chancellor determined that that was no ground for restraining them, because the Act gave them power to interfere with the public right. The only complaint made, both by the Attorney-General and by the individuals, in that case was in respect of an interference with the public right, the Attorney-General complaining on behalf of the public whose rights were interfered with. The individuals were complaining on the grounds, as is shown by the Vice-Chancellor's judgment (pp. 30 and 31), that, although they had as individuals a special interest in the public right, what they were complaining of was not an interference with any right which they had as private individuals in respect of private property, but simply complaining of an interference with public right, which in their case would be specially injurious. Of course an interference with the navigation would much more seriously affect the owner of an adjoining wharf than it would someone who had property no nearer than Chelsea or Westminster Bridge, the pier in question being very near London Bridge. What the Vice-Chancellor says is this: "If the Act had saved every right which the owners of riverside property previously possessed, nothing could be done under it, because everyone who could show particular damage to himself would have a right of action in respect of an infringement, even of a public right, as being a person specially injured, and there could scarcely be any interference with the general right of navigation which would not cause special damage to some of the riparian proprietors." That was what the individuals were then complaining of. The distinction is more marked by comparing that case with *Lyon* v. *The Fishmongers' Company* (35 L. T. Rep. N. S. 569; 1 App. Cas. 662), where the company, under the licence of the conservators, were preparing to entirely cut off the access of a particular individual from the river; that is to say, they were going to put up a wharf to shut out part of the river

frontage, and there the House of Lords decided that that was an interference, not only with his public right, which would be justified, but with the private right, which every riparian owner has of getting from his property on to the river and on to a boat or barge there, or to let down his goods from his own property to a barge. That was an interference with special private property which was saved by the Thames Conservancy Act, just as the rights of a franchise owner in respect of a market are saved by the section to which I have referred. Then it was said that this was done in order to prevent the market owners from taking their waggons over that which was originally a footway, and which had never previously been used for the purpose of carts getting into this vacant space. It is not necessary in any way to decide in this case how far the franchise owners were right or wrong in what they proposed. It is said that taking the carts over would destroy the flagstones, which are vested in the board of works. I do not give any opinion whether they would do so or not; but one must recollect this, that the franchise owner clearly did offer to bear the expense of paving this path in such a way as would substitute pavement for flagstones—pavement which would be strong enough to support any carts if the flagstones were not. But we in no way decide here what are the rights of the franchise owner as regards passing over that which was formerly solely used as a footway for the purpose of getting to what is now thrown in for market purposes by taking down the houses. Whether he has a right to do so in the present state of the pavement, or whether he could do so hereafter when it is paved in a different way, we give no opinion either for him or against him. It does not arise in this case. In my opinion, the appeal fails.

Lindley, L.J.—I am of the same opinion, and I will assume for the purpose of the observations I am about to make that the contention of the defendants is right to a certain extent. I will assume that Mr. Horner and those exercising and enjoying this market are not entitled to block up what I may call an old pathway, by putting waggons and carts upon it so as to prevent the public from passing along. I will assume that, without in any way deciding it. What follows from that? Assuming that to be true, and assuming that Mr. Horner was intending or threatening to obstruct the public use of the footpath in the way I have mentioned, the remedy would be by an information to restrain him from so doing. But it does not at all follow, because I assume that proposition in favour of the defendants, that they are justified in putting up posts which will interfere with the enjoyment of the market. That does not follow at all, and the only question which we have to consider is, whether they are or are not justified in doing that which they say they had a right to do—namely, to put up posts in such places as they may decide for the protection, as they allege, of the public in the use of these footways. Now, upon the construction of the Metropolis Local Management Act of 1855, I entertain no doubt whatever. It appears to me that, having regard to sect. 91, it is impossible to construe that Act otherwise than by holding that the rights of the Whitechapel District Board of Works are subordinate to the market rights of Mr. Horner and those claiming under him. Sect. 91 places that beyond all doubt. Whether it would be so, apart from that section, it is unnecessary to speculate. There the section is as plain as language can make it. We have only to consider what the evidence is. The evidence is that the defendants propose to put up posts, not perhaps in the exact spots shown in the plan which was handed up, and which was referred to us as a resolution of their sub-committee, but somewhere or other, as they say, in such a way as to protect the public. The evidence satisfies me that any posts which they put up for any such purpose would most seriously disturb those who are employed in prosecuting or exercising the market rights in respect of which this action is brought. There is the uncontradicted evidence not only of the plaintiff, but of several porters, who say (quite apart from the point that has been alluded to by Cotton, L.J., and which is unanswerable as far as the very spots are concerned) that the porters, if posts are put up, will have to dodge them, and will have to wait for each other, and will be seriously inconvenienced in the delivery of the vegetables and so on which find their way to this market. It hardly wants *vivâ voce* evidence of people to satisfy one that that must be so when you see the model and the crowded space in the market. It appears to me that the evidence preponderates and is all one way. In other words, it comes to this: that these posts, put them up where you will, will very seriously interfere with the exercise of these market rights, and that the defendants are not justified in putting them up at all. That explains what at first sight seemed to me to be a little irregular and a little improper in the actual form of the injunction, because it departs from the ordinary form. It is not an injunction restraining the defendants from putting up posts so as to interfere with the market rights of the plaintiff, which is the common form, but it is a more absolute injunction, and that form is only justified on the ground that the evidence satisfies the court that posts cannot be put up anywhere without interfering with the market rights of the plaintiff. That is the inference of fact which I draw from the evidence; therefore, in substance as well as in form, I think the injunction is right, and the appeal will be dismissed.

Fry, L.J.—I concur in the view of my brothers. I will assume, as the appellants have asked us to declare, that the user of the public and of the owners of the market was in accordance with their respective rights. On that assumption I will inquire whether the defendants, the appellants, are at liberty to erect any posts on these streets. Now, it is said that the plaintiff has either himself interfered, or has permitted an interference, with the rights of the public and foot passengers to pass along the strip of ground in controversy. It is said that market carts now pass over that strip of ground, over which they had never passed before, and that therefore an injury has been done to the flaging or paving, which is the property of the defendants. It may be that the complaint is justified; it may be that the plaintiff has done or permitted acts which interfere with the rights of the public. Upon that I say nothing, for we have not heard the respondent, and it does not appear to me a point necessary to determine on the present occasion. But what the appellants have done is this. In protection, as they say, of the right of way, they

have done, or contemplate doing, acts which, in my opinion, will interfere with the rights of the plaintiff. It is quite obvious that they are not at liberty, in defence of their own rights, to do anything which will interfere with the rights of the plaintiff. What they proposed originally to do was undoubtedly to put posts partly in the paving and partly in the carriage way, but the point where the posts would stand will interfere with the use of the carriage way. That they did intend to do that is not in controversy, and, if any controversy was raised, it appears to me that the statement in the statement of defence shows that they clearly intended to place their posts in such a manner as to define, as they say, the present boundaries of the footway. That being the position of the intended posts, it appears to me to be plain that they would interfere with the two modes of user which have been enjoyed by the plaintiff and those who claim under him. In the first place, the carriage way is so narrow that the practice has been for the carriages and vans when passing one another to place the boxes of the wheels over the footway. I must assume, on the evidence which the appellants have presented to me, that it is in accordance with the rights of the parties. Now, it is plain, without argument, that placing the posts in the position intended will interfere with the rights on the part of the plaintiff, and it appears to me will seriously interfere with the user of the carriage way for the purpose of the vans and waggons which are in the habit of frequenting it. In the next place, it is also apparent from the evidence—and really the matter hardly requires evidence—that these posts will interfere with the market porters who carry heavy loads down the streets frequently and continuously. There can be no doubt that if these posts are high they will interfere with the burdens under which the men are labouring. If, as has been suggested, they are very short and low, the men will fall over them, and the result would be very great inconvenience to the persons who frequent the market. If this will be the result, two evils will follow. If the posts are placed in the position originally intended, one of the evils —namely, the interference with the porters—will result, however they are placed. It follows, therefore, in my judgment, that the act which the defendants, the appellants, intended and threatened to do would, even if it was a defence of any rights of the public, have been an injury to the rights of the market owner and the persons who frequent that market. I think, therefore, that the act which they intended to do was unlawful, and consequently that the learned judge was quite justified in granting the injunction which he did with one single exception. I think that the words "committing acts of trespass in the said four streets" should be omitted, and that it should run thus: "and from interfering and impeding or obstructing the plaintiff's right of market."

COTTON, L.J.—Our attention was not called to those words, but I think they should be omitted, because it does not seem to be an act of trespass.

LINDLEY, L.J.—I agree.

Solicitor for the plaintiff, *E. Betteley.*
Solicitor for the defendants, *A. Turner.*

Wednesday Jan. 13, 1886.

(Before Lord ESHER, M.R., COTTON and BOWEN, L.JJ.)

REG. *v.* RUDGE AND OTHERS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Appeal—Application for trial at Central Criminal Court of prisoner committed to assizes —Refusal to make order—Judgment in criminal cause or matter—19 *&* 20 *Vict. c.* 16, *s.* 3—*Supreme Court of Judicature Act* 1873 (36 *&* 37 *Vict. c.* 66), *s.* 47.

The refusal by a divisional court to order, under 19 *&* 20 *Vict. c.* 16, *s.* 3, *that a person who has been committed for trial to the assizes shall be tried at the Central Criminal Court is a judgment in a criminal cause or matter within the meaning of the Supreme Court of Judicature Act* 1873 (36 *&* 37 *Vict. c.* 66), *s.* 47, *and therefore no appeal lies from such refusal.*

THIS was an *ex parte* motion by way of appeal.

An application was made to a divisional court for an order that certain prisoners, who had been committed for trial at the Cumberland Assizes on a charge of murder, should be tried at the Central Criminal Court under the provisions of the statute commonly known as Palmer's Act (19 & 20 Vict. c. 16), s. 3, by which:

Whenever any person shall have been committed or held to bail for any felony or misdemeanour committed or supposed to have been committed at any place out of the jurisdiction of the Central Criminal Court, and it shall appear to the said Court of Queen's Bench in term time, or to any judge thereof in vacation, that it is expedient to the ends of justice that such person should be tried for such offence at the said Central Criminal Court, it shall be lawful for such Court of Queen's Bench in term time, or such judge thereof in vacation, to order that such person shall be tried for such offence at the said Central Criminal Court, and thereupon a writ of *certiorari* shall be issued to the justices of oyer and terminer or of gaol delivery, or of the peace, before whom any indictment or inquisition charging such person with such offence shall then be pending, or before whom any such indictment shall thereafter be found, or to the coroner before whom such inquisition shall have been or shall thereafter be taken, commanding them or him to certify and return such indictment or inquisition into the said Central Criminal Court.

The application was refused by Denman and Grantham, JJ. sitting as a Divisional Court.

Cavanagh, for the prisoners, now moved *ex parte* by way of appeal from such refusal, and was directed by the court to deal with the question whether any appeal would lie. In addition to the cases which are commented on in the judgment, he referred to

Reg. v. *Pemberton*, 41 L. T. Rep. N. S. 664; 5 Q. B. Div. 95.

Lord ESHER, M.R.—Under the Judicature Acts it is plain that the present Court of Appeal takes the place of the old Court of Exchequer chamber, and therefore it is the Court of Appeal in civil cases, but not in criminal cases, except where there is error on the record, for the Exchequer chamber was not a Court of Appeal in criminal cases, unless where there was error on the record. The words of sect. 47 of the Supreme Court of Judicature Act 1873 are perfectly plain, and show a distinct intention on the part of the Legislature that we should have no such jurisdiction as that which we are now asked to exercise.

(*a*) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

The words are "no appeal shall lie from any judgment of the said High Court in any criminal cause or matter;" the statute does not say "on the question as to whether the person accused is guilty or not guilty," which is the construction sought to be put upon it. In the present case an application was made for an order to remove the trial of certain prisoners from the assizes to the Central Criminal Court. I am of opinion that this is an application in a criminal cause or matter. The judgment of the Divisional Court was that they would not make an order for the removal of the trial; that is a judgment against the application. Therefore, independently of authority, the meaning of the Act is plain, and moreover the point has been decided in two cases, *Reg* v. *Steel* (35 L. T. Rep. N. S. 534; 2 Q. B. Div. 37) and *Reg.* v. *Foote* (48 L. T. Rep. N. S. 394; 10 Q. B. Div. 378.) It is said in support of the application that in *Reg.* v. *Weil* (47 L. T. Rep. N. S. 630; 9 Q. B. Div. 701) this court declined to decide that the refusal of a Divisional Court to grant a *habeas corpus* on the application of a person who had been arrested on a criminal charge under the Extradition Act was not the subject of appeal. That, however, was no decision on the point, and the case was not the same as the present, for a *habeas corpus* is not necessarily a criminal matter, as for instance in the case of an application for the release of an alleged lunatic. When the question arises in the case of an application for a *habeas corpus* to bring up a person charged with a criminal offence we may have to consider whether an appeal lies or not, but that has no application in the present case.

COTTON, L.J.—I am of the same opinion, and I agree that the case is clear. The Divisional Court has made an order refusing to alter the place of the trial of persons charged with a criminal offence. That is clearly a decision in a criminal matter. An application for a *habeas corpus* may not be a criminal matter; in some cases it certainly would not be. Here, however, there is a judgment in a criminal matter affecting a criminal trial. The authorities which have been referred to are conclusive.

BOWEN, L.J.—I am also of opinion that by sect. 47 of the Supreme Court of Judicature Act 1873 we are precluded from entertaining this application. The High Court has refused to transfer the trial of persons charged with criminal offences from the Cumberland assizes to the Central Criminal Court. I am of opinion that their decision is a "judgment," for the word "judgment" is used in sect. 47 of the Supreme Court of Judicature Act in a broad and not in a technical sense. The case is concluded by the decision in *Reg.* v. *Foote* (48 L. T. Rep. N. S. 394; 10 Q. B. Div. 378). The application therefore fails, both on reason and authority.

Application refused.

Solicitor for the prisoners, *E. H. Biggin*, for *T. Johnson*, Carlisle.

Tuesday, Nov. 17, 1885.

(Before Lord ESHER, M.R., COTTON and LINDLEY, L.JJ.)

MOGG *v.* CLARK. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Vestryman—Qualification—Rating—Occupation—Metropolis Management Act 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 6, 54.

By the Metropolis Management Act 1855 (18 *&* 19 *Vict. c.* 120), *s.* 6: "*The vestry elected under this Act in any parish shall consist of persons rated or assessed to the relief of the poor upon a rental of not less than forty pounds per annum; and no person shall be capable of acting or being elected as one of such vestry for any parish unless he be the occupier of a house, lands, tenements, or hereditaments in such parish, and be rated or assessed as aforesaid upon such rental as aforesaid within such parish.*"

Held, in an action for penalties, under sect. 54 *of the same Act, for acting as vestryman without being qualified, that the defendant, who did not occupy property to the specified amount within the parish, but who was the owner of property beyond the specified amount, in respect of which he was liable for the rates under an agreement with the overseers, was not qualified, and therefore was liable.*

Judgment of Lopes, J. affirmed.

THIS action was brought to recover penalties because the defendant had on two occasions acted as a member of the vestry of Shoreditch without being qualified by rating and occupation as required by the Metropolis Management Act 1855 (18 & 19 Vict. c. 120). Sect. 6 of that Act fixes the qualification of vestrymen, as stated in the head-note.

Sect. 54 enacts that any person who acts as a member of any such vestry without being qualified by rating and occupation, as required by the Act, shall for any such offence be liable to a penalty of 50*l.*

The defendant occupied a garden which was jointly rated with a house let to another man at 18*l.*

The defendant occupied nothing else within the parish; he was the owner of several small tenements, which were rented by tenants whose names appeared in the rate-book as occupiers; the defendant had agreed with the overseers under sect. 3 of the Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict. c. 41) to be liable for the poor rates assessed in respect of these tenements. The aggregate rental of these tenements was 68*l.*, and so appeared in the rate-book.

In the year 1869 the vestry passed a resolution under the Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict. c. 41), s. 4, that owners should be rated in the parish, but this resolution was rescinded in 1872.

At the trial before Lopes, J. without a jury the fact of voting was admitted.

After taking time to consider, the learned judge held that the defendant was not qualified, and gave judgment for the plaintiff for 100*l.*

From this judgment the defendant now appealed.

(*a*) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

Charles, Q.C. and *Winch* for the defendant.—Although it cannot be said, strictly speaking, that the defendant was "rated" within the meaning of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 6, nevertheless the agreement which he has entered into with the overseers, by which he is liable to pay the rates, amounts to an assessment, which for the purposes of qualification is equivalent to rating, and therefore he was "qualified by rating and occupation as required by this Act," within the meaning of sect. 54, and is not liable to penalties. The words in sect. 6 which define the qualification are "rated or assessed," and the defendant was "assessed." They referred to

Reg. v. *Hampton*, 13 L. T. Rep. N. S. 431; 6 B. & S. 923;
Goodhew v. *Williams*, 37 L. T. Rep. N. S. 454; 3 C. P. Div. 382.

Grantham, Q.C. and *Bucknill*, Q.C., for the plaintiff, were not called upon.

Lord ESHER, M.R.—This is an action to recover penalties under the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 54, on the ground that the defendant has acted as member of a vestry without being qualified by rating and occupation, as is required by the statute. The defendant has occupied a garden, and he contends that he has had a sufficient "occupation" within the meaning of the statute; but I do not think it necessary to deal with the question as to occupation. The plaintiff relies on the fact that the defendant is not rated; but the defendant contends that an assessment has been made in respect of that which he has undertaken to pay, and that this is equivalent to his being rated. That which has taken place in this parish to secure the payment of poor rates in respect of small tenements, has been regulated by the Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict. c. 41). By sect. 4 of that statute the owners of all small tenements may be rated to the poor by order of the vestry, and sub-sect. 1 provides that "the overseers shall rate the owners instead of the occupiers." The vestry of the parish in question in the present case had passed an order rating the owners of small tenements; but this order was afterwards rescinded by virtue of the power to do so conferred on the vestry by sub-sect. 3, and then the position of affairs was the same as if the vestry had never made any such order. The most important clause in the statute is sect. 3, by which, when the owner of any hereditament not exceeding a certain value "is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates assessed in respect of such hereditament for any term not being less than one year from the date of such agreement, and to pay the poor rates whether the hereditament is occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and to allow him a commission not exceeding 25 per cent. on the amount thereof." Under this enactment the owner does not appear to me to be "assessed," for he only agrees with the overseers to pay the amount of the rate. The defendant has entered into an agreement of this kind. Sect. 6 of the Metropolis Management Act 1855 provides that the vestry elected under that Act shall consist of persons rated or assessed to the relief of the poor "upon a rental of not less than 40*l.* per annum." It is possible that a person can be "assessed" without being "rated;" but, if he acts as a member of a vestry, he will be within the penal provisions of sect. 54, although he is assessed, unless he is also rated. The words "rated" and "assessed" both apply to the person and to nothing else. But it is not easy to see how a person can be rated without being "assessed." The overseers assess the amount of the rate for the whole parish; that is to say, they consider what is wanted for the whole parish, and assess that amount. Then they fix the amount to be paid by each occupier, so that he also is "assessed." His name is afterwards put into the rate-book, and then he may be said to be "rated;" but he cannot be "rated" until he is "assessed," and therefore he cannot be "rated" without being "assessed." Although there may be different processes, yet it is one operation. It seems to me that the words of sect. 6 of the Metropolis Management Act 1855, "rated or assessed" must be taken to mean "rated and assessed." Sect. 54 imposes the penalty on any person who acts as a member of a vestry "without being qualified by rating," and as I have already pointed out, a person cannot be rated without being assessed, and therefore he is liable to the penalty if he acts as a member of a vestry unless he is both "rated and assessed." That is sufficient to dispose of the present appeal, because the appellant merely made an agreement with the overseers, and it is admitted that he was not rated. It was held also by Lopes, J., that a person who acts as a member of a vestry is liable to the penalty imposed by sect. 54, unless he occupies the hereditaments in respect of which he is rated and assessed. In the view which we take of the case it is unnecessary for us to decide this point, or to determine whether independently of sect. 3 of the Poor Rate Assessment and Collection Act 1869 the appellant would be liable to the penalties.

COTTON, L.J.—This action is brought under sect. 54 of the Metropolis Management Act 1855, to recover penalties from the defendant on the ground that he has acted as a member of a vestry without being qualified by rating and occupation. In sect. 6 the qualification is stated to be rating or assessment. The mention of both kinds of qualification supports the view expressed by the Master of the Rolls, that rating and assessment must go together. It is unnecessary for me to refer at length to the sections of the Poor Rate Assessment and Collection Act 1869, because the Master of the Rolls has dealt with the more important of them. Although the provisions of sect. 3 of that Act have been adopted, nevertheless the occupier continues to be the person rated, for there is nothing more than an agreement between the overseers and the owner, by which the latter becomes liable to pay the rates which may be levied on his goods and may be recovered from him in the same way as poor rates may be recovered from the occupier; this is provided by sect. 11. If, however, the rates are not paid by the owner, the goods and chattels of the occupier are liable to be distrained and sold, as is shown by sect. 12. Moreover, sect. 19 directs that the occupier shall be deemed to be fully rated. It is said that a distinction exists between "assessment" and a rating," and in the title of the Poor

Rate Assessment and Collection Act 1869 "the rating of occupiers" is mentioned; in the preamble "the collection of poor rates assessed upon occupiers of hereditaments" is alluded to, and in many of the sections of the Act the rates are said to be "assessed" on or in respect of the hereditaments. But sect. 6 of the Metropolis Management Act 1855 provides that the vestry "shall consist of persons rated or assessed to the relief of the poor," and we cannot depart from the obvious meaning of the Legislature, which is that the members of a vestry must be rated. The present appellant is neither assessed nor rated; he has only entered into an agreement to pay the rates. I express no opinion as to whether the occupation by the defendant is or is not sufficient. For the reasons which I have stated I am of opinion that the appeal ought to be dismissed.

Lindley, L.J.—I am of the same opinion. I can follow the argument that property is "assessed," and that a person is "rated," and I am struck with the circumstance that in the Metropolis Management Act 1855, s. 54, the word "assessed" is omitted; but it appears to me to be impossible to say that the appellant is "rated" within the meaning of the statute, and if he is not he has incurred the penalties. I am fortified in the conclusion at which I have arrived, by a reference to the Small Tenements Act (13 & 14 Vict. c. 99). Sect. 6 of that statute provided that "every such owner, so rated as aforesaid, shall have the same right of appeal (subject to the same conditions) against rates, and the same right to vote in vestry, as if he were an occupier duly rated in respect of the same tenement." A similar right of appeal is given to the owner by sect. 13 of the Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict. c. 41); but I can find no section in this statute conferring upon the owner the right to vote as if he were an occupier. On the contrary, sects. 7 and 19 seem inconsistent with it. The whole of the Small Tenements Act (13 & 14 Vict. c. 99) has been repealed by the Poor Rate Assessment and Collection Act 1869, s. 6, and by the Statute Law Revision Act 1875 (38 & 39 Vict. c. 66); and I feel pressed by the consideration that there is now no enactment enabling an owner, who is rated instead of the occupier, to vote in the vestry. I am of opinion that the judgment of Lopes, J. was right, and that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for plaintiff, *Bramwell* and *White*.
Solicitors for defendant, *F. R. Smith* and *Son*.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Thursday, Nov. 5, 1885.

(Before Day and Smith, JJ.)

Reg. v. Justices of Yorkshire; *Ex parte* Gill. (*a*)

Mandamus—Rejection of admissible evidence by justices—Conviction—Hearing and determination.

The court will not direct a mandamus to issue to compel justices to hear and determine a case upon which after hearing evidence they have adjudicated, though at the hearing they had rejected certain evidence which was properly admissible.

This was an *ex parte* application for a *mandamus* to the justices of the West Riding of Yorkshire, to hear and determine the case of one Sarah Gill, who had been convicted, together with her son, of malicious injury to property.

Mother and son were charged severally, and not jointly. The case of the son was called on first, and he pleaded guilty.

After the conviction of the son the case against the mother was gone into, and it was proposed to call the son's wife as a witness in her behalf. The justices were of opinion that the son's wife was not a competent witness, and refused to allow her to give evidence.

The mother was fined 20*s*.

T. Willes Chitty for the applicant.—The magistrates were wrong in refusing to allow this evidence to be given. If the mother and son had been jointly charged, it is true that the son's wife could not have given evidence on behalf of either of them; but as they had been charged severally, the son's wife was a competent witness for the mother. It has been doubted whether this court would grant a *mandamus* to justices to hear and determine a case, when in fact they had heard and determined it. In *Rex* v. *Justices of Carnarvon* (4 B. & Ald. 86) evidence had been tendered and refused by justices in quarter sessions, the Court of King's Bench refused to issue a *mandamus* on the ground that they had no power to review the judgment of quarter sessions except on a case sent up for its consideration. That case is really an authority in the applicant's favour, for in it Holroyd, J. expressly said that if it had appeared that the sessions had heard one side, and had altogether refused to hear the other, he would have thought it the same as if the case had not been heard at all, and he would then have been of opinion that a *mandamus* ought to issue. In *Rex* v. *Justices of Worcestershire* (1 Chitty, 649) it was admitted that in certain cases a *mandamus* might lie to sessions to admit evidence which had been rejected. The applicant here could not appeal to quarter sessions, as her fine was only 20*s*., and so was under the limit for such appeals.

Day, J.—This application must be refused.

Smith, J.—I know of no case where a *mandamus* to justices to hear and determine a case has been granted on the ground that they have not heard all the evidence tendered before them.

Application refused.

Solicitors for the applicant, *Bell, Brodrick, and Gray*.

(*a*) Reported by W. P. Eversley, Esq., Barrister-at-Law.

Friday, Nov. 27, 1885.

(Before Huddleston, B., Cave and Wills, JJ.)

Yelland (app.); Winter (resp.). (*a*)

Inland Revenue—Duties of excise—Tax on male servants—Groom—Partial employment—32 & 33 Vict. c. 14, s. 18, and s. 19, sub-sect. 3—39 Vict. c. 16, s. 5.

H. was employed by the respondent, a farmer, to feed the pony, attend to the bullocks in the yard, and to work on the land. When the respondent's trap was washed, H. did it, and he also cleaned

(*a*) Reported by F. A. Crailsheim, Esq., Barrister-at-Law.

the harness, and occasionally drove the respondent to the railway station. The respondent employed no other groom, but he sometimes harnessed and unharnessed and groomed the pony himself. If H. was present on those occasions he helped. The respondent had taken out no licence for H.

Held, that H., being employed substantially in the capacity of general servant and partially only in that of groom, the respondent was exempted by sect. 5 of 39 Vict. c. 16, from the tax upon male servants imposed by sect. 18 and sub-sect. 3 of sect. 19 of 32 & 33 Vict. c. 14.

Yelland *v.* Vincent (47 *J. P.* 230) *distinguished.*

THIS was an appeal from the decision of the justices for the county of Norfolk. The following case was stated under the statutes 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49 :—

1. At a petty sessions holden at the Petty Sessional Court at East Dereham, in and for the county of Norfolk, on the 12th June 1885, an information was preferred by John Yelland, of East Dereham aforesaid, an officer of Inland Revenue (hereinafter called the appellant), against Henry Disbrowe Winter, of Beeston-next-Mileham, in the said county, farmer (hereinafter called the respondent), charging for that he the said respondent did, on the 14th March 1885, at Beeston-next-Mileham aforesaid, employ a male servant, for the employment of whom a licence was and is required by the statutes in that behalf, without having a proper licence, and upon the hearing of such information the justices dismissed the same.

2. The said appellant, being dissatisfied with their determination as being erroneous in point of law, duly applied to them in writing to state and sign a case setting forth the facts and the grounds of such determination for the opinion of the Queen's Bench Division of the High Court of Justice, and duly entered into a recognisance as required by the statute in that behalf.

3. Therefore the justices stated and signed the following case:

4. Upon the said hearing one witness only, *videlicet* Abraham Howard, of Litcham, in the said county, was called on behalf of the appellant, and his evidence was as follows:

I am in the employ of Mr. Henry Disbrowe Winter, of Beeston-next-Mileham, farmer. I have been in his employ for about a year. I was working on the farm before Mr. Winter took it. My duties are to feed the pony, to attend to the bullocks in the yard, and to go to work on the land. When Mr. Winter's trap is washed I wash it, but that is not often—not above once in three months. I clean the harness. I never go out with him except down to the station to bring the trap back, or to meet him at the station. I have occasionally sat up for him when he has been out. If he wants me to sit up he tells me to do so. Very often when he is late he takes the pony out himself. If I am present when he returns I help him to take it out. Mr. Winter employs no other groom. Another man has washed the trap occasionally. Sometimes Mr. Winter has had two nags at the same time, but he kept one at Beeston, and I only looked after one then. Another man looks after the cart horses. If I am engaged in any work when he returns, he sometime takes out the horse, and does not call me. He sometimes rubs down the pony, and puts the cloth on.

Cross-examined: I live about fifty yards from the stable.

5. The respondent at the said hearing admitted that he had no licence to employ a male servant, and did not tender any evidence.

6. It was contended on the part of the appellant that the said Abraham Howard was a "male servant" within the meaning of the statute of the 32 & 33 Vict. c. 14, s. 19; and that because the said Abraham Howard was the respondent's groom, and practically performed all the groom's duties, and because respondent kept no other groom, the said Abraham Howard did not come within the exception provided by the statute of the 39 Vict. c. 16, s. 5.

7. It was contended by the respondent that because the said Abraham Howard was *bonâ fide* employed as yardman and labourer, and because the groom's duties only occupied a part of his time, he came within the exception provided by the last-mentioned statute.

8. The justices were of opinion that the said Abraham Howard was *bonâ fide* employed by the respondent as yardman and labourer, and that he was also *bonâ fide* employed by the respondent as groom, and performed substantially all the groom's work, but that the groom's work occupied less than half his time, and they therefore found that the said Abraham Howard was a servant who, being *bonâ fide* employed by the defendant in some other capacity, was partially employed by the defendant in the capacity of groom.

9. The justices were therefore of opinion and decided that the respondent was not liable to the duty.

10. The question of law arising on the above statement for the opinion of the court is whether the decision of the justices is correct in law. If the said question is answered in the affirmative, their decision dismissing the said information is to stand; if in the negative, the case is to be remitted to the justices for further consideration.

R. S. Wright for the appellant.—The tax imposed upon the servant by sect. 18 and sub-sect. 3 of sect. 19 of 32 & 33 Vict. c. 14, does not, in this case, come within the exemption contained in sect. 5 of 39 Vict. c. 16. There is groom's work to be done, and no other servant to do it:

Yelland v. *Vincent*, 47 J. P. 230.

The proper construction to be put upon sect. 5 of the later Act is that if a person is employed generally in a non-taxable capacity, he shall not lose the exemption by reason of his being occasionally employed in a taxable capacity. To come within sect. 5 at all, a man must be employed wholly in one capacity. Where he is engaged to do groom's work, he is taxable under the earlier Act.

A. P. Stone, for the respondent, was not called upon.

HUDDLESTON, B.—There are a number of persons mentioned in sub-sect. 3 of sect. 19 of 32 & 33 Vict. c. 14, who are to be taxed—*e.g.*, coachman, groom, postilion, stable-boy, or helper in the stables, and everyone connected with stables seems to be included. If the statute remained there, this servant would no doubt be liable to duty. But by sect. 5 of the subsequent statute, 39 Vict. c. 16, it is enacted that the term "male servant," as used in the Act 32 & 33 Vict. c. 14, shall not include a servant who, being *bonâ fide* employed in any capacity other than the capacities specified or referred to in provision 3 of sect. 19 of the said Act, is occasionally or partially employed in any of the said capacities so specified or referred to, and shall not include a person who

has been *bonâ fide* engaged to serve his employer for a portion only of each day, or does not reside in his employer's house. It appears from that that the Legislature was desirous of pointing out a class of persons who, although they might occasionally be employed in a taxable capacity, should not be subject to the duty. Therefore, by virtue of the subsequent statute, we may say that "male servant," under sect. 19 of 32 & 33 Vict. c. 14, shall not include a person who is occasionally or partially only employed as a groom or stable-boy, or helper in the stables. In this case the magistrates have found that the individual in question was *bonâ fide* employed by the defendant as yardman and labourer, and that he was also *bonâ fide* employed as groom, and substantially performed all the groom's work, but that the groom's work occupied less than half his time. Therefore it is true that he was employed as a general servant, and it is true also that he was employed as a help in the stables; but that was only occasionally, and he was employed in the latter respect only partially, and his real employment was only as a general servant. He was employed in the stables, but occasionally only in that respect, and also only partially, for his work there occupied a very small part of his day. His real and substantial employment was as a general servant, and, although serving partially in a taxable capacity, his real employment was not taxable. We must look at what he really is. The justices have found that he is a servant who, being *bonâ fide* employed in some other capacity, is partially employed in the capacity of groom. A man may be said to be employed partially in a capacity when he is in a continuous service, in which particular periods of the day are allotted to particular duties. If he is employed as a groom, then he does not do the work of a groom occasionally only. That constitutes the difference between this case and that of *Yelland* v. *Vincent* (47 J. P. 230). In *Yelland* v. *Vincent* the justices found that the individual in question was a servant who was *bonâ fide* employed by the respondent in the capacity of yardman on the respondent's farm, and that he was also *bonâ fide* employed by the respondent in the capacity of groom, and that he was in fact both yardman and groom, and was responsible for and performed the duties of each office. There the justices did not find that the servant was only "occasionally and partially" employed, and the finding being that he was *bonâ fide* employed, the exemption did not apply. In the present case the justices find that the servant was a person who being *bonâ fide* employed by the respondent in some other capacity, was partially employed by him in the capacity of groom. I therefore think that the decision of the justices was correct, and their decision must be affirmed, and this appeal dismissed.

CAVE, J.— I am of the same opinion, and I think that the decision of the justices was both good sense and good law. The meaning of the statute is that if a man's substantial employment is not within the definition given as that of a "male servant" he is not taxable. Supposing a man living in the suburbs keeps a horse and carriage, and wants a groom, and he advertises and says that, besides doing the groom's work, the man will have to feed the cow, undoubtedly there the man would be *bonâ fide* employed as groom and partially only to look after the cow, and he would be employed in a taxable capacity. But suppose, on the other hand, a farmer keeps a large dairy, and a man comes to be engaged as cowman and to attend to other matters about the place, and he is told by his employer that there is a trap which he will have to look after, and that he will have occasionally to drive the trap, in such case the employment would be *bonâ fide* that of cowman, and the employer would be exempt from paying a tax upon him. It appears to me that the decision in *Yelland* v. *Vincent* (47 J. P. 230) is right and the decision proceeds upon a correct principle, for in that case the magistrates found that the servant was *bonâ fide* employed in two capacities, but they did not find which was the substantial employment.

WILLS, J.—I am of the same opinion. I think that the *bonâ fide* employment spoken of in the first part of sect. 5 of the Act of 1876 must mean the substantial employment. The employment spoken of in the latter part of the section is different, and refers to partial or occasional employment. The partial employment clearly refers to what a man has to do regularly as part of his contract, but which is not the chief part of his work. In this case the substantial employment of the servant was undoubtedly that of a farm labourer, and his work as groom was no part of his regular business. The order of the justices must therefore stand.

Decision affirmed.

Solicitor for the appellant, *Solicitor to the Inland Revenue.*

Solicitors for the respondent, *Wright* and *Barton*, East Dereham.

Saturday, Dec. 12, 1885.

(Before MATHEW and WILLS, JJ.)

PRICE (app.) *v.* BRADLEY (resp.). (*a*)

Freshwater Fisheries Acts 1878 *and* 1884—*Freshwater fish—Eels—Eels lawfully captured abroad imported into England—Exposure for sale during the close season—Conviction*—41 *&* 42 *Vict. c.* 39, *s.* 11, *sub-sects.* 1 *and* 4—47 *&* 48 *Vict. c.* 11, *s.* 6.

The appellant was convicted and fined for exposing for sale during the close time for freshwater fish in England certain eels lawfully caught in Ireland and imported into this country. The appellant appealed, and contended that eels were not freshwater fish, and if they were the Acts applied only to fish caught in England, and not to fish lawfully caught elsewhere and imported into this country.

Held, that, under sub-sect. 4 *of sect.* 11 *of the Freshwater Fisheries Act* 1878, *the importation into and exposure for sale in England of freshwater fish constituted an offence against the Act, and rendered the importer or exposer liable to conviction.*

THIS was a case stated for the opinion of the court by two justices of the borough of Birmingham, under 42 & 43 Vict. c. 49:—

1. This matter came before the justices upon a summons, of which, omitting the formal parts, the following is a copy: "For that on the 4th day of June instant, at the borough aforesaid, the defendant did during the close season, that is

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

to say, between the 15th day of March last and the 15th day of June instant, both inclusive, unlawfully expose for sale certain freshwater fish (to wit), eels."

2. On the hearing it was proved that the defendant had exposed for sale certain eels on the 4th of June 1885, being then the close season for freshwater fish in England.

3. It was not proved whether the said eels had been caught in salt or fresh water.

4. It was admitted before the justices, and they dealt with it as a fact, that eels do at certain periods of the year leave fresh water and travel down into brackish water.

5. It was proved that the said eels were Irish eels exported from Toome Bridge, county Antrim, Ireland, and duly invoiced and consigned to the defendant in Birmingham, by whom they were received.

6. At the time when the said eels were caught and exported, the catching and sale of them in Ireland were lawful.

7. It was contended before the justices, for the defendant, that upon these facts no offence had been committed under the Freshwater Fisheries Acts of 1878 and 1884.

8. The justices being of opinion that on these facts an offence had been proved to be committed within the meaning of the said Acts, fined the defendant 5*s.* and costs; but having been duly applied to in writing, they stated this case for the opinion of the Queen's Bench Division.

9. If the court thought that the conviction was good, their decision was to stand; but if otherwise, their decision was to be reversed, and the said summons dismissed.

By 36 & 37 Vict. c. 71, s. 19:

No person shall buy, sell, or expose for sale, or have in his possession for sale, any salmon, or part of any salmon, between the third day of September and the first day of February following, both inclusive, and any person acting in contravention of this section shall forfeit any salmon, or part of any salmon, so bought, sold, or exposed for sale, or in his possession for sale, and shall incur a penalty not exceeding two pounds for every such salmon, or part of any salmon. But nothing herein contained shall apply to any person buying, selling, or exposing for sale, or having in his possession for sale . . . to any clean fresh salmon caught at any time beyond the limits of this Act, provided its capture by any net, instrument, or device other than a rod or line, within the United Kingdom, was lawful at the time and in the place where it was caught.

By sect. 20:

No person shall buy, sell, or expose for sale, or have in his possession for sale, any trout or char between the second day of October and the first day of February following, both inclusive; and any person acting in contravention of this section shall forfeit any trout or char so bought, sold, or exposed for sale, or in his possession for sale, and shall incur a penalty not exceeding one pound for every such trout or char.

By 41 & 42 Vict. c. 39, s. 2:

This Act shall, so far as is consistent with the tenour thereof, be read as one with the Salmon Fishery Acts 1861 to 1876.

By sect. 11:

(1.) In this section the term "freshwater fish" includes all kinds of fish (other than pollan, trout, and char) which live in fresh water, except those kinds which migrate to or from the open sea.

(2.) The period between the fifteenth day of March and the fifteenth day of June, both inclusive, shall be a close season for freshwater fish.

(4.) If any person during this close season buys, sells, or exposes for sale, or has in his possession for sale, any freshwater fish, he shall, on summary conviction before two justices, be liable to a fine not exceeding forty shillings.

By 47 Vict. c. 11, s. 6:

This Act shall be construed as one with the Freshwater Fisheries Act 1878, and that Act and this Act may together be cited as the Freshwater Fisheries Acts 1878 and 1884, and this Act may be cited alone as the Freshwater Fisheries Act 1884.

In the construction of this Act the expression "freshwater fish" means any fish living permanently or temporarily in fresh water, exclusive of salmon.

James Paterson for the appellant.—The first question here is, whether eels are included in the term "freshwater fish" within the meaning of the Freshwater Fisheries Act 1884. It is contended that they are not, because they belong to those kinds of fish which migrate to and from the open sea, like salmon, and the magistrates have in this case found that they descend into brackish water, and are so excluded from the term "freshwater fish," which is defined by sect. 11 of the Act of 1878. It is true that the expression "freshwater fish," in sect. 6 of the Act of 1884, is made to include a wider class of fish than the similar expression in the earlier Act, but that wider definition is only for the purposes of the Act itself, and not for the general legislation on the subject. Secondly, if eels are within the Act, the appellant was not rightly convicted in respect of these particular eels. The intention of the Freshwater Fisheries Act 1878 was to protect only English fish, and these eels were caught in Ireland, not during the Irish close season, but at a time when they might lawfully be caught. [WILLS, J.—As it is impossible to know whether eels are caught in this country, was not such a section as sect. 11 of the Freshwater Fisheries Act 1878 inserted to exclude within a certain defined time the sale of fish, however wholesome and good and lawfully caught in other countries?] It is submitted that it was not, but was *primâ facie* intended only to protect an English industry.

J. W. Baines for the respondent.—Eels are freshwater fish. The extended definition in sect. 6 of the Act of 1884 clearly includes them, and the magistrates have found that they are included in the term. Next, it is contended that there is an absolute prohibition against the sale of freshwater fish, exclusive of salmon, within the close season. Sect. 2 of the Act of 1878 makes reference to the Salmon Fishery Act of 1873, where, in sects. 19 and 20, there is a strong argument in favour of the respondent. Sect. 19 of that Act imposes a penalty on the sale, &c., of salmon during close time, but makes an exception in favour of salmon sold out of close time under certain specified circumstances; but in sect. 20, when dealing with trout and char, the prohibition is absolute, and no exception is made in their case. Under cognate statutes, the Wild Birds Protection Acts (35 & 36 Vict. c. 78, and 39 & 40 Vict. c. 29), it has been held that it is no defence to an information under those Acts for exposing wild birds for sale during the prohibited season that such birds have been bought or received of or from a person residing out of the United Kingdom:

Whitehead v. *Smithers*, 37 L. T. Rep. N. S. 378; 2 C. P. Div. 553.

These Acts were intended to prevent the sale of freshwater fish in England during the close season wherever caught.

Paterson in reply.

MATHEW, J.—I am of opinion that this conviction ought to be affirmed. The first point is, whether or not eels are freshwater fish within the Fisheries Act 1878. The magistrates have found as a fact that eels are in the habit, at certain periods of the year, of leaving the fresh water and travelling down into brackish water. Sect. 11 of the Freshwater Fisheries Act 1878 includes in the term "freshwater fish" all kinds of fish (other than pollan, trout, and char) which live in fresh water, except those kinds which migrate to and from the open sea; and in sect. 6 of the Freshwater Fisheries Act 1884 the term "freshwater fish" is construed to mean any fish living permanently or temporarily in fresh water, exclusive of salmon. Now eels answer the description of fish living permanently or temporarily in fresh water. The other point is, that sub-sect. 4 of sect. 11 of the Freshwater Fisheries Act 1878 is not to be construed against the appellant. That sub-section provides that if any person during the close season shall buy, sell, or expose for sale, or has in his possession for sale, any freshwater fish, he may be summarily convicted. It has been pointed out that the Freshwater Salmon Fisheries Act of 1884 is to be construed as one with the Salmon Fisheries Act 1873. In this latter Act a distinction is drawn between the sale of salmon out of season and the sale of trout and char during close time. In the case of trout and char, by sect. 20, the prohibition is absolute, whereas, by sect. 19, in the case of salmon, if it be sold or exposed for sale during the close time, the person so selling or exposing it for sale shall not be liable to penalties if he can prove that it was (among other things) lawfully caught in a place beyond the limits of the United Kingdom. When we come to sect. 11 of the Freshwater Fisheries Act 1878, we find its provisions in harmony with sects. 19 and 20 of the Salmon Fisheries Act 1873, and as general in its terms. The question, then, here is, whether we ought to construe the prohibition against selling freshwater fish within the close time, and the liability for penalties for so doing, as applicable only to fish caught and exposed for sale within that portion of the United Kingdom where it is so caught and exposed for sale. We are of opinion that we ought not so to construe it, and think that there is an excellent reason for the provision, namely, the trouble and difficulty of ascertaining whether the fish exposed for sale were caught within this country during the close season or imported from abroad. It may well be that such a provision is an interference with legitimate trade, but the Legislature intended to interfere with it.

WILLS, J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellant, *Mackeson, Taylor,* and *Arnould,* for *Buller, Bickley,* and *Cross,* Birmingham.

Solicitors for the respondent, *A. R.* and *H. Steele,* for *C. K. Eddowes,* Derby.

Tuesday, March 17, 1885.

(Before MATHEW and SMITH, JJ.)

KILLMISTER (app.) *v.* FITTON (resp.). (*a*)

Rochdale Market Act 1822 (3 *Geo.* 4, *c. lviii.*), *s.* 42—*Rochdale Improvement Act* 1872 (35 *& 36 Vict. c. cxlix.*), *s.* 8—*Meaning of the word "town"—Application of, as used in Act of* 1822, *to an increased and extended town under Act of* 1872—*Construction of the two statutes.*

By sect. 42 *of the Rochdale Market Act of* 1822 (3 *Geo.* 4, *c. lviii.*) *it is an offence punishable on summary conviction with a fine not exceeding* 5*l. for any person to sell within "the town of Rochdale," other than within the limits of the market-place there (except in the vendor's private dwelling-house or the shop) any . . . vegetables or other marketable commodities or provisions, &c. The respondent sold a quantity of potatoes in a street or place within the present municipal and parliamentary borough of Rochdale, about a mile from and not within the said market-place. The limits of the town are not defined in the Act of* 1882, *nor has any subsequent Act defined the meaning of the expression "town of Rochdale" as used in that Act; but since* 1822 *the town has increased, and is now, and for many years has been, a municipal and parliamentary borough, the boundaries of which have been extended and defined by Royal Charter and various Acts of Parliament, and the borough as now existing was constituted by the Rochdale Improvement Act* 1872 (35 *& 36 Vict. c. cxlix.*), *by sect.* 8 *of which Act the boundaries of the town and borough were extended and made co-extensive with those of the parliamentary borough as specified in the Boundary Act* 1868 (31 *& 32 Vict. c.* 46), *and the provisions of the Act of* 1872, *and of various other Acts specified in sect.* 8, *and "of all other Acts at present applying to and in force in and in relation to the existing town and borough," were to "apply to and be in force in and in relation to the borough." The street or place where the sale took place is an aggregation of about a dozen houses, and is within the said extended boundaries; but prior to* 1822 *it was outside the then municipal borough and, though there are one or more detached houses here and there along the road leading from the market-places to the spot in question, there is no continuous line of buildings on any part of the said road.*

The justices were of opinion that the prohibition in sect. 42 *of the Act of* 1822 *was limited to the town as it existed in* 1822, *and that the spot in question was not within the "town of Rochdale" within the meaning of the Act, and that the extension of the borough for municipal purposes did not give a wider meaning to the expression "town of Rochdale" so as to extend the market rights to the extended borough, and that the Improvement Act* 1872 *did not extend the provisions of any local Acts to the extended borough, but only applied all municipal and general Acts relating to sanitary and local government matters in the old borough to the extended borough; and they accordingly declined to convict the respondent of an offence within that section.*

Held (by Mathew and Smith, JJ.), on appeal therefrom, that the justices were wrong in not convicting the respondent, inasmuch as the Act of

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

Geo. 4 must have contemplated a growing town, and the expression "town of Rochdale" in sect. 42 was intended to include not merely the then existing but the increasing town of coming years; and that, under the Act of 1872, *the provisions of the Act of* 1822 *apply to and are in force within the extended boundaries so as to make the "town of Rochdale" mentioned in the earlier Act comprise, for all the purposes of that Act, the whole of the municipal borough as constituted by the later Act of* 1872.

CASE stated by justices, under the Summary Jurisdiction Act 1879, and other statutes in that behalf, for the opinion of the Queen's Bench Division of the High Court, upon a point of law arising as hereinafter mentioned.

At a petty sessions of the said justices on the 6th Feb. 1884, at the Town Hall, in the borough of Rochdale, the appellant appeared in support of a summons issued on an information preferred by him against the respondent, charging,

That the respondent, on the 30th Jan. 1884, at Milnrow-road in the said borough, such street not being in the old market-place or new market-place in the said borough, but within the town of Rochdale aforesaid, unlawfully did sell a quantity of potatoes, contrary to the Act of 3 Geo. 4, c. lviii., for providing an additional market-place in and for the borough of Rochdale, in the County Palatine of Lancaster.

And the said information was heard and determined by the said justices, the majority of whom dismissed the information, and stated a case for the court, upon the hearing of which the court (Stephen and Mathew, JJ.) remitted the same to the said justices, with their opinion that the reason given by the justices for their judgment was insufficient; and that they ought to further consider the information, especially with reference to the Rochdale Improvement Act 1872 (35 & 36 Vict. c. cxlix.), not mentioned in the case, but to which the court's attention had been drawn at the hearing of the argument thereon; and further to do what was right in the matter; and, if necessary, to re-state the case.

The justices accordingly, on the 31st May 1884, reconsidered the case, when the majority of them, seeing no reason to alter their previous decision, re-stated the case as follows:

1. The appellant is the Clerk of the Rochdale New Market place, established by the Act 3 Geo. 4, c. lviii. (local).

By sect. 42 of that Act it was, amongst other provisions, enacted,

That no person or persons shall hereafter, on any market day or days or on any other day, sell or expose to sale, except in the said old market-place or the new market-place, any meat, butter, poultry, eggs, garden stuff, potatoes, roots, or vegetables, or any fish, at any time, within the said town, except as hereinafter mentioned.

And every person offending in any of the cases aforesaid is by the said section made liable to forfeit and pay for every such offence, on conviction before any one or more justices, any fine not exceeding 5*l*. But the section provides,

That nothing herein contained shall extend or be construed to extend to prevent or hinder any person from selling or exposing to sale any marketable commodity, matters, or things whatsoever in his or her own private dwelling-house, or in his or her own shop, in any part of the town of Rochdale.

3. The respondent did, on the 30th Jan. 1884, expose for sale and actually sold to a person in Milnrow-road, at a place called Hyde-park, situate in the present municipal and parliamentary borough of Rochdale, a quantity of potatoes; but prior to the said Act of 1872 the said place was outside the then municipal borough of Rochdale.

4. Such sale was made in the road leading from Rochdale to Milnrow and other places (and until lately a turnpike road) from a small cart of the respondent passing along the road and stopping only for occasional sales to the residents of the neighbourhood, and was not made in the dwelling-house or shop of the respondent; but no obstruction was caused in the street or roadway by such sale.

5. There is no definition in the Act, 3 Geo. 4, c. lviii., of the limits of the "town of Rochdale," nor has any subsequent Act, local to Rochdale, defined what shall be the meaning of the expression "town of Rochdale," as used in the said Act of 3 Geo. 4, for the purposes thereof; but since the passing of such Act the town of Rochdale has much increased and extended, and is now, and for many years past has been, a municipal and parliamentary borough, and the boundaries of such borough have, by various Acts of Parliament and by Royal Charter (dated the 9th Sept. 1856), been from time to time extended and defined; the said borough, as now existing, having been constituted by the Rochdale Improvement Act 1872, intituled "An Act for extending the boundaries of the town and borough of Rochdale, for defining and extending the powers of the corporation in relation to the improvement and management of streets in the borough, and to police and other matters of local government, and to gas and water supply, and to the cemetery and to markets, and for other purposes," and which Act, after reciting, amongst other things, as follows:

And whereas it is expedient to extend the boundaries of the town and borough of Rochdale, as defined by the Royal Charter, so that they shall be co-extensive with the boundaries of the parliamentary borough of Rochdale as specified and described in the Boundary Act 1868, and for such purposes to alter and amend the Royal Charter accordingly; and whereas it is expedient to empower the said corporation, as constituted by this Act, to purchase the undertaking of the market proprietors, under the Market Act of 1822, and to purchase and extinguish the rights, if any, of all persons to hold markets and fairs now existing, and to make regulations for the holding of markets and fairs within the extended borough,

contains the following provisions:

Sect. 5. So much of the Royal Charter as is inconsistent with or contrary to the provisions of this Act shall be repealed, but in all other respects the said charter is hereby confirmed.

Sect. 8. From and after the passing of this Act the borough shall be and consist of the district comprised within the boundaries of the parliamentary borough of Rochdale, as defined in the Boundary Act 1868; and the provisions of this Act, of the Municipal Corporation Acts, of the Act of 1853 (the Rochdale Improvement Act 1853, 16 & 17 Vict. c. cxxx.) as amended by the Provisional Order of 1869, of the Royal Charter, of the Water Act of 1847 (10 & 11 Vict. c. cxxvi.), and the Water Act of 1866 (29 & 30 Vict. c. clii.), of the Provisional Order of 1869, of the Elementary Education Act 1870 (33 & 34 Vict. c. 75), and of all other Acts at present applying to and in force in and in relation to the existing town and borough, shall, so far as the same are applicable, apply to and be in force in and in relation to the borough.

Sect. 81. By this section the Markets and Fairs Clauses Act 1847 (10 & 11 Vict. c. 14) is, for

the purposes of this part of this Act (except where expressly varied), incorporated with this Act.

Sect. 82. By this section the corporation of Rochdale are empowered to purchase and the trustees of the Rochdale New Market Place under the Market Act of 1822, are empowered to sell to the corporation the market and undertaking of the market proprietors; and it is provided that, upon the completion of such sale, the said market and undertaking and all the incidents and adjuncts thereof shall, subject to the provisions of this Act and to the obligations, debts, and liabilities of the undertaking, be absolutely vested in and be used, exercised, and enjoyed by the corporation.

6. Hyde-park, where the sale took place, is an aggregation of about a dozen houses on and near to the side of the Milnrow-road. It is situate a little over a mile from the said old market-place and new market-place, and within the boundaries of the borough, as defined by sect. 8 of the Rochdale Improvement Act 1872. There is not a continuous line of buildings from the markets to Hyde-park. In one part of the road for a distance of about 150 yards lying between the said market-place and Hyde-park, and next to the latter place, there are no buildings on either side of the said road, the land on both sides being green fields; and there are other parts of the road at shorter lengths, near to the length first mentioned, where there are one or more houses, but they are detached, and do not form a continuous line of buildings.

It was contended on the part of the appellant that, notwithstanding the distance of Hyde-park from the said market-place, and that there are breaks in the line of buildings between the said market-place and Hyde-park, as before stated, the term "town of Rochdale," used in the said Act (3 Geo. 4, c. lviii.), comprises the said place called "Hyde-park" for all purposes of the said Act. And further that, for all such purposes, the said term "town of Rochdale," used in the said Act, comprises the whole of the municipal borough of Rochdale, as constituted by the Rochdale Improvement Act 1872, and that, under the said 8th section of the said Rochdale Improvement Act 1872, the provisions of the said last-named Act applied to the said Market Act of 1822 (3 Geo. 4, c. lviii.).

It was contended on the part of the respondent that the expression "town of Rochdale," as used in the said Act (3 Geo. 4, c. lviii.), referred only to an aggregate of buildings erected in a continuous line from the said market-place, and that the place, to form and be considered as part of the town within the meaning of the said Market Act, should be so connected with or adjacent or adjoining to other buildings and places forming what is considered locally to be the town of Rochdale as to be, to all appearance and in fact, part and parcel of the town; and that it was a question of fact for the justices to decide, looking at all the circumstances and the position and surroundings of the locality where the offence was alleged to have been committed, whether the place called "Hyde-park" was within the town of Rochdale within the meaning of the said Market Act; and in support of this contention the respondent relied upon the case of *Collier* v. *Worth* (1 Ex. Div. 464). And he further contended that the extension of the borough for municipal purposes did not extend or give a wider or more extensive meaning to the expression "town of Rochdale" for the purposes of the said Market Act of 1822, and so as to extend the privileges or rights of the market proprietors to the extended borough; and that, even if the Rochdale Improvement Act 1872 extended these privileges and rights so as to be co-extensive with the extended borough, such extension was only in favour and for the benefit of the Rochdale corporation, and only to be exercised by them when and so soon as they should purchase and become the owners of the said market rights and privileges now vested in the Rochdale Market Company; and further, that the Act of 1872 did not extend all or any of the provisions of any private Acts or Act relating to the town of Rochdale to the extended borough, but only applied all municipal and general Acts which related to and governed the old borough in sanitary and local government matters to the extended borough; and so far only as such Acts were not inconsistent with the Act of 1872.

In support of these contentions the respondent relied upon the following recital, contained in the Act of 1872: "And whereas it is expedient to empower the said corporation to purchase and extinguish the rights (if any) of all persons to hold markets and fairs now existing, and to make regulations for the holding of markets and fairs within the extended borough;" and also upon sect. 8 of the Act 1872 hereinbefore set forth.

The majority of the justices were of opinion that the respondent was right in his contention, and accordingly they dismissed the information against him; and they crave the opinion of this court on the following questions of law:

(1.) Whether, under the provisions of the Rochdale Improvement Act 1872, the provisions of the Market Act (3 Geo. 4, c. lviii.) apply to and are in force within the boundaries of the borough as extended by sect. 8 of the said Rochdale Improvement Act 1872, so as to make the words "town of Rochdale" used in the said Act of 3 Geo. 4, c. lviii. comprise, for all the purposes of such Act, the whole of the municipal borough of Rochdale as constituted by the Rochdale Improvement Act 1872.

(2.) If not, whether, apart from the said Rochdale Improvement Act 1872, the words "town of Rochdale" used in the said Act, 3 Geo. 4, c. lviii., comprise the said place called Hyde-park for the purposes of such last-mentioned Act?

Charles, Q.C. (with whom were *Sutton* and *Danckwerts*) argued the case on behalf of the appellant.

Jelf, Q.C. (with him was *R. O. B. Lane*) argued *contra* for the respondent.

The following cases and statutes were cited and referred to in the course of the argument:

Collier v. *Worth*, 1 Ex. Div. 464; s. c. *nom. Collier* v. *North*, 35 L. T. Rep. N. S. 345;
Reg. v. *Cottle* 16 Q. B. Rep. 412; 20 L. J. 162, Mag. Cas.; 10 B. & S. 548;
The Commissioners of Milton-next-Sittingbourne v. *The Faversham District Highway Board*, 10 B. & S. 548, *n.*;
Elliott v. *The South Devon Railway Company*, 2 Ex. Rep. 725; 17 L. J. 262, Ex.;
The Rochdale Market Act 1822 (3 Geo. 4, c. lviii.), s. 42;

The Rochdale Improvement Act 1853 (16 & 17 Vict. c. ccxx.), s. 3;
The Rochdale Improvement Act 1872 (35 & 36 Vict. c. cxlix.), ss. 5, 8, 81, 82;
The Boundary Act 1868 (31 & 32 Vict. c. 46).

MATHEW, J.—I am of opinion that there ought to have been a conviction of the respondent in this case, inasmuch as I think an offence within the meaning of sect. 8 of the Market Act of 1822 (3 Geo. 4, c. lviii.) and of the Rochdale Improvement Act 1872 (35 & 36 Vict. c. cxlix.) was committed by him on the occasion and in the manner set forth in the case stated by the justices. The former of these two Acts (that of Geo. 4) beyond all doubt contemplated a growing town, and provided a penalty for an offence that might be committed within the area of the town existing at the time when the Act was passed. Nor can there be a doubt that it was intended by that Act (see sect. 42) that there should be within the town no rival market of any sort opposed to or in competition with the old and new markets therein mentioned, but that all sales of marketable commodities and provisions of all kinds should be held and be transacted within the limits of the old and new market places therein specified. Legislation of that kind, however, not unfrequently gives rise to questions as to what are the geographical limits of the particular town. Now by the Rochdale Improvement Act 1853 (16 & 17 Vict. c. ccxx.), s. 3, the limits of the town of Rochdale are defined, and by the second of the two Acts, which I referred to above, viz., the Rochdale Improvement Act 1872, those limits are further extended, and by sect. 8 of that Act it is enacted that "From and after the passing of this Act the borough of Rochdale shall be and consist of the district comprised within the boundaries of the parliamentary borough of Rochdale, as defined in the Boundary Act 1868." Several statutes are then specified in that section that are to be applicable to the new and extended area, but the statute now in question, viz., the 3 Geo. 4, c. lviii., is not expressly named; but then it is evident that the words of that section, *all other Acts*, may apply equally and as well to statutes that are not before particularly and specifically enumerated as to those that are. The object and intention of the Act is obvious, and there is no reason why the Act of Geo. 4 should not be held to apply to and to be in force within the new boundaries described in the Act of 1872. Another fact which seems to me to favour this construction of the Act of 1872 is, that a later section of that Act (sect. 82) contemplates the acquiring by the corporation of the rights to the market proper, and that when these rights are acquired by the corporation the corporation will be able to exercise their rights over the whole area of the municipal limits. Now, if the corporation acquired the power of exercising these rights only up to and within the geographical limits of the town as defined by the old Act of 1822, there would be a sort of "no man's land" between the municipal boundaries and the parliamentary boundaries within which locality the corporation would have no power to exercise the rights which they had so acquired, for the simple reason—if such were the case which I do not think it is—that the Act of 1872 did not apply to the earlier Act of 1822 dealing with the market regulations. There was, I think, no such intention in the Act, and I am unable to arrive at any other conclusion than that the magistrates were wrong in declining to convict the respondents.

SMITH, J.—I entirely concur. The charge against the respondent of selling a quantity of potatoes in a certain street within the town of Rochdale, but not being in the old or new market-place in the borough of Rochdale, was dismissed by the magistrates upon the grounds stated by them in the case; and the question that arises for our determination upon the case as stated by them is, whether, under the provisions of the Rochdale Improvement Act 1872, the provisions of the Rochdale Market Act 1822 apply to and are in force within the boundaries of the borough of Rochdale, as extended by sect. 8 of the Act of 1872, so as to make the words "town of Rochdale," in the Act of Geo. 4, comprise for all the purposes of that Act the whole of the municipal borough of Rochdale, as constituted by the said Improvement Act of 1872; and if not, whether, apart from the Act of 1872, the words "town of Rochdale," in the Act of Geo. 4, comprise the said place called "Hyde-park" for the purposes of such last-mentioned Act. Now, as my brother Mathew has pointed out, and as was decided in the case of *Collier* v. *Worth* (*ubi sup.*), the expression "town of Rochdale," as used in the Act of Geo. 4, did not mean or refer simply and merely to the town as it existed in 1822 at the time of the passing of that Act, but it meant and was intended to include the town of Rochdale as that town should increase and extend in coming years. That that is so is quite evident from the legislation subsequent to the Act of Geo. 4. In 1853, by the Rochdale Improvement Act of that year, a radius of three-quarters of a mile is given for the town, and in 1872 came the second Rochdale Improvement Act, the title or heading of which is "An Act for extending the boundaries of the town and borough of Rochdale," &c., by which Act it is perfectly clear that the borough was extended to a point outside the spot where the respondent was selling potatoes on the occasion in question. We have then to decide whether, in so selling, he was guilty of any offence under sect. 42 of the before-mentioned Act of Geo. 4. Now that Act was undoubtedly intended to apply to a growing and increasing town; and by sect. 8 of the Improvement Act of 1872 it is enacted that "from and after the passing of this Act the borough shall be and consist of the district comprised within the boundaries of the parliamentary borough of Rochdale as defined in the Boundary Act 1868." Now, even if the section had stopped there, I think the argument for the respondent would have failed; but the section proceeds, "And the provisions of this Act, of the Municipal Corporation Acts, of the Act of 1853, as amended by the Provisional Order of 1869, of the Royal Charter, of the Water Act of 1847, and the Water Act of 1866, of the Provisional Order of 1869, of the Elementary Education Act of 1870, and," it goes on, "*of all other Acts* at present applying to and in force in and in relation to the existing town and borough, shall, so far as the same are applicable, apply to and be in force in and in relation to the borough." Mr. Jelf says that that section does not include the Act of Geo. 4. But if that be so, how are the words "all other Acts" to be read? Mr. Jelf says, first of all, that the

words "all other Acts" mean and are to be read "all other Acts" *ejusdem generis* with the Acts that are specifically mentioned. How, then, are we to read or construe the words *ejusdem generis* with the Royal Charter, the Water Acts, and the Education Act? *Ejusdem generis* with which of them, I should like to know! In my judgment they are and relate to three totally different things. As far, therefore, as I am at present advised, it is impossible to construe this Act in the way in which Mr. Jelf wishes us to do. I have no doubt that it was intended that the words "all other Acts" should apply to the borough of Rochdale and, that borough being now extended to the parliamentary boundary, there can be no question but that the respondent, in selling the potatoes as stated in the case, was committing an offence within the meaning of the Act under which he was summoned.

Judgment for the appellant.

Solicitors for the appellant, *Gregory, Rowcliffe, Rowcliffe, Rawle,* and *Johnston,* for *Killmister* and *Norbury,* Macclesfield.

Solicitors for the respondent, *Brownlow* and *Howe,* for *J. T. Worth,* Rochdale.

Oct. 30 *and Nov.* 5, 1885.

(Before COLERIDGE, C.J., GROVE and CAVE, JJ.)

WATSON *v.* BLACK; FRISBY *v.* BLACK. (*a*)

Parliament—County vote—Equitable interest in real property—Receipts of rents and profits—Proprietors of shares in London Stock Exchange—6 Vict. c. 18, *s.* 74.

Where the members of a company or association incorporated or unincorporated, vest their real property in trustees free from any equitable interest in the individual members in the land itself, and have an interest only in the profits of the concern, they have no such equitable interest in the land as to entitle them to vote as freeholders for a county.

Baxter *v.* Brown (7 *M. & G.* 198) *discussed.*

THIS was a case stated by one of the revising barristers for the county of Middlesex. The case, in which Charles William Watson was appellant, and Thomas Fraser Black was respondent, was as follows:—

(1) At a court held by me, one of the barristers appointed to revise the list of voters for the county of Middlesex, Frederick Henry Matthews, 40, St. Joseph's-road, Hornsey, duly objected to the name of Charles William Watson being retained on the list of voters for the parish of St. Bartholomew by the Exchange, in the Hornsey division of the county of Middlesex.

(2) The name stood on the copy of the register relating to the parish of St. Bartholomew, as follows:—

Christian Name.			
Watson, William.	Charles	2, Crown-court, Threadneedle-street, E.C.	Share in freehold tenements, Stock Exchange.

3. The following facts were admitted or established by the evidence:

4. The said Charles William Watson was one of 1040 proprietors in the undertaking called the Stock Exchange, situate in the said parish of Saint Bartholomew by the Exchange, in the City of London.

5. The name of the said Charles William Watson appears as an existing voter on the list of voters in force at the time of the passing of the Representation of the People Act 1884.

6. The objects of the said undertaking, as defined in the hereinafter-mentioned indenture of the 31st Dec. 1875, are the maintenance of the buildings called the Stock Exchange, belonging to the said proprietors, with its appurtenances, and the erection and maintenance of any other buildings in the City of London, and providing the same with suitable furniture, fittings, and accommodation, and the employing of the said buildings already erected or to be erected for the transacting of buying and selling English and foreign stocks and shares in public and other companies, with, under, and subject to the powers and regulations of the said deed and the rules and regulations to be made pursuant thereto.

7. The said undertaking was first constituted under the provisions of a deed of settlement, dated the 27th March 1802, a printed copy of which, marked "A," is annexed to this case, and is to be taken and read as part thereof.

8. By an indenture made the 31st Dec. 1875, under powers reserved in sect. 35 of the said deed of the 27th March 1802, between the trustees and managers at the date of the said indenture of the 31st Dec. 1875 and the then proprietors (including the predecessor in title of the said Charles William Watson), the said deed of the 27th March 1802, was annulled, except as appears by the said deed of the 31st Dec. 1875.

9. Except so far as the said deed of the 27th March 1802 may subsist and be in force, the Stock Exchange is governed and regulated by the said deed of the 31st Dec. 1875.

10. Forms of certificate and transfer of shares, marked "C" and "D" respectively in the said undertaking, are annexed hereto.

11. The land upon which the Stock Exchange and its appurtenances are built is freehold.

12. The income of the Stock Exchange is made up almost entirely of fees paid for admission to the Stock Exchange, and charges for the use of desks, sittings, drawers, and other exceptional accommodation, and for the use of boxes and safes in the strong room, and as to about one-fiftieth of the said income of dividends or interest on investments and other securities.

13. The gross annual value of the lands and buildings was more than sufficient to yield to each proprietor the clear yearly value of 40*s.* over and above all charges. It was stated and admitted at the said court that the clear annual value of the said land and buildings was of an amount which, when divided by the number of proprietors, gave a sum of not less than 10*l.* for every such proprietor. But since the said court was held and my decision was given, I have been informed by the appellant that the proprietors whose names in the schedule are marked with a † do not receive, and are not entitled to, as much as 10*l.* per year from the said income, but are entitled to more than 40*s.*, viz., sums of 4*l.* or upwards, but less than 10*l.*

14. The undertaking of the Stock Exchange

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

has never been registered as a company under any of the Companies Acts, or at all, nor has it been incorporated.

15. The names of other persons, whose names and qualifications are set out in the schedule hereto attached, were objected to in similar circumstances.

16. It was objected that the name of Charles William Watson was not entitled to be retained on the register on the following grounds: (*a*) That the share or interests of any proprietor of the Stock Exchange is not an interest in real estate, or, at any rate, not such an interest as to entitle him to the franchise; (*b*) that if the share of a proprietor is an interest in real estate, he is entitled to be on the list of the borough voters for the city of London as a 10*l.* occupier, and is therefore precluded from being on the list of voters for a county division; (*c*) that the undertaking ought to have been registered under the Companies Acts, and that, not having been so registered, it was an illegal association.

17. The appellant disputed all the above propositions.

18. I decided that the share or interest of a proprietor was not an interest in real estate—at any rate, not such an interest as to entitle him to the franchise; that he was not entitled to be on the list of borough voters for the city of London as a 10*l.* occupier; that the undertaking need not be registered under the Companies Acts; and that the name of the said Charles William Watson be expunged from the register.

19. I accordingly expunged the names of the said Charles William Watson and of the said other persons in the said schedule. Due notice of appeal from my decision was given, and I ordered the appeals in all the before-mentioned cases to be consolidated.

20. The register was to be amended by inserting the names of Charles William Watson and the said other persons in the said list, if the court should be of opinion that my decision to expunge the said names was wrong.

The case in which George Frisby was appellant was similar to the one above set forth, with the following exceptions:

(3.) The said George Frisby was one of 1040 proprietors in the undertaking called the Stock Exchange, situate in the said parish of St. Bartholomew by the Exchange in the City of London.

(6.) By indenture made the 31st Dec. 1875, under powers reserved in sect. 35 of the said deed of the 27th March 1802, and between the trustees and managers at the date of the said indenture of the 31st Dec. 1875 and the then proprietors (including the predecessor in title of the claimant), the said deed of the 27th March 1802 was annulled, except as appears by the said deed of the 31st Dec. 1875.

(15.) It was objected that the claim of the said George Frisby should be disallowed on the following grounds: (*a*) That the share or interest of a proprietor of the Stock Exchange is not an interest in real estate—or, at any rate, not such an interest as to entitle him to the franchise; (*b*) that the said proprietors of the Stock Exchange do not occupy the Stock Exchange as partners *bonâ fide* engaged in carrying on trade or business thereon, and that, except in the case of proprietors deriving their interest by descent, succession, marriage, marriage settlement, or will, new claimants were not entitled to be registered as voters in respect of their share or interest in the Stock Exchange.

The management of the undertaking known as the Stock Exchange is regulated by an indenture, dated the 31st Dec. 1875, and made between the trustees and managers at the date of the said indenture and the then proprietors (including the predecessors in title of both appellants). The following are provisions of the said deed which are material to the points raised in the present case:

The purposes of the undertaking are the maintenance of the building called the Stock Exchange, in the city of London, with its appurtenances, and the erection and maintenance (either on lands already vested in the trustees and managers, or to be acquired as provided by these presents) of any other buildings in the city of London, and providing the same with suitable furniture, fittings, and accommodation; and the employing the said buildings already erected, or to be erected, for the transacting of buying and selling English and foreign stocks and shares in public and other companies as the said building, called the Stock Exchange, has heretofore been used, but with, under, and subject to the further powers and modifications introduced by, and the regulations of, these presents, and all rules and regulations to be made pursuant to the provisions in that behalf of these presents.

The capital or stock of the undertaking shall consist of the hereditaments and premises described in the first schedule hereto, and all other the property, real and personal, vested in the said persons parties hereto of the first part, in trust for the uses and purposes of the undertaking, and the same shall be of the nominal value of 240,000*l.* divided into 20,000 shares, on each of which the sum of 12*l.* is credited as, and deemed to be, paid up. Every share shall be distinguished by a denoting number.

The shares shall be transferable and transmissible only in the manner and subject to the conditions hereinafter expressed.

Every share in the undertaking shall be transmissible as personal estate. The transfer of such shares must be in writing, and registered in a book called the "register of transfers" in which every transfer must be entered; and no transfer shall be registered purporting to transfer any share or shares to more than four persons.

No transfer of a share shall be made to any person who is not at the date thereof a member.

The shares of proprietors ceasing to be members, or dying, or becoming bankrupt or lunatic, are to be transferred within one year, and in default of such transfer within the year the trustees and managers, after notice to the proper parties, may purchase or sell such shares.

The trustees and managers are to have the right of pre-emption as to any shares which the proprietors or their representatives are desirous of selling; but subject to such pre-emption the proprietors may sell their shares.

In particular the trustees and managers shall perform and exercise the following duties and powers:

(*a*) They shall appoint, and may from time to time remove, a secretary or secretaries, and other officers and servants, and shall fix the amount of their remuneration. They may pay a salary to the secretary of the committee for general purposes. They may fix a remuneration for themselves and the auditors; and may pay pensions or retiring allowances to any of their officers or servants.

(*b*) They shall also pay out of the moneys and funds of the undertaking all rents, rates, taxes, premiums for insurance, costs of maintenance and repairs, and other outgoings in respect of their buildings, and all the expenses of lighting and warming the rooms used, and all other charges and expenses necessary for, or incident to, the management and well ordering of the Stock Exchange.

(*d*) They shall keep an account of the moneys, effects, and securities belonging to the proprietors, and of all receipts and payments. They shall also cause a general balance-sheet to be made up, stated and settled on every

25th March for the previous twelve months, and submit the same to the auditors, and recommend to the general meeting a dividend to be declared out of the profits appearing on such balance-sheet.

(*f*) They may purchase other property for the purposes of the undertaking out of the moneys or funds of the undertaking;

(*h*) And may borrow money on security of a mortgage of any part of the property of the undertaking.

(*k*) They shall settle, fix, and may from time to time vary, the entrance fee or fees (if any) and annual subscriptions at which members and their clerks shall respectively be admitted to attend and transact business at the Stock Exchange, or any particular and specified part thereof.

(*l*) They shall fix, and may from time to time vary, the charges to be made for the use of desks, sittings, drawers, and other exceptional accommodation to be permitted to members, and for the use of boxes and safes in the strong rooms of the Stock Exchange.

(*m*) They may make bye-laws, rules, and other regulations for the better management and conducting the affairs and concerns of the undertaking.

All moneys to be received by the trustees and managers on account, or for the use of the undertaking, are to be paid into the Stock Exchange bankers; and all moneys not required for immediate use are to be invested in such securities, or otherwise employed, as the trustees and managers shall think fit.

No person, whether a proprietor or not, other than such persons as shall under the provisions hereinafter contained have been admitted as members by the committee for general purposes, and their clerks, shall be permitted to enter, attend, or frequent the Stock Exchange, or to transact therein the business of a stock-broker or jobber.

No part of the profits of any year shall be applied to the purchase of any additional lands, or the erection of any buildings, or to any other purpose, the expenses of which, in the opinion of the trustees and managers, ought to be provided out of, or charged against, capital. A general meeting may from time to time resolve that any part of the profits of any year, not exceeding 10 per cent. thereof, shall be set aside and appropriated for the purpose of forming a reserve fund, which shall be applicable to the repairs, whether ordinary or extraordinary, and maintenance of any buildings belonging to the undertaking.

All dividends or shares shall be declared by a general meeting, and shall be made only out of the net profits of the undertaking.

The net profits of the undertaking shall be the sum declared to be such by the trustees and managers.

No larger dividend shall be declared than is recommended by the trustees and managers, but a general meeting may, if it think fit, declare a smaller dividend.

All dividends shall be payable to the persons who shall be registered as proprietors on the day on which the resolution declaring such dividend shall be passed, and shall be paid within thirty days after the declaration thereof.

Whenever any proprietor is in debt to the trustees and managers on behalf of the undertaking, all dividends payable to him, or a sufficient part thereof may be applied by the trustees and managers in or towards satisfaction of the debt.

Horace Davey, Q.C. (*Mattinson* with him) for the appellants.—The appellants have a freehold interest in the land and buildings of the Stock Exchange in the city of London. The claimant Watson was a proprietor and on the register at the time of the passing of the Representation of the People Act 1884; and the claimant Frisby had become a proprietor by purchase since the passing of that Act; but in other respects the two cases were similar. The deed of the 31st Dec. 1875 contains regulations governing and ordering the undertaking of the Stock Exchange. The proprietors were to be holders of shares, and there were managers and trustees who governed and managed the undertaking for the benefit of the proprietors. By clause 16 of the deed the proprietors' shares were transmissible as personal estate. [CAVE, J.—Can that be granted by mere stipulation between the parties?] Yes; as a mere provision for the mode of transmission, but not as altering the nature or devolution of real property. The proprietors are the beneficial owners of this property, and the trustees and managers were only to deal with it on their behalf and as their agents. The Stock Exchange has never been incorporated as a company. The 1040 proprietors are the beneficial owners of the property, and by consent and contract have agreed that their property should be vested in trustees for the purpose of carrying on the business of the Stock Exchange, from which they derive a profit. Their exact legal position might be doubtful as to whether they were partners or not; but there is no doubt that they do derive income from the use of their property by the trustees and managers under regulations made by themselves for such purposes. The profits so derived may vary from time to time, and the proprietors have agreed that more shall not be divided among them than the trustees and managers think proper; but that was only a mere matter of agreement between them, and might be put an end to by the proprietors—which they might do, for the Stock Exchange undertaking has never been registered and is not a joint-stock company. The agreement between the proprietors as to the division of the profits does not alter the nature of the shares; it does not convert the realty into personalty. In truth they are the equitable and beneficial owners of this property, subject to conventions and regulations established by mutual consent. They might put an end to the undertaking by proper resolutions to dissolve themselves and use their property in other ways, which no doubt they could not do if they were an ordinary joint-stock company. The interest of the proprietors is admittedly not legal, but if it is equitable that is enough:

Baxter v. *Brown*, 7 M. & G. 198.

But it has been contended that case has been overruled by *Bennett* v. *Blain* (15 C. B. N. S. 518), on which the argument was founded that what was personalty in equity must be so treated for purposes of registration; that in the latter case the company was a registered joint-stock company, whereas in the earlier case there was only an association of persons as in the present instance. Real estate held for partnership purposes was always in equity held to be personalty, and the provision in the present deed that the shares should go as personalty meant no more than that. Much reliance against the present contention was placed on the cases of *Freeman* v. *Gainsford* (18 C. B. N. S. 185; L. Rep. 1 C. P. 209) and *Watson* v. *Spratley* (10 Ex. 222; 2 C. L. R. 1434); but they are distinguishable on the ground that they dealt with registered companies and not voluntary societies. The second case, that of *Frisby* v. *Black*, involves the same point as Watson's case, but is that of a new claimant, as to which the 4th section of the Representation of the People Act 1884 applied, providing that only one of several joint owners was entitled to be registered unless they derived their interest in their real estate by descent or succession, or where they occupy the land and are engaged as

partners carrying on trade or business. The revising barrister disallowed the claims of the new claimants on the ground that they did not occupy the land and carry on business thereon. It is contended that both those who are already on the register are entitled to be kept on, and the new claimants are entitled to be put on.

Sir *H. James*, Q.C. (*Harry Greenwood* with him) for the respondent.—The claimant is not entitled to have his name retained on the register. The claim is made as being one founded on an equitable freehold under 6 Vict. c. 18, s. 74, which disqualifies a trustee from obtaining a vote in respect of the trust property unless in actual occupation of it, but confers the franchise on the *cestui que trust* who is in the receipt of the rent and profits; but here the claimant is not in the receipt of the rents and profits; the trustees of the Stock Exchange receive the rents and profits, and divide them among the proprietors. Clauses 21 and 22 and 24 of the deed of 1875 show that the proprietors of this undertaking have no real freehold interest in the land and tenements belonging to them. [GROVE, J.—Mr. Davey gives the go-by to the deed, and suggests that the proprietors were already possessed of the property, and were parties to the deed only as a voluntary arrangement which might be altered.] Yes; but the deed must be taken into consideration, and by it the proprietors have divested themselves both of their legal and equitable interest in the property. The so-called proprietors are mere holders of shares, and nothing more. The trustees and managers divide the profits and regulate the dividends as they think right, consequently the amount which they allot or divide does not represent the amount received as rents and profits, but only the amount divided by them among the proprietors; indeed they might divide nothing and invest the whole. The proprietors have no other rights except those under the deed of 1875; they do not hold any estate of inheritance, but only something of which they can be deprived; they cannot dispose of their shares to any and every body—such transfer is subject to the decision of the managing committee. No doubt their property consists of both freehold and leasehold property, but there is nothing like rents and profits receivable in respect of such property. There may not be any incorporation of this undertaking; the same result was arrived at in reference to the persons who are shareholders. The substance of the matter must be looked at; it is immaterial whether there is an incorporation or not, if in fact it was such an undertaking or body that the members do not individually become entitled to the rents and profits, but only to the residue of a fund which might be made out of the rents and profits. If this body had come into existence since the Companies Act 1862 it would have required registration; but it has all the incidents and ingredients of a body requiring registration. As regards the case of *Baxter* v. *Brown* (*ubi sup.*), relied on by the other side, it is not only distinguishable on the ground of its facts, but it was said there were no trusts inconsistent with an equitable freehold interest in the shareholders; here there are such trusts. But it has also been overruled in terms if not directly, and the weight of authority is against it; thus in *Bennett* v. *Blain* (*ubi sup.*), where the facts were like those of the present case, the members of a joint-stock company, the real estate of which was vested in trustees and the management in a committee, had no such equitable interest in land as entitled them to be put on the register. It was also questioned by Lord St. Leonards in *Myers* v. *Perigal* (2 De G. M. & G. 599; 22 L. J. 434, Ch.) The principle laid down by the later cases is that shareholders in such undertakings have only a share in the profits of the adventure, and not a freehold interest in land, so as to entitle them to vote. Here there is no actual receipt of rents and profits by the proprietors.

H. Davey, Q.C. in reply.—Proprietors and members of the Stock Exchange are to be distinguished; the former are, it is submitted, equitably entitled to the freehold. Much stress has been laid on the large powers of management vested in the trustees; but they are subject to the control of the proprietors, who are not the less entitled to the rents and profits, however these might be dealt with or applied if for their benefit and under their own management, and so the proprietors can rightly claim a freehold interest in their realty. The cases cited on the other side are to be distinguished on the ground of incorporation of the companies. Lord St. Leonards' remarks in *Myers* v. *Perigal* (*ubi sup.*) about *Baxter* v. *Brown* (*ubi sup.*) have been pressed too far; for the latter might be still a good decision as to the franchise law, though not as to the law of mortmain which was the subject-matter of the latter case. If a number of persons purchase real estate and vest it in trustees for their own purposes, they are not less the equitable owners of it because they vest it in the trustees, and give them large powers of management over it for their own purposes.

Cur. adv. vult.

Nov. 5.—The judgment of the court was delivered by

CAVE, J.—The question in this case, is whether the appellants have an equitable interest in land, and are in the receipt of the rents and profits thereof within the meaning of sect. 74 of the 6 Vict. c. 18. In our judgment, it is too clear for serious argument to the contrary that the shareholders in an unincorporated company may by an arrangement among themselves divest themselves of all interest in the real property of the company while retaining an interest in the profits of the concern. That proposition is distinctly laid down in *Bennett* v. *Blain* (33 L. J. 63, C. P.), and is supported by the earlier decisions of *Bulmer* v. *Norris* (9 C. B. N. S. 19) *Watson* v. *Spratley* (10 Ex. 222), and *Myers* v. *Perigal* (2 De G. M. & G. 622), and by the subsequent case of *Freeman* v. *Gainsford* (L. Rep. 1 C. P. 129; 34 L. J. 95, C. P.) It was admitted that this was so where the company was incorporated; but Mr. Davey sought to draw a distinction between corporations and companies registered under an Act of Parliament and mere partnerships formed under no Act of Parliament. It is clear, however, that the judgment in *Bennett* v. *Blain* (*ubi sup.*) does not proceed on any such distinction. A number of persons may agree among themselves that lands shall be bought and vested in trustees upon trusts which shall give the members no equitable interest in those lands, but only an interest in profits to be made by the use of them. If they so agree, then, so long as that

agreement lasts, the members have no equitable interest in the land, but only an interest of the nature of personalty in the profits of the undertaking. The case of *Baxter* v. *Brown* (7 M. & G. 198) was relied on. That case has been sometimes doubted and sometimes distinguished. If the court there meant to lay down the principle that members of an association cannot by agreement among themselves divest themselves of any equitable interest in lands purchased for the purposes of the association, and cannot vest those lands in trustees free from such equitable interest, that case is opposed to a cloud of authorities and is not law. If, however, the court there only meant to decide that in that case the parties had not agreed to divest themselves of equitable interests the case is distinguishable. In the case now under consideration it is clear that the members meant to vest the freeholds in the trustees free from any equitable interest in the individual members in the land itself, and to give to the members of the association an interest in the profits of the concern only. There is nothing contrary to law in such an arrangement, but one consequence of it is that the individual members have no equitable interest in the freeholds vested in the trustees, and consequently the decision of the revising barrister was correct, and must be affirmed. *Appeal dismissed.*

Solicitors for the appellants, *Travers, Smith,* and *Braithwaite.*

Solicitors for the respondent, *Corbin* and *Greener.*

Friday, Nov. 6, 1885.

(Before DAY and SMITH, JJ.)

THE GUARDIANS OF THE DORCHESTER UNION (apps.) *v.* THE GUARDIANS OF THE WEYMOUTH UNION (resps.). (*a*)

Poor law—Residence settlement—For "term of three years"—Without receipt of relief "in each of those years"—Meaning of those expressions—Irremovability—Receipt of relief by broken periods of a year—Divided Parishes and Poor Law Amendment Act 1876 (39 *&* 40 *Vict. c.* 61), *s.* 34*—Construction of—*28 *&* 29 *Vict. c.* 79.

No settlement by residence under sect. 34 *of the Divided Parishes and Poor Law Amendment Act* 1876 (39 *&* 40 *Vict. c.* 61) *can be acquired unless the residence has been for an unbroken term of three consecutive years, without the receipt by the pauper resident in any portion of either of such three years of such parochial relief as would confer on him the status of irremovability under the Poor Law Amendment Act of* 1846 (9 *&* 10 *Vict. c.* 66), *s.* 1, *as altered with regard to the time necessary to confer such status by the* 28 *&* 29 *Vict. c.* 79.

THIS was a case stated pursuant to 12 & 13 Vict. c. 45, by order of Chitty, J., dated 31st Dec. 1884.

1. On the 31st Oct. 1884 two of Her Majesty's justices of the peace of and acting in and for the county of Dorset, upon the complaint of the respondents, ordered that Mary Jane Green, aged forty years; Joseph Green, aged fifteen years; Mary Jane Green, aged ten years; Emily Green, aged seven years; Charlotte Green, aged seven years; Charles Green aged four years; and George Green, aged two years, should be removed from the respondent union to the appellant union.

2. Mary Jane Green the elder was married to George Green on the 26th July 1863. The other paupers are the children of their marriage.

3. The said George Green was born in the year 1810 in the parish of Toller Porcorum, in the appellant union.

4. On the 6th April 1875 the said George Green went to reside in the parish of Overmoigne, in the respondent union, and continued to reside there until his death on the 25th Dec. 1881.

5. The said George Green during his said residence in the parish of Overmoigne received parish relief for the following periods only, viz.:

In 1876, during the month of June, medical relief.

During the week ending the 3rd Dec. he was supplied with a truss.

1877. During the week ending the 29th Sept. he was supplied with a truss.

1879. During the week ending the 30th May he was given a coffin.

1880. From the week ending the 24th Jan. till his death he received relief.

6. The pauper Joseph was born in the parish of Exmouth, in the Axminster Union; the pauper Mary Jane the younger in the parish of Compton Abbis in the appellant union, and the four paupers, Emily, Charlotte, Charles, and George were born in the parish of Overmoigne in the respondent union.

7. The settlement of the pauper Mary Jane the elder is the settlement derived from her husband the said George Green.

8. After the death of the said George Green on the 25th Dec. 1881 the said Mary Jane Green the elder, Joseph Green, Mary Jane Green the younger, Emily Green, Charlotte Green, Charles Green, and George Green continued to reside in the said parish of Overmoigne, and would receive continuously parish relief therefrom until the week ending the 7th April 1883, when they went to reside in the appellant union, and there received continuous parish relief until the 6th April 1884, when they went to reside, and have since continued to reside, in the respondent union, receiving therefrom continuous relief.

The question for the opinion of the court is, whether, upon the facts stated, the said order was rightly made, or was wrongly, or in part wrongly, made, and whether the said order shall stand, or be quashed or varied.

The Poor Law Amendment Act of 1846 (9 & 10 Vict. c. 66), by sect. 1, enacts that:

No person shall be removed nor shall any warrant be granted for the removal of any person from any parish in which such person shall have resided for five years next before the application for the said warrant: Provided always, that the time during which such person shall be a prisoner in a prison, or shall be serving Her Majesty as a soldier, &c. . . . or reside as an in-pensioner in Greenwich or Chelsea Hospital, or shall be confined in a lunatic asylum . . . or as a patient in a hospital, or during which any such person shall receive relief from any parish, or shall be wholly or in part maintained by any rate or subscription raised in a parish in which such person does not reside, not being a *bonâ fide* charitable gift, shall, for all purposes, be excluded in the computation of time hereinbefore mentioned. . . . Provided always that, whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children shall

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

be removable whenever he or she is removable, and shall not be removable when he or she is not removable.

By the 24 & 25 Vict. c. 55 (1861), the five years mentioned in sect. 1 of the Act of 1846 was reduced to three years; and that time was again, by the 28 & 29 Vict. c. 79 (1865), altered and further reduced to one year.

By sect. 34 of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61) enacted that:

> Where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as should, in accordance with the several statutes in that behalf, render him irremovable, he shall be deemed to be settled therein, unless he shall acquire a settlement in some other parish by a like residence or otherwise: Provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed without such corroboration as the justices or court shall think sufficient.

E. U. Bullen for the appellant union.—The order of the justices in this case was wrong The five years' residence in a parish necessary to confer the status of irremovability on a pauper under sect. 1 of the 9 & 10 Vict. c. 68 has been altered and reduced by subsequent statutes: first of all, by 24 & 25 Vict. c. 55 to three years; and again by 28 & 29 Vict. c. 79 to one year. The proviso, however, in sect. 1 of the first-mentioned statute still remains intact; by that it is expressly enacted that the time during which the pauper shall (*inter alia*) "receive relief from any parish shall for all purposes be excluded in the computation of time hereinbefore mentioned." No doubt there has not been in the present case any period of three consecutive years in which no relief has been given. But it is submitted that the several detached periods, during which, in several of the years from the 6th April 1875 to the time of his death in Dec. 1881, he received relief from the respondent union, as stated in the case, must be deducted from the computation of time, which must therefore be calculated without reference to such periods. That this is so is clearly shown by the cases of

Reg. v. *The Inhabitants of Harrow-on-the-Hill*, 12 Q. B. Rep. 103; 17 L. J. 148, Mag. Cas.;
Reg. v. *The Inhabitants of Christchurch*, 12 Q. B. Rep. 149; 18 L. J. 28, Mag. Cas.;

the reasoning and arguments in the judgments in which cases are applicable here. The present statute (39 & 40 Vict. c. 61) refers back to the previous statutes by the words "in such manner and under such circumstances in each of such years," and the point is, what is the meaning and proper construction of those words. It is submitted that the pauper must have gone on residing in each of such years under such circumstances as would, under the decisions in the above-cited cases, have rendered him irremovable. If that be so, then, excluding the relief periods, and joining together the other portions of time during which he resided in the respondent union, there were three periods of one year in each of which aggregated three years he acquired the status of irremovability; and adding those three aggregated years together the three years' residence in the respondent parish, required by sect. 34 of the Act of 1876, was obtained, and a settlement acquired in that parish, thus rendering his widow and children irremovable.

E. Lumley, for the respondent union, *contra*.—The statutes conferring irremovability are entirely different from those which confer a settlement. A new mode of acquiring a settlement by residence was introduced by sect. 34 of the Act of 1876, viz., by residence "for a term of three years" under certain given conditions. The expression "term of three years" must have the usual and ordinary meaning given to it, viz., that it means and implies a series or number of full and complete years in consecutive order; and in each of those three years there must be the circumstances or condition of things in which, under the latest of the Acts relating to irremovability, the pauper would become irremovable; or, in other words, in each of these years he must have complied with the conditions and provisions of the statute. Now there was in this case no term of three consecutive years, in each of which the status of irremovability was or could have been acquired, nor even indeed three separate periods of twelve months each in which that was the case. The argument for the appellants appears to confuse the statutes conferring a settlement with those relating to irremovability, whereas they are quite distinct, and very different language is used in each. The statute in question here does not enact that a settlement is to be conferred by a status of irremovability, but that a settlement may be acquired by "residence for a term of three years" if the residence in each year of that term is such as would confer irremovability. According to the appellants' contention, a man living for thirty-six years in a parish, and passing eleven months in each year in the workhouse, might nevertheless, by putting the thirty-six odd months together, make up three years, and claim to have acquired a settlement. The cases cited *contra* were under an entirely different statute. The order of the justices was right and should be confirmed.

DAY, J.—In my opinion the order of the justices in this case was rightly made, for I think that the deceased man George Green had not at the time of his decease acquired a settlement in the respondent union. The question turns entirely on the proper construction of sect. 34 of the Act of 1876 (39 & 40 Vict. c. 61). [His Lordship here read the section.] I think the argument that has been addressed to us by the respondents' counsel with regard to the expression "term of three years" used in that section is right, and that those words mean a complete and unbroken period of three consecutive years. A "term of three years" cannot, I think, be got at without continuity, and each of the three continuous years must be complete and perfect in itself. At the date (1876) of the passing of the Act of Parliament now in question the period of residence required to confer the status of irremovability upon a pauper, which had been originally fixed at five years by the Act of 1846, had been subsequently reduced to three years, had been further reduced, and was then fixed by the 28 & 29 Vict. c. 79, at one year; and in the computation of that period of one year it was provided by the earlier Act of 1846 (9 & 10 Vict. c. 66, s. 1) that the time during which any such person should be in prison, or in a number of other places and positions therein specified, as well also as the time during which he should receive relief from any parish, should for all purposes be excluded. That

accounts for and explains why, in sect. 34, the expression "term of three years" is introduced. That section appears to me explicitly to require two things: first, the existence of a complete, continuous, and unbroken term of three consecutive years; and, secondly, that each year of the three must be complete and perfect in itself without anything occurring in it to affect the status of irremovability or to render it necessary to deduct or exclude, in making the necessary computation, any portion of the time. For these reasons I am of opinion that the order of the justices was right and must be confirmed, and that our judgment must be given for the respondent union.

SMITH, J.—I am entirely of the same opinion. The section which we have to consider in this case has nothing to do with conferring irremovability, but is one which simply confers a settlement under certain specified conditions. In my judgment the argument addressed to us by the appellants' counsel is untenable, and the construction of sect. 34, which he would have us adopt, is not the right one; whilst, on the other hand, I think that the construction that has been put by the respondents' counsel upon the expressions "term of three years" and "in each of such years" in that section is correct. The section does not say "for three years," but "for the term of three years," an expression of which every lawyer well knows the meaning. I think that, to acquire a settlement under that section, there must be not only a residence in the parish for three consecutive years, but also in each of those three years the residence must be such as would under the statutes relating to the particular subject which have been referred to in the course of the argument confer upon the pauper resident the status of irremovability. In this case neither of those conditions was fulfilled.

Judgment for the respondent union with costs.

Solicitors for the appellant union, *Macarthur, Charlton,* and *Smith,* for *A. H. Lock,* Dorchester.

Solicitors for the respondent union, *Pattison, Wigg,* and *Co.,* for *G. R. Welsford,* Weymouth.

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, Nov. 5, 1885.

(Before Lord ESHER, M.R., COTTON and BOWEN, L.JJ.)

FOSKETT (app.) *v.* KAUFMAN (resp.). (*a*)

Parliament—Registration — Successive occupation —Mistake in the list—Power of revising barrister to amend—6 & 7 Vict. c. 18, *s.* 40—41 *& 42 Vict. c.* 26, *ss.* 24, 28, *sub-sects.* 1, 13.

The overseers of a certain parliamentary election district made out a list upon which the name of F. appeared as entitled to the franchise. F.'s qualification was described as a "dwelling-house," and that dwelling-house was described as "No. 5, *Victoria-cottages." F. was objected to. At the holding of the revision court, F. attended and proved that, although he had not occupied the said dwelling-house for the necessary period of twelve months, yet that he had occupied that dwelling-house in immediate succession to another dwelling-house, so as to properly entitle him to the franchise. The revising barrister, with these facts before him, was asked to amend the list so as to make the qualification appearing therein correspond with the facts. The revising barrister held that he had no power to make such amendment, and struck the name of F. off the list:*

Held, that the revising barrister was right; that F., having taken no steps under sect. 24 *of* 41 *& 42 Vict. c.* 26, *to correct the mistake in the description of his qualification, there was no power in the revising barrister to amend the list.*

Bartlett *v.* Gibbs (5 *M. & G.* 81) *approved.*

Porrett *v.* Lord (42 *L. T. Rep. N. S.* 28; 5 *C. P. Div.* 65) *dissented from.*

THIS was an appeal from a decision of the Queen's Bench Division affirming a decision of the revising barrister for the borough of Tower Hamlets.

The material parts of the case stated were as follows:—

The name of the appellant, Henry Foskett, appeared in form E., for the hamlet of Mile End New Town, of the list of parliamentary voters, as the occupier of a dwelling-house, and the entry and description on the said list were as follows:

Name of Voter.	Place of Abode.	Nature of Qualification.	Name and Situation of Qualifying Property.
Foskett, Henry	5, Victoria-cottages.	Dwelling-house.	5, Victoria-cottages.

The respondent duly objected to the name of the appellant being retained on the list of voters for the said division of the said borough, upon the ground that the appellant had not been in occupation of the premises as described therein for the period required by law to give him a vote.

The following facts were proved:

The appellant had occupied in the borough, during the whole of the qualifying period, two dwelling-houses in immediate succession, namely, High-street, Wapping, and the said 5, Victoria-cottages, and such his occupation of those two dwelling-houses would have given him a complete qualification, if in addition to his name and place of abode as above stated the nature of qualification had in the third column of the said list been described as "dwelling-houses in succession," and the name and situation of the qualifying property had been described in the fourth column as High-street, Wapping, and 5, Victoria-cottages.

The name of the appellant did not appear upon the register of voters in force for the year 1885 for any qualification, and it appeared that his name had been inserted by the overseers in the list in the manner above mentioned, because they had obtained from the person rated, or liable to be rated, in respect of the premises, 5, Victoria-cottages, a return according to form A. of the general forms to schedule 3 of the Registration Act 1885, according to which it was by mistake stated that the appellant on the 15th July 1884, and up to the date of the return, had been an inhabitant occupier of the dwelling-house, 5,

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

Victoria-cottages, and the appellant had been found by the overseers to be inhabiting that dwelling-house at the date of the inquiries made by them pursuant to the provisions of the Act, and his name had been placed and still remained upon their rate-book in consequence of the said return.

It was urged on behalf of the appellant that, under these circumstances, the revising barrister ought to amend the third column of the list by altering "dwelling-house" to "dwelling-houses in succession," and the fourth column by altering "5, Victoria-cottages," to "High-street, Wapping, and 5, Victoria-cottages," upon the authority of the cases of *Hitchins* v. *Brown*, 2 C. B. 25, and *Ford* v. *Hoar* (53 L. T. Rep. N. S. 44; 14 Q. B. Div. 507).

The revising barrister decided that neither of these cases applied, and that he was bound by the case of *Porrett* v. *Lord* (42 L. T. Rep. N. S. 28; 5 C. P. Div. 65), and he expunged the name of the appellant from the list.

The name of one other person, whose name and qualification were set out in the schedule thereunto attached, was objected to under similar circumstances, and his name also expunged from the list.

If the court should be of opinion that the decision was wrong, the register was to be amended by inserting the name of the appellant and the name of the other person in the list.

The Divisional Court (Lord Coleridge, C.J., Grove and Cave, JJ.) affirmed the decision of the revising barrister, but gave leave to appeal.

Willis, Q.C. and *Markwick* for the appellant — The revising barrister had power to amend the list, and ought to have done so. He acted upon the authority of *Porrett* v. *Lord* (*ubi sup.*), which was based upon the case of *Bartlett* v. *Gibbs* (*ubi sup.*). The case of *Bartlett* v. *Gibbs* was wrongly decided, the error in the decision being in considering that the Reform Act of 1832 (2 Will. 4, c. 45) made two different qualifications by sects. 27 and 28; the qualification in respect of the occupation of two houses in succession was not a different description of qualification from that in respect of the occupation of one house. [Lord ESHER, M.R.—*Bartlett* v. *Gibbs* is precisely like the present case, and has stood as good law for over forty years; how can we overrule it?] The fourth column does not refer to the nature or description of the qualification, but merely to the local description of the property, and that column, therefore, can be amended. The qualification by occupation of houses in succession need not be stated in the third column, for the qualification is not the occupation of two houses, but the occupation of a house:

Hitchins v. *Brown*, 2 C. B. 25.

The words "except as herein provided," in sub-sect. 13 of sect. 28 of the Act of 1878, apply to the whole section, and therefore let in the large powers of amendment conferred upon the revising barrister by sub-sect. 1 of that section; those powers are large enough to enable him to make the amendment asked for here. The case of *Porrett* v. *Lord* (*ubi sup.*) was wrongly decided; the effect of that case is to make sect. 24 of the Act of 1878 absolutely useless. They referred to

Ford v. *Hoar* (*ubi sup.*);
Wood v. *Overseers of Willesden*, 2 C. B. 15;
Pickard v. *Baylis*, 41 L. T. Rep. N. S. 509; 5 C. P. Div. 235.

Grantham, Q.C. and *H. C. Richards* for the respondent.—That which has happened here has not been a mistake in the list in the sense in which the word is used in sub-sect. 1 of sect. 28 of the Act of 1878. "Mistake" there means an incorrect description of the qualification:

Bendle v. *Watson*, 25 L. T. Rep. N. S. 806; L. Rep. 7 C. P. 163.

The mistake here was a mistake in the nature of the qualification, and that can only be amended in accordance with the provisions of the statute, namely, by means of a declaration made under sect. 24. In the absence of any such declaration the revising barrister had no power to make the amendment asked. It is not necessary for this argument to support the case of *Porrett* v. *Lord* (*ubi sup.*), but the argument is based upon the decision of *Bartlett* v. *Gibbs* (*ubi sup.*), that the qualification arising from the occupation of houses in succession is different in its nature from the qualification arising from the occupation of one house. That case has been constantly acted on as good law for many years, and the judgment was a considered judgment of learned judges of great eminence. In the case of *Ford* v. *Hoar* (*ubi sup.*) the whole matter was within the knowledge of the overseer, and was merely an error of description on his part.

Willis, Q.C. in reply.

Lord ESHER, M.R.—I think we must give judgment on this case as stated, and on this case alone; the effect which our judgment will have on other cases will be hereafter seen. Now, in this case a list was made out by the overseers, a list which was to come before the revising barrister to be revised, and in that list was placed by the overseers the name of Henry Foskett, as being a person entitled to the franchise; his place of abode was put down in the list, the nature of his qualification was described as a dwelling-house, and that dwelling-house was said to be "5, Victoria-cottages." In the list, therefore, in this case, there is no mention of houses in the plural, there is no mention of houses in succession, there are not two houses named in the list, but one house only, namely, No. 5, Victoria-cottages. Now, that being the overseers' list, the proposed voter did not act under sect. 24 of 41 & 42 Vict. c. 26; he did not, as he might have done, subscribe or send in any such declaration as to the nature of his qualification being incorrectly described in the list as is in that section mentioned, but he attended before the revising barrister, and before him he proved that he occupied the house, No. 5, Victoria-cottages, that he had not occupied it for the space of twelve months, but that he had occupied it in immediate succession to another house which was not named nor in any way glanced at in the list, and that this successive occupation of these two houses was such as to qualify him for the franchise. Therefore the revising barrister, if he had the power to amend the list, had before him the materials necessary to enable him to make that amendment. The question which we have to decide is, whether the revising barrister had the power to amend. Now, the power of revising barristers to make amendments in the lists before them is, of course, a statutory power, and is to be found now in the Act to which I have already referred — the Parliamentary and Municipal

Registration Act 1878 (41 & 42 Vict. c. 26). But before I discuss the powers of amendment, I pause to dispose of the argument which was raised, that the description of the qualification in the list is right and does not require any amendment; it was said that this claimant's qualification was, in any view, a qualification derived from a dwelling-house, and that the words "dwelling-house" in the third column of the list truly and sufficiently described that qualification. Is that a good argument or not? I think plainly not. The instant that the proposed voter is objected to, and has to come forward to prove his qualification, he must fail in doing so for the reason that he has not occupied the dwelling-house named for the necessary period of twelve months, and therefore, on the description of his qualification contained in the list, he cannot maintain his vote. He proposes to amend by proving that he has occupied the house named in immediate succession to another house not named, under circumstances which qualify him as a voter, and the question I am dealing with is whether or not a qualification arising out of successive occupation of two houses is a different qualification to that arising out of the occupation of one house for a period of twelve months. The two qualifications are mentioned and described in the old Reform Act of 1832, and all the circumstances of the two qualifications are different and distinct; dealing with the question as a pure question of construction of that statute, I should say that the two qualifications are different. But that very point was discussed and decided in the case of *Bartlett* v. *Gibbs* (*ubi sup.*); that decision is some forty years old, and has been acted upon till now, and the Legislature has had full knowledge of the construction which the courts by that decision placed upon the statute. It would be contrary to every rule by which we are guided in dealing with old cases to alter that construction now, and therefore I think we are bound to hold that the qualification for the franchise arising from the successive occupation of houses is different from that arising from the occupation of one house. From that it follows that the qualification described in the list in this case was different to the qualification substantiated by the evidence. Amendment was, therefore, necessary, and I come now to the question whether or not the revising barrister had power to amend. That depends upon sect. 28 of 41 & 42 Vict. c. 26, in which section the powers of amendment are contained, and we have to consider what is the true construction of that section. In construing that section it is impossible to keep out of view the fact that prior to the passing of the Registration Act of 1878 the law on this point had been contained in sect. 40 of the Parliamentary Registration Act 1843 (6 & 7 Vict. c. 18). Now, sub-sect. 1 of sect. 28 of 41 & 42 Vict. c. 26, enacts that a revising barrister "shall correct any mistake which is proved to him to have been made in any list." If that enactment stood alone the question here would simply be whether in this case there has or has not been proved to exist a mistake in the list. I think such a mistake has been proved. I take the description in this list to be an erroneous statement of the proposed voter's position, the error being that the qualification which entitles him to the franchise is wrongly described. Therefore, if there were nothing further in the statute except that part of the section to which I have alluded, I think it quite clear that the revising barrister had the power to amend, just as he would clearly have had the power to amend under sect. 40 of 6 & 7 Vict. c. 18, if the first part of that section had stood alone and there had been no proviso. Now comes the question whether or not that general power of amending mistakes is in any way limited, and whether all or only some mistakes may be amended, and, if only some, whether this mistake may be amended. It is said that the power is limited by sub-sect. 13 of sect. 28, and it must be remembered that under the Act of 1843 it was rightly held that no such power of amendment could be exercised, in consequence of the proviso contained in sect. 40; and the question is whether sub-sect. 13 of sect. 28 of the Act of 1878 has the same effect as that proviso. Now it is not in terms by way of proviso; on the contrary, it reads, "Except as herein provided . . . . no evidence shall be given of any other qualification than that which is described in the list. . . . . nor shall the revising barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same." The words "provided always," in the old Act, have, in this Act, become "except as herein provided." Is there any and what reason for that change? It was argued by Mr. Willis that the effect of the words "except as herein provided" is to leave in the whole of the large power of amendment provided for in sub-sect. 1; but that, in my judgment, cannot be so, for this reason, that to so hold would be to make sub-sect. 13 of no effect at all; that sub-section is evidently meant to have some limiting effect, and the argument I have mentioned deprives it of any effect at all. If we can read the sub-section in one way so as to give a reasonable effect to it, while to read it in another way renders the sub-section of no effect, then the rule of construction is plain as to the meaning which must be adopted. Can, therefore, the words "except as herein provided" be so read as to give a reasonable effect to the limiting intention of the sub-section? I think they can. Sect. 24 of the Act we are considering contains a new provision, a provision which was not contained in the Act of 1843; that section gives a new facility to a voter to enable him to correct a mistake which has been made in the list in the nature or description of his qualification. It gives a double relief in such a case to the voter; it relieves him from coming in person before the revising barrister, and it enables him to alter a mistake in the description of his qualification, if he takes the proper steps to do so, without sending in a new claim by a certain day, as he would have had to do in such a case under the old law. Under the Act of 1843 he would have had to make a new claim and prove it by a certain day, and this sect. 24 enables him to effect that purpose by a different time and in a different way. This new and important right thus given to voters, sub-sect. 13, treated as a limited proviso, would have struck out but for the presence of the words "except as herein provided," and those words, therefore, have an important effect and meaning. But beyond that I do not think they must be stretched, and certainly not so far as to let in the whole of the large power of amendment con-

tained in sub-sect. 1, because, if so, sub-sect. 13 becomes meaningless and ineffectual. Sub-sect. 13 is therefore to be read thus, "Provided always that except as herein provided," &c., the effect of which is that if the voter takes the prescribed steps under sect. 24, then the revising barrister has power to alter the description of his qualification on the list; but if the voter goes on to act wholly as he used to act under the old law, and himself comes before the revising barrister to prove a qualification different to that which appears upon the list, then there is no power in the revising barrister to amend. This conclusion may at first sight seem to have a somewhat strange effect, but I cannot help thinking that it is a very reasonable one, for a reason easily seen. A person who objects to a voter's name appearing on the register makes his objection upon, for instance, what he knows to be the inaccurate statement of the qualification appearing on the list; it is at least fair that such an objector should not be taken by surprise. If the proposed voter comes for the first time before the revising barrister with the view to prove a qualification different to that which appears upon the list and of which the objector has had no notice, that objector is taken by surprise; whereas, if the proposed voter acts under sect. 24, and makes the declaration therein prescribed, that declaration is by the terms of the section open to public inspection during certain times, and the objector has an opportunity of receiving notice of the mistake in the list and is not taken by surprise before the revising barrister. I am therefore of opinion that the true construction of sub-sect. 13 is the construction which I have pointed out, that in this case the revising barrister had no power to amend, and that this appeal must be dismissed. With regard to the cases which have been cited to us, I think I need only say this, that the effect of this decision is that we are of opinion that the case of *Porrett* v. *Lord* (*ubi sup.*) takes too strict a view of the limiting effect of sub-sect. 13, and is undoubtedly inconsistent with the reasons of this decision, and therefore, as to that case, we must say that we do not agree with it. I do not think we need express an opinion upon any of the other cases.

COTTON, L.J.—In this case the revising barrister has struck off the list the name of a proposed voter, on the ground that his qualification, as it appears upon the list, does not entitle him to the franchise, and he has held that he has no power to amend the list so as to make the description of the qualification correspond to that which was in fact proved before him, and which was sufficient to entitle the proposed voter to the franchise. The facts were, that the qualification of the proposed voter was described in the list as a "dwelling-house," and the situation of that dwelling-house was described as "No. 5, Victoria-cottages," and it was agreed on all hands that the proposed voter had not occupied that dwelling-house for a sufficient length of time to entitle him to vote. The revising barrister was asked to alter the third column of the list, in accordance with evidence which was given before him, by amending "dwelling-house" into "dwelling-houses in succession," and further to insert another dwelling-house, a certain number in High-street, Wapping, in the fourth column of the list. The revising barrister held he had no power to make that amendment, and struck the name off the list, and the question we have to decide is, whether he was right in coming to that conclusion, or whether he has power to make such an amendment under the Registration Act of 1878, from which his powers in that particular are derived. The question turns upon the true construction of sub-sect. 13 of that Act of Parliament. That sub-section may be said to be divided into two parts. In the first part it limits the power of the revising barrister as to the reception of evidence, and enacts that "no evidence shall be received of any other qualification than that described in the list or claim." In the second part it deals with the power of amendment given to the revising barrister, and limits that power by enacting that he shall not "be at liberty to change the description of the qualification as it appears in the list, expect for the purpose of more clearly and accurately defining the same." Therefore but for the words at the commencement of this sub-section, "except as herein provided," the revising barrister could not have made this amendment. Now, the argument used was, that the effect of those words was to let in the very full powers of amendment given to the revising barrister by sub-sect. 1, and that the effect of sub-sect. 13 was to restrict the power of amendment when the error is one which has not been made by mistake. I think we cannot place that construction upon the Act of Parliament, if we can find any other reasonable construction by which effect can be given to the words "except as herein provided." I think it cannot be considered that the Legislature contemplated the overseers making an intentional error in the list, and I, therefore, look for something to which those words can be taken to refer. In my opinion they refer to sect. 24. That section enables a voter, "whose name or place of abode or the nature of whose qualification is not correctly stated in such list," to send in a declaration correcting the error, and that declaration is made evidence receivable by the revising barrister of the facts which it states. By means of such declaration another and different qualification to that stated in the list, for which, but for this enactment, the voter would have had to send in a new claim, may be proved before the revising barrister. Then the declaration is open at certain times to public inspection, and therefore may be objected to, if necessary, before the court. In my opinion, this sect. 24 is distinctly referred to by the words "except as herein provided." "Except as herein provided, no evidence shall be given of any other qualification than that which is described in the list;" and sect. 24 expressly makes the declaration evidence of the facts declared to, which may be of another qualification. It follows from what I have said that I agree with the Master of the Rolls as to the case of *Porrett* v. *Lord* (*ubi sup.*). In that case the declaration under sect. 24 had been made, and the court, erroneously in my opinion, decided that the error in the list could not be corrected after that declaration had been made. The amendment required in this case was the insertion of what was a different qualification to that appearing in the list; that was decided long ago by *Bartlett* v. *Gibbs* (*ubi sup.*), and I agree that we cannot now interfere with or set aside that case. I therefore think that, in the absence of any declaration under sect. 24, the

amendment which the revising barrister was here asked to make was one which he had no power to make, and therefore I think he was right in refusing to alter or amend the qualification in the way suggested.

BOWEN, L.J.—I am of the same opinion. I should not add anything to what has been said, were it not that we are reviewing the decisions of different learned judges, and out of respect to them I will very shortly give my reasons. The case of *Bartlett* v. *Gibbs* (*ubi sup.*) decided that the occupation of a house was a different qualification for the franchise to the qualification arising from the occupation of houses in succession; and it further decided that a list which described in the third column the qualification as a "dwelling-house," and had one house in the fourth column, could not be amended by putting "houses in succession" in the third column, and the names and situations of the various houses in the fourth column. That decision seems quite right, decided as it was upon the Registration Act of 1843, but it is a decision which is now forty-three years old, and it has been acted on as good law ever since it was decided, and it is now past all praying for to ask us to review that decision, with a view to questioning its correctness. Therefore the appellant here must fail, unless the powers of amendment given to the revising barrister by the Registration Act of 1878 materially differ from the powers given to him by the Act of 1843. Now, sect. 40 of the Act of 1843 begins with the same general and sweeping words as sect. 28 of the Act of 1878, to the effect that the revising barrister is to have power to amend any mistake in the list; but then the proviso contained later on, in sect. 40, narrows those powers down, as was decided in the case of *Bartlett* v. *Gibbs* (*ubi sup.*). Is there any material difference in the Act of 1878? It is true that sect. 24 of that statute does give an indulgence to the voter which he has not under the old Act; but when we come to compare sect. 28 of the Act of 1878 with sect. 40 of the old Act, we find that there is no difference on any material point, except this, that the words of the proviso, "provided always," in the 40th section of the Act of 1843, become "except as herein provided" in sect. 28 of the Act of 1878. At first sight that seems a very material alteration, because what was an absolute proviso in the old Act has in the latter Act become a limiting section, beginning with the words "except as herein provided," and, *primâ facie*, when a limitation begins with such words, nothing is limited thereby which is expressly enacted in the statute. Now, it is expressly enacted in this statute that the revising barrister shall correct every mistake in the list, and it is argued that, in consequence of the way the limitation is enacted, the whole of these large powers are still in his hands. But I think the fallacy of this argument arises thus: sub-sect. 13 is clearly intended to have a limiting effect of some sort, and the draftsman of the statute, having in his mind sect. 24, wanted to introduce in his proviso an exception upon his proviso, and for that reason put in the words, "except as herein provided." But does it follow that sub-sect. 13 is not a proviso still? I think not; I think it is just as much a proviso as if it began with the words "provided always." To sum up the effect of this judgment, I think it is this, that sub-sect. 13 is to be read as if it began thus: "Provided always that, except as herein provided." Another effect of this judgment is, that the case of *Porrett* v. *Lord* (*ubi sup.*) must be considered as having been too strictly decided, and that we are unable to agree with it.

Appeal dismissed.

Solicitor for the appellant, *E. T. Hargrave.*
Solicitor for the respondent, *E. T. Hughes.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Thursday, Dec. 17, 1885.

(Before KAY, J.)

LYNCH *v.* THE COMMISSIONERS OF SEWERS OF THE CITY OF LONDON. (*a*)

Street improvements—Power of Commissioners of Sewers to take land for—Compulsory purchase—Notice to treat—Negotiations on basis of—Subsequent objection to validity of.

Where an owner in fee simple of land, having received a notice from the Commissioners of Sewers of the City of London to treat for the sale thereof, does not then object to that notice to treat, and negotiates with the commissioners on the basis thereof, but subsequently objects to it on the ground that the commissioners are seeking to acquire more land than is actually required for the purpose of their proposed street improvements, he has precluded himself, whether the notice to treat be good or not, from so objecting to it, and is estopped from denying its validity.

Thomas *v.* Daw (15 *L. T. Rep. N. S.* 200; *L. Rep.* 2 *Ch. App.* 1) *followed.*

AT a meeting of the Commissioners of Sewers of the City of London, held on the 2nd Dec. 1884, it was resolved that, for the improvement of Butler's-alley, in the city of London, and for the public advantage, and under and in pursuance of the powers vested in them by the statute 57 Geo. 3, c. 29, the commissioners should forthwith alter, widen, and extend the street called Butler's-alley; and the commissioners adjudged that the houses, buildings, and tenements known as Nos. 1, 2, 3, 4, and 5, Gresham-place, and No. 1, Butler's-alley, and the land whereon the same stood, did project into, obstruct, and prevent them from so altering, widening, and extending the said street; and that the possession, occupation, and purchase of such houses, buildings, and tenements, and of the land whereon the same stood, would be necessary for that purpose; and the commissioners ordered their solicitor to treat, contract, and agree with the owners or occupiers of the houses, buildings, and tenements, and of the land whereon the same stood, for the purpose aforesaid, in pursuance of the said Act.

Henry Jeremiah Lynch was owner in fee simple in possession of the six houses referred to in the resolution of the Commissioners of Sewers.

On the 15th Dec. 1884 the Commissioners of Sewers gave notice through their solicitor, to H. J. Lynch, of their intention to take the six houses, and further gave notice to treat for the same. The notice was as follows:

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

To H. J. Lynch and all other persons interested in the houses, buildings, lands, tenements, and hereditaments hereinafter mentioned and described. I, the undersigned, do hereby for and on behalf of the Commissioners of Sewers of the City of London, who are the commissioners having the control of the pavements of the city of London, and by the direction of the said commissioners, give you and each and every of you notice that, for the improvement of the streets and public places within the said city, and for the public advantage, they the said commissioners, in pursuance of the powers enabling them in that behalf, do intend forthwith to alter, widen, and extend the street called Butler's-alley in the said city, and for such purpose require to purchase and take all your estate and interest in all those houses, buildings, lands, tenements, and hereditaments, situate and being Nos. 1, 2, 3, 4, and 5, Gresham-street, and No. 1, Butler's-alley, in the said city of London, together with all rights, ways, members, and appurtenances thereto belonging, and of which said houses, buildings, lands, tenements, and hereditaments you or some or one of you are possessed, or in which you or some or one of you are otherwise interested. Now, I do hereby, on the part and behalf of the said commissioners, and by their direction, further give you notice that they, the said commissioners, have appointed and employed me on their behalf to treat, contract, and agree with you and each and every of you, and with all other or others the several owner or owners, occupier or occupiers of the said houses, buildings, lands, tenements and hereditaments, for the purchase thereof, with the appurtenances and all your and their estate and interest therein, by them the said commissioners for the purposes aforesaid, and do require you and each and every of you to treat, contract, and agree with me on behalf of the said commissioners for the sale to them of the said houses, lands, tenements, and hereditaments hereinbefore described, with the appurtenances and all your estate and interest therein; and I do hereby, on the part and behalf of the said commissioners, demand from you particulars of your estate and interest in the said houses, buildings, lands, tenements, and hereditaments, and of the claim or claims made by you in respect thereof, pursuant and according to the form of the statute, being chapter 29 of the statutes made and passed in the fifty-seventh year of the reign of his late Majesty King George the Third, intituled "An Act for better paving, improving, and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein."

On the 17th Jan. 1885 H. J. Lynch, without objecting in any way to the validity of the notice to treat, gave notice that he claimed 2500*l.* as compensation for the whole property.

On the 29th Jan. 1885 the commissioners offered 1320*l.* in settlement of H. J. Lynch's claim. He declined that offer, but subsequently, in March 1885, he said that he might perhaps take 2300*l.*

In April 1885 the commissioners offered 1600*l.*, and proposed in the alternative that the amount of compensation should be determined by arbitration. Both these propositions being declined by H. J. Lynch, in Aug. 1885 the commissioners intimated that 2300*l.* might be given in order to facilitate a prompt settlement, but that, if such offer were not accepted, the compensation must be referred to a jury.

H. J. Lynch refused to accept 2300*l.*, but on the 16th Sept. 1885 he said he would take 2400*l.* and costs of his solicitor and surveyor. This proposal not having been acceded to by the commissioners, H. J. Lynch, in Oct. 1885, for the first time disputed the validity of the notice to treat on the ground that only a portion of his property was required by the commissioners for the proposed street improvements.

This action was thereupon commenced by H. J. Lynch against the commissioners; and a motion was made for an interim injunction to restrain the commissioners from proceeding under their notice to treat for the purchase of (among other property) No. 5, Gresham-place, or other property belonging to H. J. Lynch not necessary for the commissioners' purpose.

The motion now came on for hearing.

Graham Hastings, Q.C. and *J. Douglas Walker*, in support of the motion, relied on *Teuliere* v. *Vestry of St. Mary Abbotts, Kensington* (53 L. T. Rep. N. S. 422; 30 Ch. Div. 642), as being completely in their favour, and showing that the commissioners were not entitled to take more land than was actually required for the purpose of their street improvements. They referred also to

Gard v. *Commissioners of Sewers of the City of London*, 53 L. T. Rep. N. S. 827; 28 C. H. Div. 486.

W. Pearson, Q.C. and *John Henderson*, for the commissioners, referred to *Thomas* v. *Daw* (15 L. T. Rep. N. S. 200; 2 Ch. App. 1) as an authority that H. J. Lynch, having negotiated on the basis of the notice to treat, had precluded himself from objecting to the validity thereof, and that the court ought not to restrain the commissioners from proceeding upon it.

Hastings in reply.—The case of *Thomas* v. *Daw* (*ubi sup.*) was decided by Kindersley, V.C. evidently upon some facts which do not appear in the report. Being decided on some special facts, I submit that it is no authority in the present case.

KAY, J.—The defendants in this case are a public body, who are intrusted with very large powers and duties. Those powers and duties, however, they do not, and cannot, exercise for any purpose of profit to themselves, and in that respect they are very distinct from an ordinary trading company or joint-stock company, or other body like a railway company, who may have compulsory powers, which they exercise for their own benefit. It therefore seems to me extremely important that when questions like those which are raised in this case come before the court, the court should be very careful indeed how it interferes with a body like the defendants in this case. In my opinion, it ought not to do so unless a very clear ground for such interference is made out by the plaintiff. Now, the nature of the case before me is this: The Commissioners of Sewers of the City of London made, under powers which are now pretty familiar, an adjudication to this effect: "This court—*i.e.*, the commissioners—do adjudge the houses, buildings, and tenements, known as Nos. 1, 2, 3, 4, and 5, Gresham-place, and No. 1, Butler's-alley, and the land whereon the same stand, project into, obstruct, and prevent them from so altering, widening, and extending the said street called Butler's-alley; and that the possession, occupation, and purchase of such houses, buildings, and tenements, and of the land whereon the same stand, will be necessary for that purpose; and this court do order their solicitor to treat with the owner," and so on. The plaintiff is the owner, and the absolute owner in fee simple. It seems from the affidavit of Mr. William Hayward, who was the engineer and surveyor to the Commissioners of Sewers, that what took place was this: A

notification was made to the owner, which is dated the 15th Dec. 1884, showing the situation and description of the property required, stating its nature, and that it was held in small tenements. There the claim which the plaintiff made for compensation on taking these houses is inserted at 2500*l*. Now, Mr. Haywood says this: "On the 25th Jan. 1885 I received from Mr. Baylis, the defendants' solicitor, a claim by the plaintiff of the sum of 2500*l*. as compensation for the premises comprised in the said notice to treat, and at once entered upon negotiations as to the price with Mr. Walker, the plaintiff's surveyor, and these negotiations lasted from Jan. to Nov. 1885. On the 29th Jan. 1885 I offered Mr. Walker the sum of 1320*l*. in settlement of the plaintiff's claim. He declined that offer, but subsequently, in the month of March, he intimated that perhaps the sum of 2300*l*. might be taken. In the month of April I made an offer of 1600*l*., and proposed in the alternative that the amount of compensation should be determined by arbitration; but, both these propositions being declined, I intimated, about the 5th Aug. 1885, that the sum of 2300*l*. might be given in order to facilitate a prompt settlement, but otherwise that the question of compensation must be referred to a jury. On the 16th Sept. 1885 Mr. Walker wrote to me that his client had authorised him to accept the sum of 2400*l*. for the property, but for the first time endeavoured to stipulate that the commissioners should pay all the solicitor's preliminary costs, Mr. Walker's fee of 30 guineas, and another fee of 25 guineas for the said Rowland Plumbe, whose name had never been mentioned to me, and of whom I had never heard in connection with this case; and finding that, as my offers increased in amount, fresh demands were made, I advised the defendants not to comply with the plaintiff's demand, which seemed to me extravagant, but to have the compensation settled by a jury. During the whole of the said negotiations the said Mr. Walker never intimated to me, nor did I ever hear, that the plaintiff was desirous of keeping his property, or objected to dispose of it to the defendants, or that the plaintiff objected to their taking more than a portion of his property; but, on the contrary, Mr. Walker appeared to be willing to sell the whole. It was only when it appeared that there was no chance of my acceding to what appeared to me an exorbitant demand for compensation for his property, that Mr. Walker asked for information as to the nature or extent of the improvements contemplated by the defendants, and until I was informed of the letter sent by the plaintiff's solicitor to Mr. Baylis, on the 26th Oct. 1885, I never heard of any such objection or inquiry." So that the position is this: The owner in fee, receiving an intimation that his property is wanted by the commissioners, endeavours to obtain from them a larger price than they think fit to give, extends that negotiation over some months, and never suggests that they have not a perfect right to buy it. When, however, he finds that he cannot exact the terms which he insists upon, and that the commissioners are determined to have the price fixed by a jury, he then, for the first time, turns round and says, "Now I will object to your notice to treat altogether." Is that competent? One would think, apart from any authority, that it was an excessively unreasonable, vexatious, and improper course for any person to take. It would seem that the objection to the notice in such a case was a mere afterthought, by way of putting an additional compulsion upon the commissioners to give the plaintiff the price he was asking; and I have no doubt that that is the reason why this objection is raised in the present case. But the matter is not without authority, because I have what seems to me an extremely clear and plain decision of Kindersley, V.C. on the subject in *Thomas* v. *Daw* (15 L. T. Rep. N. S. 200; L. Rep. 2 Ch. App. 1). There is appended to the statement of the case a note of the judgment of the Vice-Chancellor, and it seems that two houses in that case were in question. Notice had been given to take both, when it clearly appeared that both houses were not in fact wanted. The Vice-Chancellor, as to one of the houses, decided that the commissioners were wrong, which decision was affirmed by the Court of Appeal by the Lord Chancellor (Lord Chelmsford). The Vice-Chancellor says: "With respect to No. 49, the plaintiffs had precluded themselves from complaining by reason that, when they received the notice to treat, instead of insisting that the commissioners ought to content themselves with taking the seven feet, they sent in a claim, thereby recognising their right to take No. 49. The plaintiffs said that they did not thereby recognise the right, because the notice to treat being merely formal, the claim was equally so; but it was admitted that the commissioners had a right to take"—that is, it was admitted by sending in the claim, as I read the judgment—"or, at all events, that the plaintiffs were willing that they should take the whole. As to No. 49, therefore, the bill must be dismissed." There was no appeal on that point, and therefore that did not come before the Lord Chancellor; but of course the decision is one which I should not think of departing from. It is one which is completely binding—binding at least by the courtesy that courts of equal jurisdiction always show one another—upon me. I do not refer, as in any way confirming it, to what was said by Baggallay, L.J. in *Gard* v. *Commissioners of Sewers of the City of London* (53 L. T. Rep. N. S. 827; 28 Ch. Div. 486, 508), a later case, but certainly he does refer in his judgment to that decision of Kindersley, V.C., and states it without intimating a word of objection. That is of some importance. That decision, having been come to a good many years ago now, has not been dissented from and not departed from, and is not contradicted by any other decision; therefore I take it to be completely binding. I understand the decision to mean that, if an owner in fee simple, having received a notice to treat, does not object to that notice to treat, but negotiates and tries to get a large price for his property, and then, when he finds he cannot get that large price, turns round at the last moment and says, "Now, I object to your notice to treat," he has precluded himself, whether the notice to treat be good or not, and is estopped from denying its validity. That is the ground on which I understand the Vice-Chancellor to have proceeded, and that decision, if it is to be altered at all, must be altered by a higher authority than this court is. Therefore it seems to me that is a complete answer to the case on the part of this plaintiff. I should, as I have before said, be extremely disinclined, even if there were not that authority, to

allow him in this vexatious manner to interfere with the exercise by the Commissioners of Sewers of their powers. I have no doubt, from the evidence that is before me, that the commissioners' powers were perfectly honestly exercised. I am not at all convinced, from any evidence before me now, that they may not be quite right in having given the notice they have given, but of course I should not decide the matter on that point alone. If that were the only point, I might be compelled to leave that point to be decided at the trial of the action, and to preserve the *status quo* in the meantime. When, however, this question, which has been the subject of actual decision, is brought to my attention, it seems to me to be purely a case in which the court ought not to interfere and to embarrass a public body like the Commissioners of Sewers by restraining them or hindering them from carrying out that which, according to Kindersley, V.C.'s decision, whether the notice was originally right or not, they have, as against the plaintiff, an entire right to carry out in the way they propose. Accordingly I refuse this motion with costs.

Solicitor for the plaintiff, *R. H. Harris.*
Solicitor for the defendants, *E. A. Baylis.*

QUEEN'S BENCH DIVISION.

Dec. 1 *and* 19, 1885.

(Before Cave and Wills, JJ.)

The Berwick Harbour Commissioners (apps.) *v.* The Churchwardens and Overseers of the Parish of Tweedmouth (resps.). (*a*)

Poor rate—Rateable value—Docks—Tolls—Harbour due—Tonnage duties—Additional duty on vessels using dock.

The Commissioners of Berwick Harbour were empowered, under 48 *Geo.* 3, *c. ci. and* 25 *&* 26 *Vict. c. xxv., to improve the navigation of the harbour, the soil of which was not vested in them, and to construct quays and landing places which were vested in them. In return, they were entitled to receive certain rates and duties of tonnage from all ships using the harbour, and on all goods shipped from or landed on the quays and landing places. By* 35 *Vict. c. ix., they were empowered to make and maintain a wet dock. The duties on goods substituted by the later Act were practically the same as those given by the Act of* 1862, *with the exception that there was a new clause to the effect that additional dues of* 75 *per cent. above the rates specified were to be payable on the completion of the wet dock on goods (except coal, iron, or lime) loaded or discharged in the dock, or exported or imported in vessels of* 100 *tons or upward. By sect.* 66 *of the later Act, the commissioners were empowered to levy a harbour duty of* 3*s.* 4*d. on every ship entering the harbour. By the* 25*th section of the same Act, for the rates and duties given by the Act of* 1862, *were substituted the tonnage dues on ships entering or leaving the harbour, contained in schedule B. This schedule contained two sets of rates, one for vessels under* 100 *tons, the other for vessels of or above* 100 *tons; it also contained the following new clause: "Additional dues to be payable on completion of wet dock. For every ship or vessel entering the wet dock, over and above the before-mentioned dues, for every ton,* 2*d."*

The commissioners were assessed to a poor rate, for the parish of Tweedmouth, as occupiers of the wet dock, at a gross estimated rental of 1380*l.*, *and a rateable value of* 1180*l. In this estimate both the harbour due and the tonnage duties of the vessels using the dock were included by the assessment committee. The commissioners appealed to quarter sessions, and the Recorder was of opinion that both the harbour due and the tonnage duties ought to be excluded when ascertaining the rateable value of the dock, and amended the rate, altering the assessment to a gross estimated rental of* 636*l. and a rateable value of* 530*l.*

The assessment committee appealed by way of a special case.

Held, on the argument of the case, that the decision of the Recorder was right, and that as the dock was not the sole meritorious cause of the commissioners' right to the dues, the harbour due and the tonnage duties were not to be taken into account in ascertaining the rateable value of the dock, but only the additional 2*d. per ton levied on vessels actually entering and using the dock.*

Reg. *v.* The Dock Company at Kingston-upon-Hull (7 *Q. B.* 2) *distinguished.*

This was a case stated for the opinion of the court by the Recorder of Berwick-upon-Tweed; of which the following are the material parts :—

1. The appellants were the commissioners incorporated by the Berwick-upon-Tweed Harbour Act 1862, "An Act for the preservation and improvement of the Pier and Harbour of Berwick-upon-Tweed," and the respondents were the assessment committee of the Berwick-upon-Tweed Union and the overseers of the poor of the parish of Tweedmouth, in the said county.

2. The appellants were assessed to a rate, dated the 20th Nov. 1884, and made for the relief of the poor of the said parish, as "occupiers of the dock-buildings and plant, Main-street, Tweedmouth," at a gross estimated rental of 1380*l.* and a rateable value of 1150*l.*, and were appealing against such assessment.

3. The Harbour of Berwick-upon-Tweed is a natural tidal harbour, navigable for about a mile upwards from its mouth; and down to the year 1808 it was managed by the mayor, bailiffs, and burgesses of the borough, who, for that purpose, levied certain dues on all shipping entering the harbour. In that year an Act of Parliament was passed (48 Geo. 3, c. ci.), whereby certain commissioners were appointed for rebuilding and maintaining the pier, and for erecting such other works as might seem proper and expedient for the preservation and improvement of the said harbour. A new scale of rates or duties on goods and ballast imported into or exported out of the harbour was substituted for those formerly levied, certain rates or duties of tonnage were imposed, and a due of 3*s.* 4*d.* for every vessel coming into the harbour, which was in substitution for the dues levied before the passing of the said Act. Under this Act the said pier was rebuilt and quays and wharves constructed, and other improvements carried out from the funds at the disposal of the said commissioners.

4. In 1862 a further Act of Parliament was passed, 25 Vict. c. xxv., reconstituting and incor-

(*a*) Reported by W. P. Eversley, Esq., Barrister-at-Law.

porating the said commissioners, vesting in the new body all the property of the former commissioners, and substituting new rates or duties on goods and ballast imported into or exported from the harbour, and new rates or duties of tonnage, and retaining the before-mentioned due of 3*s.* 4*d.* on all vessels entering the harbour.

5. In 1872 a further Act of Parliament was passed, 35 Vict. c. ix., giving the said commissioners power to construct a wet dock, and other works incidental thereto, and new schedules of rates, or dues, on goods and on tonnage were substituted for the former ones. The rates and dues levied under the Act consisted of: (1.) Shore dues on goods imported into or exported from the harbour. (2.) Additional dues to be payable on completion of the wet dock; that is to say, all goods loaded or discharged in the dock, or exported or imported in vessels of a registered tonnage of 100 tons and upwards to be charged 75 per cent. above the ordinary rates. (3.) Ballast dues. (4.) Tonnage dues on ships on entering or leaving the harbour, and a due of 3*s.* 4*d.* on every vessel. (5.) Additional dues to be payable on completion of the wet dock; that is to say, 2*d.* per ton on every ship or vessel entering the wet dock, over and above the ordinary tonnage dues, and a further sum at the rate of one halfpenny per registered ton per week after the first six weeks, in the case of any ship remaining in the dock longer than six weeks, unless wind-bound or detained by stress of weather. (6.) Rates for the use of staiths, cranes, tramways, sheds, and weighing machinery.

6. All money received by the appellants from rates or duties, or other sources of income under their said Acts, was required to be applied in the manner and order following, and not otherwise, namely: First, in paying interest accruing due on money borrowed, and providing the requisite annual instalments or appropriations for payment off of the principal thereof, and in paying annuities granted under the said Act of 1872. Secondly, in paying the current working and establishment expenses of the appellants, and their expenses of maintaining and keeping in repair their works.

7. The appellants, accordingly, constructed a wet dock upon the south side of the river, upon a portion of the foreshore which was purchased from the Crown by them. The said dock was opened by them in 1876. This dock and other works connected therewith, under description of "dock-buildings and plant," were, together with the pier or wharf called Carr Rock, the subject of the rate appealed against.

9. Previously to the year 1808 Carr Rock was a natural rock projecting into the river at high water, at the end of which the river, by its scouring action, excavated a deep hole in which vessels could lie afloat. At some time between 1808 and 1862 works were done upon the said rock for the purpose of rendering it more convenient for use as a wharf, and such works had since been, and were still, maintained and repaired by the appellants, and shore dues had been, and were still, received by them in respect of goods landed and shipped at the said rock.

10. No portion of the bed of the harbour was vested in the said commissioners, and they had no ownership in nor occupation of it.

11. The following figures were agreed upon between the parties as representing, for the purposes of this appeal, the receipts and outgoings of the said commissioners:

Tweed Dock.

Actual Receipts.	£	s.	d.
1. Dock dues, *i.e.*, the 2*d.* per ton, payable by every ship or vessel entering the wet dock, schedule B.	173	7	6
2. Shore dues, being the dues on all goods landed in the dock, under schedule A., including 75 per cent. additional payable on completion of the dock...	621	11	2
Ditto, on goods exported...	35	18	1
3. Crane dues, schedule C.	23	11	8
4. Tonnage dues, schedule B., being the tonnage dues on ships entering or leaving the harbour, irrespective of their entering or not entering the dock, but received from vessels which did enter the dock	986	17	9
5. Harbour duty, schedule B., being a duty of 3*s.* 4*d.* payable by every ship or vessel coming into the harbour, irrespective of the dock, but received in respect of vessels which did enter the dock	17	0	0

Actual Outgoings attributable exclusively to the Dock.			
1. Wages of dock attendants and engineer at steam crane, oil for lamps, and other stores...	318	3	0
2. Dredging at entrance, average...	250	0	0

Note.—No allowance in these figures was made for costs of management, tenants' profits, renewals, or interest on borrowed money.

For renewals, if chargeable, the amount to be taken at...	250	0	0
If it was held that the tonnage dues above mentioned ought to have been taken into account in estimating the rateable value of the dock, it was further agreed that there should be further deducted as an annual outgoing against the dock a proportion of the general charges of the harbour, such as clerk and harbour master's salary, lighthouse expenses, steam tug, &c., &c., and allowance for renewals (pier &c.)	350	0	0

Rates included in this sum.

Note.—It was open to the appellants to contend that, in addition to the items above specified, deductions or allowances should be made in respect of interest on borrowed money and tenants' capital and profits.

Carr Rock.

Receipts.			
1. Amount actually received for "tonnage dues," schedule B., from vessels moored at this berth	347	5	4
2. Ditto, harbour duty, ditto...	15	10	0
3. Amount received from shore dues on goods landed at this berth, schedule A....	230	9	4
Ditto, shipped at ditto	73	3	6

Outgoings.			
Repairs	15	0	0
Proportion of general harbour expenses, including rates	80	0	0
Renewals	50	0	0

Note.—No allowances made in these figures for tenants' capital or profits.

12. The appellants, in the years 1874, 1875, and 1876, borrowed from the Public Works Loan Commissioners, upon mortgage upon their said property, the sum of 35,000*l.*, of which sum there was at the date of the appeal, owing to the said commissioners the principal sum of 31,590*l.* 4*s.* 7*d.* and the sum of 240*l.* 12*s.* interest thereon, at the rate of 3½ per cent. per annum.

13. The appellants have borrowed the further sum of 25,000*l.*, which loan is secured by bonds

issued by them upon the security of the whole of the property, tolls, and dues of the appellants, and of such last-mentioned sum there is still owing by the appellants the sum of 23,280*l.*, the interest and charges upon which for the year 1885 amount to the sum of 1166*l.* 4*s.*

14. On behalf of the appellants, it was contended: first, that, in order to obtain the rateable value of the property rated, the tonnage dues and harbour duty were not to be taken into consideration, because they were not earned in respect of the said dock or Carr Rock, but were payable by all vessels entering the harbour, whether using the said dock or not, and that, therefore, the sums of 986*l.* 17*s.* 9*d.*, 17*l.*, 347*l.* 5*s.* 4*d.*, and 15*l.* 10*s.* should be omitted from the list of receipts; secondly, that the said commissioners were entitled to deduct from the annual receipts interest on the capital necessary to carry on the business and tenants' profits.

15. On behalf of the respondents it was contended that tonnage dues and harbour duty paid to the appellants upon all vessels which actually used the wet dock or the Carr Rock were to be taken into consideration in ascertaining the said rateable value; that the appellants were restricted under the said Acts in the application of their income, and therefore were not entitled to any deduction from the gross value of their said property in respect of tenants' profits, and that payments of the interest upon moneys borrowed by them were in the nature of payment of rent, and not to be deducted from the gross value, and that the appellants were not overrated.

16. The Recorder decided, 1st, That in ascertaining the rateable value of the appellants' said property the tonnage dues and harbour duty received by them as aforesaid, were not to be taken into consideration. 2nd. That the appellants were not entitled to reduction in respect of interest on tenants' capital or tenants' profits. 3rd. That the appellants were overrated; and by his order allowed the appeal and altered the said assessment, in accordance with such decisions, to a gross estimated rental of 636*l.* and a rateable value of 530*l.*

If the court should be of opinion that the said order was correct in point of law, it was to be affirmed. If the court should be of opinion that the said order was not correct in point of law, it was to be quashed.

J. L. Walton (*R. Cunningham Glen* with him) for the assessment committee.—The order of the recorder ought to quashed, and the original rating of the appellants restored. The charge of 2*d.* per ton on vessels entering the commissioners' dock ought not to be the only basis for rating their premises; the dues levied upon the tonnage of the vessels entering the harbour should also be added, because were it not for this wet dock, where they may easily unload their cargoes, ships would not enter the harbour at all. In 1862 the Carr Rock was turned into a quay, under a private Act of Parliament which vests the property in the new commissioners, and in sect. 66 gives them power to take rates and duties on the tonnage, and generally new powers which the old commissioners did not possess. Sect. 25 of that Act substitutes for the rates and duties on goods given by the Act of 1862 the shore dues on goods imported into or exported from the harbour, as set out in schedule A., which contains a new clause to the effect that additional dues are to be payable on the completion of the wet dock, and goods (with certain exceptions) loaded or discharged in the dock, or exported or imported in vessels of a registered tonnage of 100 tons or upwards, are to be charged 75 per cent. above the rates specified. The same section also substituted for the rates and duties under the Act of 1862 the tonnage dues on ships on entering or leaving the harbour, contained in schedule B., which schedule contains a new clause to the effect that additional dues are to be payable on the completion of the wet dock, for every ship or vessel entering the wet dock, over and above the beforementioned dues, for every ton 2*d.* These dues are to be paid on completion of the wet dock, and it has been completed, consequently the tonnage dues and harbour duties on all vessels entering the harbour ought to be taken into account in estimating the rateable value of the dock, because the increase in these dues is to be attributed to the expense incurred by the commissioners in making the wet dock. It was the object of the Legislature to induce the commissioners to make this dock. Next, the whole of the tonnage dues and the duties paid by ships actually entering the wet dock ought to be brought into the account, and not merely the additional 2*d.* per ton:

Reg. v. *Kingston-upon-Hull Dock Company*, 7 Q. B. 2; 14 L. J. 114, M. C.

The present case cannot be distinguished from the *Hull Dock case*, and there the tonnage dues on ships using the dock were taken into account in ascertaining the rateable value of the dock If the vessels use this wet dock their tonnage dues are earned in respect of it, and are therefore properly rateable. The commissioners may get profits from the use of the dock by increasing the tonnage dues and letting the additional 2*d.* per ton go, and so escape rateability of the dock altogether.

Ridley (*F. D. Blake* with him) for the commissioners.—It was intended by the Legislature in this case that all vessels coming within the mouth of the Berwick Harbour should pay both a harbour duty and a tonnage duty, and when the wet dock was completed and ready for use, the commissioners were empowered to make an additional charge of 2*d.* per ton on every vessel making use of the dock. This additional duty is alone to be taken into account, and not the harbour and tonnage duties, and certainly not the harbour duty of 3*s.* 4*d.* per vessel. The *Hull Dock case* (*ubi sup.*) is distinguishable from the present one. There was no harbour or dock at Hull before those made under statutory sanction, and no additional duty was imposed upon vessels making use of the docks, and certain duties were made payable to the company making the docks, for every ship coming into or going out of the harbour, basin, or docks within the port of Hull. But in the present case there has been an additional duty imposed on vessels using this wet dock, and this additional duty has been rightly taken into consideration. The difference between the two cases is shortly this: in the *Hull Dock case* there were no other dues receivable by the dock owners, except the tonnage dues on ships entering the harbour and port, and if these had been subtracted there would have been nothing left to be

taken into consideration; but in the present case that is not so. *The Harbour Commissioners for New Shoreham* v. *The Overseers of Lancing* (L. Rep. 5 Q. B. 489) is in point.

Walton, in reply, cited

Cory v. *Bristow*, 32 L. T. Rep. N. S. 797; L. Rep. 10 C. P. 504.

Cur. adv. vult.

Dec. 19.—Cave, J.—The only point raised for our consideration upon the argument of this appeal was whether, in assessing the Berwick Harbour Commissioners to the poor rate in respect of their dock buildings and plant, both tonnage dues and harbour duty, received by them under the Harbour Act 1872, are to be taken into account. It appears that in the early part of this century the pier, formerly built to shelter the Berwick harbour from storms, had gone to decay whereby the harbour was much exposed to storms, and the navigation thereby was much impeded by sand banks and other obstructions, and in danger of becoming altogether unfit for the purposes of trade. The Legislature thereupon interposed, and by 48 Geo. 3, c. ci., appointed commissioners with power to improve the navigation of the harbour by deepening it and removing obstructions, and to make and erect jetties, capstans, and other engines, and posts for preserving the navigation and rendering it more safe and commodious, and to make quays and docks for the better accommodation of the shipping and the trade of the port. The commissioners were also empowered (sect. 31) to make regulations for the navigation of the harbour and of all vessels resorting thereto, and for the loading and delivering of goods, and for the quays under their authority, and for the laying of goods thereon. For the purpose of providing funds for the undertaking the commissioners were empowered (sect. 33) to demand and collect (*a*) certain rates or duties on goods and on ballast imported into or exported from the harbour, and also (*b*) certain rates or duties of tonnage on ships using the harbour for trading purposes or shelter. By sect. 42 the commissioners were empowered to let these rates and duties, either from year to year or for any term not exceeding seven years. This Act was repealed by the Berwick Harbour Act 1862, and from the recitals contained in the later Act it appears that the commissioners had re-erected the pier and kept it in repair, and had erected a lighthouse and quays, wharves, jetties, and offices, and had provided steam-tugs, buoys, moorings, anchors, and dolphins, and had kept in repair the previously existing quays and wharves, and had removed various sand banks and other obstructions and annoyances to the navigation within the harbour. By sect. 14 the commissioners were empowered to erect all such piers and other works authorised by the repealed Act as had not then been erected, or as the commissioners thereafter might deem it necessary to erect, and to maintain the piers and works already erected or thereafter to be erected. By sect. 49 they were empowered to dig and remove sand, gravel, or clay, in any part of the harbour; and by sect. 50, to dredge any banks, shoals, or channels within the harbour for the better maintaining and improving the navigation thereof, and to remove any other obstructions and impediments. By sect. 66 they were empowered to demand and collect certain rates and duties on goods and on ballast imported into or exported from the harbour, and also certain rates or duties of tonnage, which latter were only one half the amount of those given by the earlier Act, except the harbour duty, which in each case was 3*s.* 4*d.* on every ship coming into the harbour. The soil of the harbour was not vested in the commissioners by either Act. So far the case is comparatively free from difficulty. The commissioners were empowered to improve the navigation of the harbour, the soil of which was not vested in them, and received certain rates and duties of tonnage from all ships using the harbour. They were also empowered to construct quays and landing places, which were vested in them, and received certain rates or duties on all goods shipped from or landed on these quays and landing places. The tonnage rates and duties were granted for, and arose from, the use of the land covered with water which the commissioners did not occupy. The rates and duties on goods were granted for, and arose from, the use of the quays and landing places; and consequently, where the commissioners were the occupiers of the quays and landing places, these rates and duties on goods were in the nature of profits arising from the land so occupied, and were rateable. We have, however, to deal with the new conditions introduced by the Act of 1872, which, by sect. 4, empowered the commissioners to make and maintain a wet dock, an embankment below high-water mark, a quay or quays, an entrance into the dock, a gangway, and an access to the quay, and all necessary subsidiary works. They were also empowered (sect. 20) to purchase fisheries in the harbour, with a view to the improvement of the navigation of the harbour or the increase of the accommodation available for vessels frequenting the same. By sect. 25 there were substituted for the duties on goods given by the Act of 1862 the shore dues on goods imported into or exported from the harbour set out in schedule A. which are very much the same as those contained in the Act of 1862, except that schedule A. contains this new clause: "Additional dues to be payable on completion of wet dock. Goods (except coal, iron, or lime) loaded or discharged in the dock, or exported or imported in vessels of a registered tonnage of 100 tons or upwards, to be charged 75 per cent. above the rates specified." Sect. 25 also substituted for the rates and duties of tonnage given by the Act of 1862 the "tonnage dues on ships on entering or leaving the harbour," contained in schedule B. In that schedule there are two sets of rates, one for vessels under, the other for vessels of or above, 100 tons. The rates for vessels under 100 tons are practically the same as those imposed by the Act of 1862. Those for vessels of or above 100 tons are 2*d.* a ton higher than the other rates, but still lower than the rates imposed by the Act of 1808. Schedule B. also contains the following new clause: "Additional dues to be payable on completion of wet dock. For every ship or vessel entering the wet dock, over and above the before-mentioned dues, for every ton 2*d.*" Under these circumstances, it was contended that the tonnage dues and harbour duty on all vessels entering the harbour should be taken into account in estimating the rateable value of the dock, because the increase in these dues (which, however, only existed in the case of vessels of or above 100

tons) must be attributed to the expense incurred by the commissioners in making the wet dock. To this, however, it seems to be a sufficient answer that the commissioners were by the Act of 1872 empowered to execute other works in addition to the wet docks, and that these dues were authorised to be taken immediately on the passing of the Act, and before the wet docks were completed or even begun, and might, it would seem, be taken although the wet docks never were made at all. I am therefore of opinion that these rates and duty are unconnected with the wet docks, and cannot be said to have been earned by them. Secondly, it was urged that, assuming the tonnage dues and duty on all ships could not be taken into account, yet at least the whole of the tonnage dues and the duty paid by ships actually entering the wet dock should be brought into the account, and not merely the additional 2*d.* per ton. The word "additional" it was said showed that the totality of the dues in the case of a vessel entering the wet dock must be treated as a single and indivisible payment, and the whole of it must be deemed to be earned by the wet dock. For this position the case of *Reg.* v. *Hull Dock Company* (7 Q. B. 2) was cited. In that case certain dues were given to the dock company in respect of the charges and expenses they had been at in making the docks, and these dues were of the same amount and were equally payable whether the ships entered the docks the property of the company, or merely entered the harbour which was not the property of the company without going into the docks at all. The docks were the sole meritorious cause of the company's right to the dues, and it was held that the dues were not the less earned by the docks where the ship actually entered the docks because the ship must have paid the same amount if it had not entered the docks at all. In the present case the wet dock is not the sole meritorious cause of the commissioners' right to the dues. On the contrary, the commissioners have executed and maintain works in the harbour by which ships using the harbour are directly benefited; and seeing that all ships entering the harbour pay a certain and uniform rate whether they enter the wet dock or not, while those which enter the wet dock pay an additional rate of 2*d.* a ton from which those who do not enter it are free; and seeing that the former rate was always payable even before the wet dock was made, while the additional rate only came into operation when the wet dock was completed, the inference is, in my judgment, irresistible that the additional 2*d.* a ton alone is earned by the wet dock, and that the dues which all vessels pay alike whether they enter the wet dock or not are earned by the works carried out and maintained by the commissioners in the harbour, and cannot be taken into account in rating the docks, because they are not earned by the wet dock, nor is the wet dock in any way the meritorious cause of them. In my judgment the decision of the recorder was correct, and must be affirmed.

Wills, J.—I am of opinion that the recorder was right in excluding from the receipts to be taken into consideration in assessing the commissioners in respect of the docks those portions of the tonnage dues under schedule B. of the Act of which are not the "additional dues" at the end of that schedule, and also the harbour duties of 3*s.* 4*d.* per vessel. Since the year 1808 harbour duties have been charged under Acts of the years 1808, 1862, and 1872 respectively upon all ships making use of the harbour; but, as the soil of the harbour did not belong to the commissioners, and any accommodation afforded by them through the pier, quays, and wharves which they owned was paid for by the import and export duties (which in the Act of 1872 are called the shore duties), harbour duties were never treated as increasing the value of the occupation of the premises belonging to the commissioners, and therefore were not carried into the rating. This seems to have been a correct practice according to the second branch of the decision in *Reg.* v. *Kingston-upon-Hull Dock Company* (7 Q. B. 2). In 1872 the Act under which dues are now collected was passed. It recited that the commissioners were desirous of undertaking the construction of a wet dock and other works for the improvement of the harbour and the accommodation of vessels resorting thereto, and for facilitating communication with the southern shore of the harbour, on being authorised to do so, and on the maximum rates and duties leviable by them being increased. The Act accordingly empowered them (sect. 4) to make a wet dock, to make an embankment below high-water mark from Berwick Bridge to the landward end of Carr Rock Pier, and certain quays and wharves, and empowered them to take under schedule A.: 1. Shore duties which (with a few very trivial alterations, and with the introduction of a very few articles not included in the former schedule) were identical with the then existing shore duties. 2. Additional dues to be payable on the completion of the wet dock, and which were payable on goods loaded or discharged in the dock, or on goods exported or imported in vessels of a registered tonnage of 100 tons or upwards. And under schedule B.: 1. Tonnage duties on vessels entering or leaving the harbour and not using the wet dock, which for small vessels were the same as the then existing tonnage duties, but which for vessels of or above 100 tons register were materially higher that those leviable under the Act of 1862. 2. A harbour duty of 3*s.* 4*d.* per vessel, which was the old duty, except that an additional sum was now made chargeable upon vessels remaining in the harbour more than six weeks. 3. Certain dues in certain events upon boats, which were the same as the existing dues. 4. Additional tonnage dues at the rates of 2*d.* per ton, to be payable on completion of the wet dock in respect of every vessel entering the wet dock. There were then two classes of tonnage dues: 1. Upon vessels which did not enter the docks, which were substantially and with two very trivial exceptions the same as the old harbour duties. 2. Upon vessels which did enter the docks, the latter being 2*d.* per ton higher than the former. By the preamble of the Act the rate upon a vessel which entered the docks, and which was the aggregate of the harbour duty proper, and the 2*d.* per ton payable on entering the wet dock is treated as one rate, and the additional dues are spoken of as effecting an increase of the maximum rates theretofore chargeable, which were harbour dues simply, and not as a new and separate charge. If this form of expression were to be taken as conclusive, it would follow that the whole of the larger rate chargeable upon a vessel entering the

dock must be treated as one and indivisible, and it would follow, further, that either the whole of it must be included, or, in calculating the earnings of the dock, the whole of it must be rejected as an element in arriving at their rateable value. But I think this would be a pedantic adherence to mere phraseology, and would ignore the facts and the real substance of the enactment. The commissioners do works of two classes—they construct an embankment ending with the landward end of Carr Rock Pier and certain quays, and also a wet dock. By the first of these they improve the facilities for landing goods, and as a compensation they get, in the case of vessels of or above 100 tons, largely increased landing charges in case such vessels use the quays or the Carr Rock Pier without entering the dock. As to these no question arises. As a compensation for constructing the wet docks they get, besides the increased shore duties on all goods in respect of which the docks are used, the additional tonnage duty of 2*d.* per ton on vessels which enter the dock. The substance of this enactment seems to be, that the commissioners get the old tonnage dues which were chargeable before the dock was constructed, and which still attach the moment the vessel crosses the outer boundary of the harbour, and which are therefore irrespective of the use of the dock, and beyond that get a fresh tonnage charge upon every vessel which uses the dock. The result is to show that the charge which in the preamble is called one is in effect two, namely, the old tonnage dues which were strictly harbour dues, and which have never been taken into account in the rating of the commissioners, and the dues for the use of the dock. I see no reason why the portion of the aggregate duty referable to the mere use of the harbour, and which the provisions of the Act make it easy to separate from the total, should assume a different character because the dock (which may or may not be used, and which is of no benefit to the ship making no use of it) is allowed to earn an additional 2*d.* per ton if used. The duty of 3*s.* 4*d.* upon each ship entering the harbour is wholly unaffected by the construction of the dock, and is not increased in the case of a vessel entering the dock, and I think it retains its old character, and has been properly excluded from the calculation by the recorder. It is said, however, that such a decision conflicts with the case of *Reg.* v. *The Kingston-upon-Hull Dock Company*, cited above. I do not think so. In that case the charge was upon every vessel entering the harbour basin or docks; and it was the same in each of the three cases. The court held that when once a vessel did enter the docks the rate was earned by the docks, and was therefore to be taken into account in assessing their earnings. It is difficult to see how any other conclusion could be arrived at. It was not possible to dissect the charge and say that a portion was paid as a mere harbour due, inasmuch as the only definite measure of the harbour due afforded by the Act, if subtracted from the total charge, would have left nothing as the earnings of the docks. I think, therefore, that as to the dock the learned recorder was right as to both the classes of dues which he excluded. As to the Carr Rock, it seems to me that the facilities which were afforded by the property of the commissioners were paid for by the shore dues. It is not contended that the soil of the bed of the harbour adjoining the Carr Rock where vessels lie alongside it belongs to the commissioners. It is said, however, that it earns the tonnage dues, which are of the character of harbour dues, by having a mooring post to which vessels make fast. I cannot think that this is anything more than a facility for the landing of goods. It would be going a long way to say that it was enough to turn the harbour dues, which would be payable by a vessel whether it made fast to the mooring post or depended upon its own anchor, into the earnings of the pier or landing place; and I think that in respect of the Carr Rock also the decision of the learned recorder was right. The order of the sessions will, therefore, be confirmed with costs.

Appeal dismissed; order of sessions affirmed.

Solicitors for the appellants, *Flux* and *Leadbetter*, for *S. Sanderson* and *R. B. Weatherhead*, Berwick-upon-Tweed.

Solicitors for the respondents, *E. Bromley*, for *Willoby* and *Peters*, Berwick-upon-Tweed,

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Thursday, Dec. 10, 1885.

(Before HUDDLESTON, B. and WILLS, J.)

APPLEBY *v.* FRANKLIN. (*a*)

Practice—Action—Felonious injury—Civil and criminal proceeding—Motion to strike out allegation of felony from statement of claim—Master and servant—Felonious injury to servant.

The rule that no action is maintainable to recover damages caused by a felonious act until the person committing it has been prosecuted only applies where the plaintiff is the person to whom the wrong constituting the felony is done, and the defendant is the person committing the felonious act.

A master may maintain an action against a person causing injury to his servant by administering noxious drugs to her with intent to procure abortion, without having previously prosecuted that person.

Semble, where an action is brought by a person injured by a felonious act against the person committing that act, without having previously prosecuted him, the court will strike out the allegation of felony from the statement of claim.

THIS was an appeal, referred to the court by a judge at chambers, from an order of a master striking out the second paragraph of the plaintiff's statement of claim on the ground that it alleged a felony as a cause of action, for which the felon had not been prosecuted.

The action was brought by the plaintiff, Mary Ann Appleby, against the defendant, Henry Franklin, to recover damages suffered by the plaintiff in consequence of the defendant having seduced the plaintiff's daughter and servant, and having subsequently administered to her noxious drugs for the purpose of procuring abortion.

The statement of claim alleged that on the 3rd June 1885 the defendant seduced and carnally knew the daughter and servant of the plaintiff, whereby she became *enceinte*; and in the second paragraph that the defendant, subsequently to the seduction, administered to her certain

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

noxious drugs for the purpose of procuring an abortion; and that by reason of the matters aforesaid the plaintiff had suffered damage.

The defendant having taken out a summons to strike out the second paragraph, the master made an order striking it out, on the ground that it alleged a felony, for which the felon had not been prosecuted. On appeal, the judge at chambers referred the question to the court.

Terrell for the plaintiff.—The defendant is not entitled to set up his own criminality and say that until he has been prosecuted he is entitled to take an objection to any proceeding commenced against him on the ground of his felony. Such an objection can only, it is contended, be taken by the Attorney-General on the part of the Crown. It cannot be taken by the defendant by demurrer, since *Roope* v. *D'Avigdor* (48 L. T. Rep. N. S. 761; 10 Q. B. Div. 412) distinctly decided that a statement of claim is not demurrable on the ground that it shows the cause of action to be a felony for which the felon has not been prosecuted. Again, it is contended that he cannot take the objection by plea. In *Wells* v. *Abraham* (26 L. T. Rep. N. S. 433; L. Rep. 7 Q. B. 554), in an action of trover and trespass for a brooch, the pleas being not guilty and not possessed, the jury found a verdict for the plaintiff. A rule for a new trial having been obtained on the ground that it appeared from the evidence that the brooch was taken by the defendant under such circumstances as to prove a charge of felony, and that the judge ought therefore to have nonsuited the plaintiff, it was held that the judge was bound to try the issues on the record, and that he was right in not having nonsuited the plaintiff. In his judgment in that case Cockburn, C.J. says: "No doubt it has been long established as the law of England that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy, that is, the right of redress by action, is suspended until the party inflicting the injury has been prosecuted. But although that is the rule, it becomes a different question when we have to consider how it is to be enforced. It may be that the person against whom a prosecution for felony is pending may have a right in an action to show by plea that he is in the position of a felon, and so he may be able to stop the action brought by the person injured by his felonious act, although I think this is open to doubt, because the effect would be to allow a party to set up his own criminality." Cockburn, C.J. therefore did not think that a party could set up his own criminality by plea. [HUDDLESTON, B.—But Cockburn C.J. goes on to say: "But it may very well be that, if an action were brought against a person who was either in the course of being prosecuted for felony, or was liable to be prosecuted for felony, the summary jurisdiction of this court might be invoked to stay the proceedings which would involve an undue use, probably an abuse, of the process of this court, in which case the court is always willing to prevent such abuse. It may be—I do not say it is so—that, if a person neglecting his duty to prosecute for an offence committed against him were to bring an action instead of prosecuting, the court might be called upon to intervene, and to prevent the plaintiff obtaining by judgment and execution the fruits of the action thus improperly brought," Are we not now called on to exercise our summary jurisdiction?] No; the court is asked to strike out the cause of action altogether. Besides, Cockburn, C.J. does not say that the court may be called upon by the defendant; and it is submitted that the observations of Blackburn, J., in his judgment in the same case, show that the defendant cannot himself raise this objection. Blackburn, J. says: "No doubt there are many dicta of high authority to the effect that when there has been a private injury to a civil right, which may also be the subject of criminal prosecution for felony, it is the duty of the person injured to prosecute for the criminal offence before he can pursue his remedy by action for the private injury. But although there are many dicta to that effect, I cannot find any case where that rule of law has been acted on before the cases of *White* v. *Spettigue* (13 M. & W. 603) and *Gimson* v. *Woodfull* (2 C. & P. 41). While the law throws the prosecution of criminal offences on private individuals it may be, in some cases, that the civil remedy is suspended until there has been a prosecution for the felony. I am not prepared to say that if an action were brought against a defendant, and it was stated by the Attorney-General on behalf of the Crown that criminal proceedings were pending, and the action was brought with an intention of compromising the felony, the court might not in such a case, in the exercise of its summary jurisdiction, stay proceedings in the action until the indictment for felony had been tried." In the opinion of Blackburn J., therefore, the objection can only be taken by the Attorney-General on behalf of the Crown, and the effect of the cases cited is that the defendant cannot himself by demurrer or pleading, or in any way, take advantage of his own criminality. The rule of law is, as is stated by all the judges in all the cases, clear, but the only person who can take advantage of it is the Attorney-General for the Crown. [HUDDLESTON, B.—The learned judge does not say that the Attorney-General is the only person. Could not the defendant move to stay the civil action on the ground that it might prejudice criminal proceedings going on at the same time?] The defendant cannot himself take advantage of the rule. The court, in the absence of interference by the Crown, will construe technical rules as far as possible against a defendant who has been guilty of felony. In *Markham* v. *Cobb* (Sir W. Jones, 147; Noy, 82) in an action of trespass for breaking into the plaintiff's house, the defendant pleaded that he had been, by the procurement of the plaintiff, indicted for burglary and found guilty, but the court refused to allow the plea on the ground that it did not show that the plaintiff had given evidence of the conviction, without which he could not have restitution. [HUDDLESTON, B.—Does not *Wellock* v. *Constantine* (7 L. T. Rep. N. S. 751; 2 H. & C. 146) settle the case? That was an action brought by a woman for assaulting her and forcibly violating her person, whereby she was delivered of a child. It was objected on the part of the defendant that the action was not maintainable, inasmuch as there was proof of a rape, and the learned judge ruled that the action was not maintainable, for if a rape was proved that could not form the subject of a civil action, but the plaintiff must proceed criminally, and

thereupon nonsuited the plaintiff, and this nonsuit was upheld by Pollock, C.B and Bramwell B. Again, in *Ex parte Ball*; *Re Shepherd* (40 L.T. Rep. N. S. 141; L. Rep. 10 Ch. Div. 667), Bramwell, J., although with some reluctance, recognises the same principle. He says: "*Wellock* v. *Constantine* has been said to be of no authority. If I may speak for myself I have no doubt I concurred in the judgment, or the statement that I did so would have been set right, but I am sure I must have done so in the faintest way, not only from what I think now, but from what I am reported to have said then, and from there being no reasons given for the judgment, which I should have desired to give if I had thought there were any good ones to support it. But, at all events, there are the opinions of Pollock, C.B. and Willes, J.—opinions which no one who knew those judges will undervalue." Then, as to the theory that there is neither defence to nor suspension of the claim by or at the instance of the felon debtor, but that the court, of its own motion, on the suggestion of the Crown, should stay proceedings till public justice is satisfied, Bramwell, L.J. says: "Nobody ever heard of such a thing; nobody in any case or book ever suggested it till Blackburn, J. did as a possibility. Is it left to the court to find it out on the pleadings? If it appears on the trial is the judge to discharge the jury? How is the Crown to know of it?" This case is fatal to your contention unless you can distinguish it.] In any case the rule does not apply here, since the action is brought by a third person, and not by the person injured by the felonious act. *White* v. *Spettigue* (13 M. & W. 603) established that the rule as to the right of action being suspended by the felony, whatever its extent may be, was, at any rate, not applicable, except between the party injured and the criminal himself. Again, in *Osborn* v. *Gillett* (28 L. T. Rep. N. S. 197; L. Rep. 8 Ex. 88) an action was brought against the defendant for injuries caused to the plaintiff's daughter and servant by the negligent driving of the defendant's servant, by reason whereof she afterwards died, and it was held that a plea that the acts complained of amounted to a felonious act, and that the person committing them had not been prosecuted, was bad on the ground that there was no greater duty in the plaintiff than in anyone else to prosecute for the supposed felony. The same considerations apply in the present case.

L. G. Pike for the defendant.—The second paragraph of the statement of claim shows no cause of action. It is consistent with the allegations contained therein that the servant combined with the defendant to do the felonious act, in which case it is impossible that the servant can prosecute the defendant. The argument founded on *Osborn* v. *Gillett* (28 L. T. Rep. N. S. 197; L. Rep. 8 Ex. 88) is not good in the absence of an allegation that the act was done without the consent of the servant. [WILLS, J. — The defendant has done something to her which has caused the plaintiff to lose her services.] If the plaintiff is to be allowed to sue in this case, the policy of the law, which is to provide for the prosecution of the felon, will be wholly defeated. The injury was caused by the servant taking the drugs of her own free will.

Terrell in reply.

HUDDLESTON, B.—In this case the master has made an order striking out the second paragraph of the plaintiff's statement of claim, and on the appeal from him to the judge at chambers, my brother Stephen has referred the matter to this court as an important question requiring argument and consideration. The action is brought against the defendant by a mother, who, in the first paragraph of her statement of claim, alleges that the defendant has seduced her daughter; and in the second, that he has administered to her certain noxious drugs for the purpose of procuring abortion; and then, in the third, that by reason of those two matters she has suffered damage. The second paragraph the master struck out, and it is said on the one side that he was right in striking it out, because the matters alleged therein amount to felony, and it is a principle of the English law that if the matters alleged as a cause of action amount to felony no action will lie till the felon has been prosecuted. On the other side Mr. Terrell says that, although this objection is in itself founded on authority, it cannot be taken by the defendant, and as an authority for that he quotes the case of *Wells* v. *Abraham* (26 L. T. Rep. N. S. 433; L. Rep. 7 Q. B. 554). To my mind, however, it is perfectly clear, from the judgment of Cockburn, C.J. in that case, and also from that of Blackburn, J., that those learned judges thought that, where an action is brought against a person who is liable to be prosecuted for felony, the summary jurisdiction of this court might be invoked to stay the proceedings; that is, that the court had power to strike out a statement of claim on that ground, and could deal with the matter in that way. There is, however, strong authority for the proposition that, where a party is injured by a felonious act on the part of another, no action is maintainable until the felon has been prosecuted. That authority is to be found in the case of *Wellock* v. *Constantine* (2 H. & C. 146), where Willes, J., on the case coming before him for trial at York, held that, as the evidence amounted to rape, no action would lie until after the defendant had been prosecuted. That case was considered by the court, and the nonsuit was supported. Doubt was, indeed, expressed by Martin, B.; but Pollock, C.B. and Bramwell, J. concurred in the decision, and when that case was brought under the notice of the Court of Appeal in *Ex parte Ball; Re Shepherd* (40 L. T. Rep. N. S. 141; 10 Ch. Div. 667), it was approved by them, although an endeavour was made to discredit it. "*Wellock* v. *Constantine*," says Bramwell, L.J., "has been said to be no authority. If I may speak of myself, I have no doubt I concurred in the judgment, or the statement that I did so would have been set right; but I am sure I must have done so in the faintest way, not only from what I think now, but from what I am reported to have said then, and from there being no reasons given for the judgment, which I should have desired to give if I had thought there were any good ones to support it. But, at all events, there are the opinions of Pollock, C.B. and Willes, J.—opinions which no one who knew those judges will undervalue;" and Baggallay, L.J., in stating the reasons for his decision, says that "notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured to seek civil redress if he has failed in his duty of bringing or endeavouring to bring the felon to justice." That

is certainly the law, but these cases only went to the extent that a plaintiff who has been injured by a felonious act cannot maintain an action, and they do not apply to persons who have a right of action based on a felonious act but are not the persons injured by it; so that a master who brings an action for the loss of service of his servant may maintain it against the person doing the injury notwithstandings that the circumstance amount to a felony. This is clearly pointed out in an authority to which our attention has been called. In the case of *Osborn* v. *Gillett* (28 L. T. Rep. N. S. 197; L. Rep. 8 Ex. 88) a master brought an action against the defendant to recover damages for injuries caused to his daughter and servant, and the defendant pleaded that the acts complained of amounted to a felonious act, and that the person committing them had not been prosecuted; but the court held that the master could maintain the action. In the argument in that case the learned counsel for the plaintiff pointed out the distinction between the action being brought by the person injured by the felonious act and by a third party, and quoted *White* v. *Spettigue* (13 M. & W. 603), where an action was brought against a bookseller who had innocently purchased goods stolen from the plaintiff, and the court held that the plaintiff could maintain the action because the objection that the felon had not been prosecuted fell to the ground, inasmuch as the rule only applied between the party injured and the criminal himself, and the felony had not been committed by the defendant, but by the person from whom he had innocently purchased the goods. To this argument the court acceded in *Osborn* v. *Gillett*, and held that, although the defendant might have committed the felony, that did not prevent the plaintiff from bringing the action, as he was not the person injured, Pigott, B. in his judgment saying very shortly: "I think the fourth plea is bad for the reasons given in the argument, viz., that it only affords a defence, if at all, when the action is brought against the supposed criminal and before prosecution." Bramwell, B. also says: "The fourth plea in this case is clearly bad. *White* v. *Spettigue* is in point. Indeed, this case is stronger. There the plaintiff was owner of the books, and it may be said that in some sense it was his duty to prosecute the man who stole them; but in this case I see no greater duty in the plaintiff than in anyone else to prosecute for the supposed felony." That state of things is, in my opinion, in point in this case also. Mr. Pike has endeavoured to distinguish the present case from the case of *Osborn* v. *Gillett*, but I think that he has failed to do so. Under these circumstances I am of opinion that the master was wrong in striking out the second paragraph of the statement of claim. I think that, if it is really true that the defendant has seduced and administered drugs to the plaintiff's daughter and servant, it would be a scandal upon the administration of justice if he could not be made amenable to damages for the wrong which he has done. The paragraph will therefore be restored to the statement of claim, and the appeal will be allowed with costs.

Wills, J.—I am of the same opinion. I think that the authorities leave no room for doubt that the objection to an action being brought to recover damages caused by a felonious act until the person committing the felony has been prosecuted applies only when the person bringing the action is the injured party, and the action is brought against the person committing the felony. My only doubt is as to the manner in which the objection should be taken. It cannot be taken by plea or by demurrer, for the good reason that, if it could be taken by either of those methods, the result would be that the cause of action would be extinguished, whereas the cause of action is not extinct, but still exists, although I do not know whether it is more correct to say that it is suspended, or that the court will not allow the plaintiff to go on until he has prosecuted the felon. That being so, I do not know what course would be more proper, where an action is brought by a person to whom a wrong constituting a felony has been done against the person doing it, than to strike out the allegation of the felonious act. Here, however, the action is not being brought by that person, but by a person on whom no public duty is laid by the law. I am of opinion, therefore, that the plaintiff in this case is not debarred from her action, inasmuch as she is in no default, and has committed no breach of any duty which she owes to society. The decision of the master must therefore be reversed, and the paragraph restored.

Appeal allowed.

Solicitor for the plaintiff, *J. H. Evans.*

Solicitors for the defendant, *Lumley* and *Lumley.*

Dec. 15, 16, 1885, *and Jan.* 11, 1886.

(Before Huddleston, B. and Wills, J.)

Loughborough Highway Board (apps.) *v.* Curzon (resp.). (*a*)

Highway, non-repair of—Admissions by waywarden as to road being a highway and liability to repair—Liability of highway board—Jurisdiction of justices—25 *&* 26 *Vict. c.* 61 (*Highway Act* 1862), *s.* 18—41 *&* 42 *Vict. c.* 77 (*Highways and Locomotives* (*Amendment*) *Act* 1878), *s.* 10.

A summons issued under sect. 18 *of* 25 *&* 26 *Vict. c.* 61 *against the highway board of the district, and the waywarden of the parish of L. alleged that a certain highway in the said parish of L., and within the district of the said highway board, was out of repair, and required the said highway board and waywarden to appear before the justices in petty sessions to answer the information.*

At the hearing the waywarden bonâ fide admitted that the road was a highway which the parish was liable to repair, and that the road was out of repair. The highway board denied that the road was a highway, and objected that the justices had no jurisdiction to hear the summons, and contended that the power to enforce the repair of a highway by a defaulting highway authority was vested in the county authority under sect. 10 *of* 41 *&* 42 *Vict. c.* 77, *which repealed sect.* 18 *of* 25 *&* 26 *Vict. c.* 61, *and that the waywarden was not a person qualified to make the above admission. The justices made an order on the highway board for the repair of the road.*

Held (*affirming the order of the justices*), *that the justices had jurisdiction to hear the summons in petty sessions.*

(*a*) Reported by F. A. Crailsheim, Esq., Barrister-at-Law.

Held also, that sect. 18 *of* 25 *&* 26 *Vict. c.* 61 *was not repealed by sect.* 10 *of* 41 *&* 42 *Vict. c.* 77, *and that the procedure at petty sessions was not altered by the latter Act.*

Held also, that the admission by the waywarden that the road was a highway which the parish was liable to repair was conclusive, and that it was not competent to the highway board, after the admission of the waywarden, to deny those facts.

THIS was a special case stated under sect. 33 of the Summary Jurisdiction Act 1879, by way of appeal against an order, dated the 27th May 1885, of William Byerley Paget and Thomas Allan Henry, Esqrs., two of the justices of the peace for the county of Leicester, whereby it was adjudged that a certain highway in the parish of Lockington, in the county of Leicester, was on the 9th Oct. 1885 and then was out of repair, and that the said highway board as such was chargeable with the repairs of the same. And it was further ordered and adjudged that the said highway board as aforesaid is chargeable with such repairs of the said highway, and that the said board should well and sufficiently repair and amend the said highway on or before the 27th Nov. 1885, which time is by the said order limited and appointed for the repairing of the same.

1. The highway board for the Loughborough district is a highway board under 25 & 26 Vict. c. 61 and 27 & 28 Vict. c. 101, and a highway authority under 41 & 42 Vict. c. 77.

2. The parish of Lockington is a parish within the said highway district.

3. On the 25th Feb. 1885 a summons was issued under sect. 18 of 25 & 26 Vict. c. 61 upon the information of the respondent against the appellant highway board and against George Spencer Shepperson, the waywarden of the parish of Lockington, alleging that

> There was, and is, a certain common and ancient highway in the parish of Lockington in the county of Leicester, within the district of the highway board for the district of Loughborough in the said county of Leicester, used by and for all the liege subjects of our Lady the Queen and her predecessors, with their horses, carts, and carriages, to go, return, pass and repass, at their free will and pleasure, and that a portion of the said common and ancient highway lying and being in the said parish of Lockington, and extending from a certain gate being the first gate on the said highway, leading from the village of Lockington aforesaid to the junction of the said highway with the highway leading from Kegworth to Diseworth, containing in length 1390 yards or thereabouts, and in breadth 18 feet or thereabouts, on the 9th Oct. last, and continually afterwards, until the date of this information, was and is out of repair, and is ruinous, miry, deep, broken, and in great decay for want of due reparation and amendment of the same, and that you, the said highway board, being the highway authority for the said parish of Lockington, ought to repair and amend the said portion of the said highway as aforesaid, which for the time aforesaid has been and now is ruinous, miry, deep, broken, and in great decay as aforesaid, when and so often as there should be occasion, and that you, the said highway authority, have neglected and refused so to do.

And such summons required the said highway board and the said George Spencer Shepperson, as such waywarden for the said parish, to appear before the justices in petty sessions at Loughborough on the 11th March 1885, to answer the said information, and to be further dealt with according to law.

4. On the 11th March 1885, being the day duly appointed for special sessions for highway purposes at Loughborough, the said highway board attended by Henry Deane, their clerk, the informant Nathaniel Charles Curzon, being represented by Mr. H. A. Owston, of Leicester, his solicitor, and Mr. George Spencer Shepperson, the waywarden, appearing in person.

5. On the summons being called on, the solicitor for the informant opened his case, when it was objected by the clerk to the highway board that sect. 18 of 25 & 26 Vict. c. 61, under which the proceedings were taken, had been repealed by sect. 10 of 41 & 42 Vict. c. 77, by which the power to enforce the performance of the duty to repair a road by a defaulting highway authority is vested in the county authority as defined by that Act, and urged that, if this were not so, the waywarden might admit the road to be a highway, although he could not, in the words of sect. 18 of 25 & 26 Vict. c. 61, admit "the liability of the parish to repair," as all repairs are now charged on a district fund, and thus the waywarden would be able to throw the burden of repair not on his own parish, as was the case when 25 & 26 Vict. c. 61, was passed, but upon the whole highway district, on which, by sect. 7 of 41 & 42 Vict. c. 77, the cost of the repair is now chargeable. For the respondent it was contended that sect. 10 of 41 & 42 Vict. c. 77, did not repeal 25 & 26 Vict. c. 61, s. 18, or take away the right of the respondents to proceed under the latter section, but merely gave another remedy, and the waywarden having admitted the road to be a highway, it was not competent for the highway board to deny it, and that the duty of the justices was simply to be satisfied that the admission of the waywarden was made *bonâ fide*, and not collusively, and that *Reg.* v. *Odell* (34 J. P. 534; 21 L. T. Rep. N. S. 556) was an authority on this point, and also that no person but the waywarden could in these proceedings deny the liability to repair.

6. The justices held that this was so, and that they had jurisdiction to proceed with the hearing, and they therefore inquired whether the waywarden denied the liability of the parish to repair, and he thereupon admitted such liability, and also that the road was a highway, for all purposes as claimed in the summons, and also that the road was out of repair.

7. The highway board by their clerk admitted that the board were liable to repair the road if it were a highway for carts and carriages as alleged, and if it was dedicated to the public before 1836, but denied this, and claimed to be protected by sect. 23 of the Highway Act 1835.

8. The justices thereupon, in order to determine the question of *bona fides* of the admission by the waywarden, and not the question of highway or no highway, directed witnesses to be called, and thereupon proceeded to take the evidence of the waywarden and other witnesses. The justices' clerk's notes of the evidence accompanied and formed part of the case. Mr. Deane, the clerk to the highway board, was then asked if he had any witnesses to call, but he declined doing so, lest he should be taken to admit the jurisdiction of the justices, and the case was adjourned. At the adjourned hearing Mr. Deane requested to be allowed to call witnesses, with a view of showing that the highway board *bonâ*

fide disputed the road to be a highway for all purposes, but this was refused.

9. The summons was adjourned from time to time by consent of all parties, but ultimately came on for hearing and final disposal on the 27th May 1885, when the clerk to the highway board applied for permission to call witnesses to prove that the highway board did *bonâ fide* dispute that the road was a carriage way as alleged in the summons, when the respondents' solicitor objected that it was out of the jurisdiction of the justices to decide the question of highway or no highway, and that the only person who could admit whether the road was a highway or not was the waywarden, and the justices thereupon declined to hear any evidence on behalf of the highway board.

10. During the interval between the adjournments the justices had themselves viewed the road, and by consent of both sides it was taken that such view had been a view under the statute, and that the road was out of repair. Thereupon the justices made an order upon the board for the repair of the road, and the clerk to the board applied for a case to be stated.

11. The grounds on which the order upon the highway board are objected to on behalf of the highway board, are as follows:

That the section under which the order purports to be made enacts that the person to be summoned, and who can deny the liability of the parish to repair, is the "waywarden of the parish liable to repair;" and that the said George Spencer Shepperson is not a person qualified to make such a denial, but that the highway board (consisting of the waywardens for all the parishes within the district) is, by sect. 7 of 41 & 42 Vict. c. 77, the authority liable to repair the road (if a highway) out of their district fund, and such board is now the only proper authority to deny the liability to repair, and that the admission of liability made by the said George Spencer Shepperson was not therefore binding on the highway board, nor was it, under the circumstances disclosed by the evidence, *bonâ fide*. That the duty or obligation to repair being denied by the board, and it being disputed (by the highway board only) that the road is a public highway (*Reg.* v. *Farrer*, L. Rep. 1 Q. B. 558; *Ex parte Bartlett*, 30 L. J. 65, M. C.; *Reg.* v. *Johnson*, 34 L. J. 85, M. C.), the justices should have declined to make any order. That sect. 18 of 25 & 26 Vict. c. 61, is repealed so far as relates to proceedings against a highway board, by sect. 10 of 41 & 42 Vict. c. 77, and the said order was therefore irregular and void. That the evidence of user by the public, repair by the parish surveyors and by the highway board (which latter was denied by the clerk to the highway board), and of reputation as a highway, was improperly received. If received, then the board should have been permitted to call rebutting evidence.

The board further contended that the road in question is only a bridle road, and that the user by carts, carriages, and other vehicles was for the convenience of the tenant of a farmhouse and farm belonging to the respondent, situated between the portions of undisputed road (and is not fenced on either side, formed, or metalled), and that the justices by making the order have deprived the board of having the question of whether there was or was not a dedication before the 20th March 1836 investigated by a jury.

If the court should be of opinion on any of the grounds stated that the justices were wrong in making the said order, the same should be quashed; but if on the contrary, the same should stand confirmed.

Jelf, Q.C. (*Sills* with him) for the appellants.—The question to be decided by the court in this case substantially is, whether an admission by the waywarden of a parish that a certain road is a highway, and that the parish is liable to repair such highway, is conclusive, or whether it is competent to the highway board, notwithstanding the admission of the waywarden, to dispute those facts, and so oust the jurisdiction of the justices. This question will depend upon the construction put by the court upon various sections of the Highway Acts of 1835, 1862, and 1864, and of the Highways and Locomotives (Amendment) Act 1878. Under the Highway Act of 1835 (5 & 6 Will. 4, c. 50) the surveyor represented the parish, and sect. 94 of that Act provided that, if a highway was out of repair, a summons might be issued requiring the surveyor of the parish, or other person chargeable with such repairs, to appear before the justices at special sessions to be held within the division in which such highway was situated, and the justices might make an order on the surveyor, or other person chargeable, for the repair of the highway within a certain time; but the justices were to have no power to make such order in any case where the duty or obligation of repairing the highway came in question. Sect. 95 provides that "if, on the hearing of any such summons respecting the repair of any highway, the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, it shall then be lawful for such justices, and they are hereby required to direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpœnaed at the next assizes . . . or at the next general quarter sessions of the peace . . . and the costs of such prosecution shall be directed by the judge of assize before whom the indictment is tried, or by the justices at such quarter sessions, to be paid out of the rate levied in pursuance of this Act in the parish in which such highway shall be situate . . ." The Highway Act 1862 (25 & 26 Vict. c. 61) provides, in sect. 10, for the election of a waywarden in every parish forming part of a highway district. Sect. 11 provides that "all such powers, rights, duties, liabilities, capacities, and incapacities (except the power of making, assessing, and levying highway rates) as are vested in or attached to . . . any surveyor or surveyors of any parish forming part of the district shall vest in and attach to the highway board." Sect. 17 enacts that the highway board are to maintain in good repair the highways within their district. Sect. 18 (under which the summons now in question was issued) provides that "where complaint is made to any justice of the peace that any highway within the jurisdiction of the highway board is out of repair, the justice shall issue two summonses, the one addressed to the highway board and the other to the waywarden of the parish liable to the repair of such highway, requiring the board and waywardens to appear before the justices at some petty sessions, in the summons mentioned, to be held in the division where such highway is situate . . ." Sect. 19 is a re-enactment of sect. 95 of the Act of 1835, with the substitution of the waywarden for the surveyor, the jurisdiction of justices under this section being also limited to admitted highways. When the present case was before the justices it was *bonâ fide* denied by the appellants that the road in question was a high-

way, but the liability to repair the road, if it was a highway, was not denied. It is therefore submitted that the justices had no jurisdiction to make the order for repair upon the appellants (*Reg.* v. *Farrer*, L. Rep. 1 Q. B. 558). The Highway Act of 1864 (27 & 28 Vict. c. 101) does not affect the present case, but sect. 32 of that Act places the contributions to the district fund upon a new basis. The Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. 77), s. 7, provides that "all expenses incurred by any highway board in maintaining and keeping in repair the highways of each parish within their district . . . shall . . . be deemed to have been incurred for the common use or benefit of the several parishes within their district, and shall be charged on their district fund . . ." Sect. 10 provides that "when complaint is made to the county authority that the highway authority of any highways area within their jurisdiction has made default in maintaining or repairing all or any of the highways, within their jurisdiction, the county authority, if satisfied after due inquiry and report by their surveyor that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of the duty of the highway authority in the matter of such complaint. Where an order has been made by a county authority for the repair of a highway on a highway authority alleged to be in default, if such authority, within ten days after service on them of the order of the county authority, give notice to the clerk of the peace that they decline to comply with the requisitions of such order until their liability to repair the highway in respect to which they are alleged to have made default has been determined by a jury, it shall be the duty of the county authority either to satisfy the defaulting authority by cancelling or modifying in such manner as the authority may desire the order of the county authority, or else to submit to a jury the question of the liability of the defaulting authority to repair the highway. If the county authority decide to submit the question to a jury they shall direct a bill of indictment to be preferred to the next practicable assizes to be holden in and for their county, with a view to try the liability of the defaulting authority to repair the highway." It is submitted that sect. 10 of the Act of 1878 is substituted for, and practically repeals, sect. 18 of the Act of 1862. At any rate we are entitled to read the Act of 1878 as showing that it controls the Act of 1862 so as to make the admission by the waywarden that the road was a highway which the highway board were liable to repair, a mere nullity. Sects. 18 and 19 of the Act of 1862 do not repeal, but merely vary, the provisions of sects. 94 and 95 of the Act of 1835. Under the later of these Acts the proper course was to take the admission of the waywarden as final, because, although the highway board were the persons who had to do the work, it was the parish who had to pay, and the waywardens represented the party liable to bear the expense. But the Act of 1878 puts all the parishes in the highway district on the same footing with regard to the expense of repairing the roads in the district by making them all equally liable to contribute to the district fund, upon which the expense of repair now falls. The waywarden is only the representative of a single parish; and it is submitted that the person entitled to admit or deny that a road is a highway ought to be a representative of all the parishes which have to bear the expense of repair. If there is no provision for such person in the Act, it is probably an oversight. It is submitted that the Act of 1878 creates a new authority which ousts the old, and that the justices acted beyond their jurisdiction in making the order for repair upon the highway board, it being *bonâ fide* disputed by the board that the road was a highway. The appellants have a right to have the question of highway or no highway tried before a jury at quarter sessions, and the admission by the waywarden ought to have been treated as a nullity. The systems of procedure instituted by the Acts of 1835 and 1862 have been swept away and supplanted by that introduced by sect. 10 of the Act of 1878.

Shiress Will, Q.C. for the respondent.—Under the Highway Act of 1835, ss. 94 and 95, the surveyor of highways as the representative of the parish, had authority to admit or deny liability on the part of his parish to repair roads. By sect. 18 of the Act of 1862 the waywarden is placed for this purpose in the same position as the surveyor of highways previously occupied. Sect. 10 of the Highways and Locomotives (Amendment) Act of 1878 does not expressly repeal the provisions before mentioned on this subject. Neither can it be construed as impliedly repealing them, because the procedure introduced by sect. 10 of the Act of 1878 is an entirely new and different proceeding. This section provides a different remedy before a different tribunal, and the two sets of provisions may well stand together. It is not disputed that the surveyor of highways, and by the later Act, the waywarden, was, until the Act of 1878, the person to decide whether a road was a highway or not. The duty of the waywarden in this behalf is the same as that of the surveyor of highways formerly was. Taking the Act of 1862, sect. 5 relates to the formation of highway districts. Sect. 9 provides for the constitution of highway boards, consisting of the waywardens for each parish, who collectively constitute the board. Sect. 10 provides for the election of the waywardens; and sect. 11 transfers the jurisdiction and powers of the surveyor to the highway board as now constituted. Sect. 12 enumerates the officers of the highway board, but the waywarden is not included; he is a distinct person. Sect. 18 enacts what steps are to be taken if the roads are out of repair. Sect. 20 of the Act of 1864 gives the waywardens power to contract for the supply or cartage of materials, &c. Sect. 52 gives them power to contract for materials for repairing highways. The Highways and Locomotives (Amendment) Act of 1878 is not a destructive Act; it is not intended to repeal the previous legislation on the subject, nor to alter the machinery of the Acts of 1862 and 1864. Sect. 11 of the Act of 1878 enacts that waywardens shall continue in office for a year; the Legislature has, therefore, intentionally shielded the waywardens. Sect. 12 shows the only repeal that the Act contemplates. Under the provisions of the Acts of 1835 and 1862 the Legislature provided a quick summary remedy, but all that sect. 10 of the Act of 1878 does is to provide a new and distinct remedy, applicable to a different state of facts and conditions. The two systems may well stand together; there may be a remedy at

petty sessions as well as one at quarter sessions. For these reasons it is submitted that the order of the justices was correct, and ought to be affirmed. He cited the cases of

Reg. v. *Odell*, 21 L. T. Rep. N. S. 556; 34 J. P. 534;
Young v. *Davis*, 7 H. & N. 760; 31 L. J. 250, Ex.; 6 L. T. Rep. N. S. 363, affirmed 2 H. & C. 197; 9 L. T. Rep. N. S. 145.

Sills in reply.—The highway board are, by sect. 18 of the Act of 1862, made a party to the proceedings before the justices, and it is submitted that they must be intended to have a right to admit or deny the liability to repair. The reason why, under the Act of 1862, the waywarden was the proper person to admit or deny the liability of the parish to repair roads, was because under that Act the parish he represented was the only body interested. It is an admitted principle of law that the moment a *bonâ fide* question of title is raised, the magistrates must hold their hands. This highway board represents nineteen parishes, and the inhabitants of Lockington have a great interest in making this road a highway. Under the present system, the highway board are far more interested than the waywarden of the particular parish, because by sect. 7 of the Act of 1878 the expenses of repair which would formerly have fallen on the particular parish are now thrown on the funds of the whole highway district. It would be absurd that the highway board, being parties to the proceedings, and being the parties chiefly interested, should be unable to raise the question of liability.

Cur. adv. vult.

The judgment of HUDDLESTON, B. and WILLS, J. was delivered as follows:—In this case a summons was taken out by the respondent, Mr. Curzon, against the appellants and Mr. Shepperson, waywarden of the parish of Lockington, complaining that a portion of an ancient highway within the said parish was out of repair, and that the appellants had neglected and refused to repair and amend the same. Upon the hearing before the justices, the waywarden admitted that the road was a highway for all purposes, and that the parish was liable to repair it. The appellants sought to deny that it was more than a footway, and that there had been any dedication before 1836. The justices heard evidence to satisfy themselves that the admissions made by the waywarden were *bonâ fide*, and asked if the appellants had any witnesses to call. The appellants declined to call any witnesses, lest they should be taken to admit the jurisdiction of the justices. Upon an adjourned hearing, the appellants asked to be allowed to give evidence to show that they *bonâ fide* disputed that the road was more than a footway. This evidence the justices declined to receive, and, after viewing the road under circumstances which must be taken as equivalent to a compliance with the 18th section of 25 & 26 Vict. c. 61, made an order upon the appellants for the repair of the road. The principal and important question for our decision is, whether, since the Act of 41 & 42 Vict. c. 77 (the Highways and Locomotives Amendment Act 1878), the admission by the waywarden that the road was a highway which the parish were liable to repair, was conclusive; or whether it was competent to the appellants, notwithstanding his admission, to deny those facts, and so oust the jurisdiction of the justices. By the Act of 1835 (5 & 6 Will. 4, c. 50), s. 94, it was enacted that, upon information being given to a justice that any highway was out of repair, a summons should issue, requiring the surveyor of the parish or other person chargeable with such repairs, to appear before the justices, who, upon satisfying themselves in the manner pointed out by the Act, that the highway is out of repair, shall convict such surveyor or other party liable to repair in a penalty, and shall make an order limiting a time for repairing the highway, upon the breach of which the surveyor or other person may be ordered to pay a sum sufficient to meet the expenses of the repairs; provided, nevertheless, that the justices shall not have power to make such order in any case where the duty or obligation of repairing the highway comes in question. By sect. 95 it is enacted that if, on the hearing of any such summons, the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, the justices shall direct an indictment to be preferred at the next assizes or quarter sessions against the inhabitants of the parish, or the party to be named in such order, for suffering the highway to be out of repair, and it is directed that the costs of the prosecution shall be paid out of the highway rate. The construction that has been put by judicial decisions upon these sections is, that sect. 95 has no application where the fact of the road being a highway is denied, and that, in such a case, the justices are bound to make no order under the statute (*Reg.* v. *Farrer*, L. Rep. 1 Q. B. 558), but must leave the complainant to the ordinary remedy of an indictment at common law, no special provision being made in such a case for the costs. Where, however, it is admitted that the road is a highway, but denied that there is liability to repair on the part of the parish or other party alleged to be liable, the justices are required to make an order (under sect. 95) for an indictment, in which case the costs of the prosecution will fall on the highway rate. The "other party" referred to in those sections as possibly chargeable instead of the parish, is a person or body who may be under special liability, such as that of repairing *ratione tenuræ* or by virtue of special statute, as in cases in which canal or railway companies have been made liable by Act of Parliament to repair particular roads. It is clear that under the statute of 1835 the surveyor of highways was the only person entitled on behalf of the inhabitants either to admit or deny the fact of the road being a highway, or the liability of the parish to repair. By the Highway Act of 1862 (25 & 26 Vict. c. 61), highway districts may be formed by grouping together several contiguous parishes whose highways, in the event of the formation of such districts, are to be placed under the control and management of the highway board for the district. The board is to be composed of persons elected by the several parishes, to whom the denomination of waywardens is given, and upon the formation of such a district the office of surveyor of highways in any parish within it is no longer to be filled up (sect. 43). The powers and duties of the surveyor are transferred to the highway board, except the power of making rates, for which special provisions are made by sect. 21, and, except the duty of representing the inhabitants of a parish in proceedings before justices

under the Act of 1835, to compel the repair of a highway not in good order, a matter provided for in the following manner: By sect. 17 the highway board is to maintain the several highways within the district, and (subject to the provisions of the Act) to perform the same duties, have the same powers, and be liable to the same legal proceedings as the surveyor, but for that Act, would have had performed or been liable to. By sects. 18 and 19 the proceedings under the Act of 1835, sects. 94 and 95, are modified, and it is provided that, upon complaint of non-repair made to a justice, two summonses, one addressed to the highway board and the other to the waywarden of the parish liable to the repair of the highway in question, shall be issued. Upon the hearing, unless the board undertake to repair the road, or unless the waywarden deny the liability of the parish to repair, the justices, if satisfied by the report of the surveyor, or their own view, that the road is out of repair, shall make an order on the board limiting a time for the repair, and upon default, shall appoint some person to effect the repairs; and the expenses thereof, together with the costs of the proceedings, are to be paid by the board, and deemed to be expenses of repair done to the particular highway. Where, however, the liability to repair is denied by the waywarden on behalf of his parish, or by any party charged therewith, an indictment against the inhabitants of the parish or the party charged with the liability shall be as theretofore ordered by the justices, which indictment is to be tried at the next assizes or quarter sessions, the costs whereof are to be in the discretion of the court, and, if ordered to be paid by the parish, shall be deemed expenses incurred by the parish in keeping its highways in repair. By sect. 20, the salaries of officers appointed for the district, and certain other kinds of expenses, are to be dealt with as expenditure for the common benefit, and to be charged upon the parishes in the district in proportion to the expenditure of the several parishes respectively for the three last preceding years, but the expenses of repairs and all similar expenses shall be a separate charge on each parish. We think it clear that, under the Act of 1862, the scheme established by sects. 94 and 95 of the Act of 1835 was substantially unaltered. The parochial liability to repair is clearly maintained. By sect. 17, the highway board are substituted for the surveyor of highways. They are to perform the same duties, and be liable to the same legal proceedings—and apparently only to the same legal proceedings—as the surveyor was. It is true that it is said that the board "shall maintain in good repair the highways," but the same liability is imposed by sect. 6 of the Act of 1835 in almost exactly the same words upon the surveyor, and it has long been settled law that no indictment will lie against the surveyor: (see *Young* v. *Davis*, 7 H. & N. 760; 2 H. & C. 197.) The order, which under the former Act would have been made on the surveyor, is, under the Act of 1862, to be made upon the highway board, and they are therefore directed to be summoned, but no liability and no power is given to them which the surveyor had not before, and the duty of representing the parish in respects other than those in which the surveyor's duties have been transferred to the board, is vested in the waywarden. The cost of the repairs is, as under the Act of 1862, a charge upon the parish, and the expenses of a prosecution might fall upon them if on their behalf the liability to repair was denied. Upon them also might equally fall the cost of defending themselves against an indictment, if either the fact of a road being a highway, or the liability to repair, were on their behalf denied, and it was their representative on the highway board who had the right of deciding on their behalf whether these expenses should be incurred, or the liability admitted. It is worth while mentioning in this connection, that we are informed that in the records of the Crown Office down to the year 1884, there is no instance of an indictment for non-repair against a highway board, though the records of indictment against parishes number between eighty and ninety. It was argued that the expression, "or the party charged therewith" in sect. 19 of the Act of 1862, being large enough to include the highway board, was meant to apply to it, and had rendered the board indictable under that Act. But a careful consideration of the enactments shows that this is not so. Sect. 95 of the Act of 1835 directed a summons to issue against the surveyor if the parish was alleged to be liable, against the party chargeable if the liability was alleged to be in someone else; and sect. 95 directed that if the liability to repair were disputed by the surveyor on behalf of the parish, the justices should order an indictment against the parish—if it were disputed by any other party (which means the party summoned as liable), an indictment should be preferred against him. Sect. 19 of the Act of 1862 alters the procedure in the case of parochial liability, by substituting the board and the waywarden (upon each of whom had devolved a part of the duties of the surveyor), as the parties to be summoned, instead of the surveyor. It does not deal with the case of any other party alleged to be chargeable as to whom no alteration was necessary. But sect. 19 alters the jurisdiction of the court before whom the indictment is tried as to costs, and sect. 19 accordingly deals with both cases—that of an indictment against the parish, and that of an indictment against some other person alleged to be liable. The two possible cases of liability dealt with are those of the inhabitants, who are clearly treated as still the persons liable to indictment, notwithstanding the existence of the highway board—and (where the parish is not liable), the person who may be so. The contrast is certainly not between the inhabitants of the parish and the highway board. This is a very material consideration in dealing with the subsequent legislation, because, by the Act of 1862, all independent action in the matter of repairs was taken from the parish, and yet the liability to indictment—and the sole liability to indictment—as well as the right of the elected representative of the parish to admit or deny on behalf of the parish, both the fact of the road being a highway, and the liability of the parish to repair, were preserved. By the Highway Act of 1864, the expenses chargeable to the individual parishes were directed to be apportioned, not with reference to average parochial expenditure, but with reference to the rateable value of the property in each parish, but the cost of repairs to the highways in each parish was still treated as a liability of the individual parish. By the Highways and Locomotives (Amendment) Act of 1878

(41 & 42 Vict. c. 77), an important change was made in the apportionment of the expenses of highways. By sect 7 (except in cases where the board may deem that special circumstances render it desirable to order otherwise), it is provided that all the expenses of keeping the highways of each parish in repair, and all other expenses legally incurred by such board, shall be defrayed out of the common fund, and divided in the manner directed by the Act of 1864, amongst the several parishes according to the value of the rateable property in each parish, and at the same time an entirely new method of enforcing the duty of repair is provided. By sects. 3 to 5 power is given in certain cases to place under the jurisdiction of a rural sanitary authority all the highways within its district, and the rural sanitary authority then becomes in effect the highway board of such district. As there are a great many parishes in England which have never become portions of a highway district, but have remained, as from time immemorial, managers of their own highway affairs, there may thus be under the Act of 1878 three kinds of highway administration. 1. By a rural sanitary authority. 2. By a highway board constituted under the Act of 1862. 3. By a surveyor of the parish constituted and acting under 5 & 6 Will. 4, c. 50. These three different methods of administration are dealt with together under the Act of 1878, by provisions applicable to what is therein called a "highway authority" (sect. 38). By sect. 10 it is enacted, that where complaint is made—not as theretofore to special petty sessions—to general or quarter sessions, that a highway authority has made default in repairing any highway, the sessions, after inquiry as directed by the Act, may make an order limiting a time for repair by the highway authority in question, and on default may appoint some person to effect the repairs, the expenses whereof, together with the incidental costs, shall be paid by the defaulting authority. Where, however, the highway authority alleged to be in default gives notice to the clerk of the peace, within ten days after service of the order to repair, that they decline to comply with such order until their liability to repair has been determined by a jury, the sessions shall either satisfy the alleged defaulters by cancelling or modifying, as such defaulting authority may desire, the order in question, or else must submit to a jury the question of the liability of the defaulting authority to repair the highway. In the latter case an indictment is to be preferred at the assizes to try the liability of the authority in question to repair the highway, and the order of sessions is to stand or fall according as the jury find the defendants guilty or not guilty. The costs of the indictment and of the proceedings consequent thereon, are to be in the discretion of the court before whom the case is tried, and any costs directed to be paid by the highway authority, are to be deemed to be expenses properly incurred by such authority in the maintenance of the roads within their jurisdiction. The proceedings with which the present case is concerned were proceedings before special petty sessions of the highways. To them sect. 10 of the Act of 1878 has no application, and unless the contention of the appellants, that the constitution by sect. 10 of the new procedure which it establishes, has the effect of repealing those portions of the Acts of 1835 and 1862 which relate to proceedings before justices in petty sessions, is right, the present question must be determined as if sect. 10 were not in the Act of 1878 at all. We can see, however, no trace of an intention on the part of the Legislature to abolish the simpler and far less cumbrous and expensive method of proceeding under the earlier Acts. There is great difficulty in applying the provisions of sect. 10 at all in the large class of cases in which parishes have not become component parts of a highway board, but manage their own highways, inasmuch as that section plainly contemplates the indictment of the defaulting highway authority—in the case of a parish managing its own highways, the surveyor of highways—who, as has been pointed out, is under no liability to repair, except as an element of his duty to the parishioners who have appointed him, and who up to that time was certainly not subject to indictment if the road were out of order. The necessary delay which a recourse to proceedings under sect. 10 would entail is so great, that it would be most unfortunate if the simpler and more expeditious means of enforcing repair, provided by the earlier statutes, were abrogated, and a complainant compelled to resort to the quarter sessions. We think it enough to say, with respect to this point, that there is no such express repeal, and that we can see no ground whatever for implying it. It was, however, strenuously contended by Mr. Sills, in a very able and well-considered argument, that, although the remedy before the justices in petty sessions may be still subsisting, the effect of the Act of 1878, which throws the cost of repair upon the common fund of the highway board, is to make the board the true defendants in the proceedings, and therefore to give them a right at common law to dispute the existence of the highway or the liability to repair it, and therefore to substitute them for the waywarden as the party entitled to admit or deny these matters before the justices. The answer seems to us to be that, whether or not it would have been a fair corollary to the amendments of 1878 to have so enacted, the Legislature has not done so. Putting aside sect. 10, the Act of 1878 makes no express change in either the duties or the powers of the highway board, except as to the manner in which they shall apportion the expenditure; and we think it left the system of procedure at petty sessions unaltered. That procedure contemplates and is based upon the notion of primary parochial liability, although, since 1862, where there was a highway board the parish could do nothing towards keeping the road in repair, except to complain by the mouth of the waywarden if it were allowed to become unfit for traffic. Under the Act of 1862, although the duty of effecting the repairs was that of the board, no one but the inhabitants could be indicted, and the waywarden was by express enactment constituted the spokesman of the body whose liability to indictment depended upon his action. How can these liabilities and these rights be taken away by an Act which does not contain one word applicable to the procedure constituted by the Acts of 1835 and 1862? It is said that it is unreasonable that the waywarden of a particular parish should thus be able to saddle the district with the repair of a road which it may suit the parish to acknowledge, but in which the rest of the district may have but

little interest. It is, in our opinion, an unsatisfactory method of interpretation to assume a particular hypothesis as the sole reason why a particular enactment was passed, and then to say that because that hypothesis no longer answers to the present facts, the particular enactment is repealed. But, apart from such consideration, there is no reason for assuming that the incidence upon the parish of the cost of repair is the sole reason why the right of determining whether the liability of the parish shall be admitted at petty sessions is vested in the representative of the parish. The value of a particular highway may be very great to the dwellers in the immediate neighbourhood, but may be nothing at all to those living a few miles off. A question which affects the convenience and comfort of many of the parishioners, but which may be of supreme indifference to outsiders, except in a respect in which their interests are opposed to those of the parishioners, may very well be left (upon grounds quite apart from the incidence of cost), to the decision of their elected representative. It is assumed, in any such legislation as that which relates to highway boards, that the clashing interests of different localities are not incapable of reasonable adjustment. What may be the chance of parish A. to-day, may be that of parish B. to-morrow. The highway board are not without a remedy in their own hands if unreasonable burdens should be thrown upon the common fund. If the highway board think that, by reason of exceptional circumstances, it is just that one or more parishes should bear the expenses of their own highways, they have power to compel them to do so (Act of 1878, s. 7). To us, therefore, there seems to be nothing absurd or unreasonable in a construction which leaves the waywarden still the person whose admission or denial of liability before the justices in petty sessions shall be conclusive, as up to 1878 it certainly was. Nothing short of a paramount necessity would justify us in introducing by decision and as a matter of implication, important alterations of the statute law, of which there is no trace in anything that has been expressed by the Act of 1878. For these reasons we think the magistrates were right in acting upon the admission of the waywarden. This view decides the other questions raised. The magistrates properly made such inquiry as was necessary to satisfy them that the action of the waywarden was *bonâ fide*. The evidence of the rejection of which the appellants complain was intended, not to impeach the *bona fides* of the waywarden, but to establish their own *bona fides* in desiring to maintain a different view to his, as to the existence of the highway and the liability of the parish to repair it. Such evidence was, in our opinion, irrelevant, and therefore properly rejected. The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants, *Field, Roscoe*, and *Co.*, for *Deane* and *Hands*, Loughborough.

Solicitors for the respondent, *Crowder, Anstie*, and *Vizard*, for *Owston, Dickinson*, and *Simpson*, Leicester.

Nov. 11 *and* 12, 1885.

(Before MANISTY and SMITH, JJ.)

HALL (app.) *v.* THE URBAN SANITARY AUTHORITY OF THE BOROUGH OF DERBY (resps.). (*a*)

"Public charity"—Rating—Premises used for purposes of public charity—Railway Servants' Orphanage—Exempt from district rates—Local Act, 9 *Geo.* 4, *c. cxxxii. s.* 103.

A railway servants' orphanage was founded and used for the purpose of boarding, clothing, and educating the children of deceased railway servants, and was almost entirely supported by donations from the public.

Held, that the orphanage was used and occupied exclusively for the purposes of "public charity," and was therefore exempt from a district rate by virtue of a local improvement Act (6 *Geo.* 4, *c. cxxxii. s.* 103), *which provided that none of the rates or assessments which should be made by virtue of the Act should be laid upon or in respect of any houses or buildings "used and occupied exclusively for the purpose of public charity."*

CASE stated by justices under 20 & 21 Vict. c. 43.

The appellant, who was secretary to the Railway Servants' Orphanage, was rated in respect of premises in the borough of Derby known as and occupied by the Orphanage, under a general district rate made by the urban sanitary authority under the provisions of the Public Health Act 1875.

The appellant disputed the validity of the rate on the ground that the premises were occupied exclusively for purposes of public charity, and were therefore exempted from taxation, by virtue of certain local Acts, and sect. 211, sub-sect. 1, of the Public Health Act 1875.

By "an Act for better paving and otherwise improving the borough of Derby" (6 Geo. 4, c. cxxxii, s. 103) the commissioners were authorised to make rates defraying the expenses of the Act, which provided that

None of the rates or assessments which shall be made by virtue of this Act shall be laid upon or in respect of any houses or buildings used and occupied exclusively for the purposes of public charity.

By 22 & 23 Vict. c. 11, intituled "An Act to confirm certain provisional orders under the Local Government Act 1858," confirming a provisional order made by the Secretary of State for the Home Department, under the provisions of the Local Government Act 1858:

So much of sect. 103 as exempts from any of the rates or assessments made by virtue of the said local Act all lands or grounds used solely for husbandry and agricultural purposes, and houses of which the annual value, to be ascertained as in the said Act directed, shall not exceed 5*l.*, shall be repealed, but such repeal shall not extend and apply to houses and buildings occupied exclusively for the purposes of public charity.

By the Public Health Act 1875 (38 & 39 Vict. c. 55), s. 211, sub-sect. 1, it is provided that:

If within any urban district or part of such district any kind of property is exempted from rating by any local Act in respect of all or any of the purposes for which general district rates may be made under this Act, the same kind of property shall in respect of the same purposes and to the same extent within the parts to which the exemption applies (but not further or otherwise) be exempt from assessments to any general district rates under this Act, unless the Local Government Board by provisional order otherwise direct.

(*a*) Reported by H. D. BOSSEY, Esq., Barrister-at-Law.

By a deed, dated the 1st Jan. 1878, it was declared that certain persons therein named stood possessed of certain hereditaments therein described upon trust that they and the survivors of them should, upon such hereditaments, with the moneys then or thereafter to be collected, erect and build, and from time to time repair, enlarge, or rebuild a house or orphanage, to be called the Railway Servants' Orphanage, and permit the orphanage and school house or houses to be used for the suitable maintenance, board, lodging, clothing, education, and instruction of such orphans or destitute children of deceased railway servants as should from time to time be elected, nominated, or presented, or otherwise admitted in accordance with the rules for the time being of the said orphanage, and under and subject to the rules and regulations set forth in the schedule thereunto annexed, being the rules of the said orphanage then in force, or to the rules for the time being of the said orphanage. The objects of the charity were to board, clothe, and educate children of deceased railway servants who have lost their lives in the performance of their duties till they shall have arrived at fourteen years of age, and that the benefits thereof should be open to the children of both sexes of deceased station-masters, clerks, inspectors, ticket collectors, guards, drivers, stokers, signalmen, engineers, porters, shunters, police, carmen, platelayers, labourers, mechanics, and other *bonâ fide* railway servants, including workmen employed by contractors in the construction or repair of a railway, who have lost their lives in the performance of their duty, such children being in needy circumstances. The children of deceased members of the Amalgamated Society of Railway Servants, or of other railway servants, or of workmen employed by contractors in the construction or repair of a railway who should have subscribed or collected not less than 2*s.* each annually for the orphanage fund were to be placed first and in a distinctive manner on the list of candidates for election.

In addition to the contributions of railway servants, the charity was to be supported by annual subscriptions and donations from the general public, and all subscribers were to be represented in its management by a board of governors, to be nominated and appointed as therein mentioned. The affairs of the institution were to be managed by a committee elected by the governors out of their own body, or otherwise.

On the 31st May 1881, by a resolution of the committee, the orphanage was amalgamated with and became part of the Railway Benevolent Institution. The rules of the orphanage were rescinded, and that institution became subject to the rules of the Railway Benevolent Institution, and a copy of these rules was annexed to and formed part of the case.

From these rules it appeared that part of the scheme of the Railway Benevolent Institution was to carry on the railway orphanage upon similar lines to those upon which it was originally founded. It was managed by a committee consisting of six members, to be nominated by the board of management of the Railway Benevolent Institution, and of twelve honorary subscribers to be elected by the subscribers, subject to the approval of the board of management. It was also provided by the rules that the design of the orphanage should be to board, clothe, and educate children of deceased railway servants who had lost their lives in the performance of their duty; and that after so providing any vacancies should be open to the reception of the children of railway servants being subscribing members of the benevolent institution or to the orphanage who had died a natural death. It was also provided by the rules that the names of children eligible for election whose fathers had been members of "the servants' department" of the Railway Benevolent Institution, or had subscribed not less than two shillings annually to the orphanage funds, should be placed first and in a distinctive manner on the list of candidates; or, at the discretion of the orphanage committee, such children might be admitted without election, and that the orphanage committee might without election receive into the institution orphans eligible according to the rules, on payment in advance by any person or persons, committee, railway company, or other public company or corporation of such sum annually, or of such single payment as the committee might from time to time fix, provided that the payment should not entitle the donor or donors to a vote.

The premises were occupied and used in accordance with the purposes set forth in the deed and rules above mentioned; and it appeared from the books of the orphanage that it almost entirely depended for support on public contributions.

The justices decided that the orphanage was not entitled to exemption from rates, and ordered the appellant to pay them.

The question for the opinion of the court was, whether the premises of the orphanage were premises used and occupied exclusively for the purposes of public charity within the meaning of the enactment, 6 Geo. 4, c. cxxxii., s. 103.

W. Graham for the appellant.—The orphanage is a public charity. It is immaterial that the class for whom it is instituted is limited; that is the case in almost all public charities. Persons are not admitted into hospitals and infirmaries without an order. There is no direct authority as to what is a public charity. In the case of *The Attorney-General* v. *Pearce* (2 Atk. 87) the Lord Chancellor said it was the extensiveness of the object of the charity which constituted it a public one. In *Dolan* v. *Macdermot* (L. Rep. 3 Ch. 676) there was a bequest of personalty "for such charities and other public purposes as lawfully might be in a certain parish, and it was there held by Lord Cairns, L.C. that there was a good charitable gift. There is a definition of "public charitable purposes" in 35 & 36 Vict. c. 24, s. 14, viz., all such as come within the meaning, purview, or interpretation of 43 Eliz. c. 4. I admit that the orphanage is rateable to the poor rate, but the question is whether it is a public charity, and therefore not liable to be rated to the district rate. He also cited

The Attorney-General v. *Heelis*, 2 S. & S. 67.

E. Lumley (*Arthur Charles*, Q.C. with him) for the respondents.—The orphanage is not used for the purposes of a public charity within the meaning of the Act. The cases cited do not apply, because the case depends entirely on the meaning

of the terms public charity construed with regard to the enactment in which they are found. The true test is, whether the charity is for the public, and not whether it is supported by the public. But, even if it did depend on whether the charity is supported by the public, this charity is not entirely supported by the public. It is in a great measure supported by contributions from railway servants. Premises "used and occupied for the purposes of public charity" must be for the public without restriction; that is, be open to all members of the public. But this orphanage is limited to children of the servants of railway companies. There can be no distinction between a charity for those of a certain family and for those in a certain employment, *e.g.*, between a charity for the founder's kin or for railway servants. In the case of *Reg.* v. *The Inhabitants of Stapleton* (4 B. & S. 629) there was a school founded for poor boys, of which a specified number were to be sons of freemen of Bristol, and Blackburn, J. said that the purposes for which the premises were used were not public in any sense of the word. He also cited

Governors of the Bristol Prison v. *Wait*, 5 Ad. & E. 1;
Jones v. *Mersey Docks*, 11 H. of L. Cas. 443.

MANISTY, J.—The question we have to decide is, whether this orphanage is occupied exclusively for purposes of public charity. That this institution is a charity cannot be doubted. It is for the maintenance, board, lodging, clothing, and education of orphans, the children of railway servants, who either have been killed on the railway or have died a natural death; therefore, there can be no doubt whatever that it is a charity. But then, what ought we to take into consideration in order to determine whether it is a "public charity?" I think we ought to consider the general character of the purposes for which the charity is constituted. It is said that we ought to consider the source from which the income is derived; but, speaking for myself, I think the main point is the purpose of the institution, and I have much doubt whether the test of a public charity is the source from which the income is derived. It is not necessary to consider that here, because the income is derived from voluntary donations by the public, with some small exception. To my mind, the purpose of the charity is the main point, and if that is the true test it seems to me that this institution is a public charity. It has been argued that the question whether a charity is a public one or not depends upon whether it is universal; that is to say, that if it is confined to a particular class it is deprived of its public character. I cannot accept that argument. Take, for example, hospitals for people of certain classes, such as those for the deaf, dumb, and blind. Surely these are public charities, and yet they are confined to a particular class. It may be difficult to give a definition of "public charity" which would embrace every public charity, and it is unnecessary to do so; at all events, there may be a public charity which is confined to a particular class. This is a most useful and beneficial institution for a very large class of Her Majesty's subjects. Then is there any authority on the point? The case of the *Attorney-General* v. *Pearce*, which was relied on by the appellant, seems applicable to this case. The question there arose on a will; but, in construing either a will or an Act of Parliament, we must regard the intention of it. In that case a lady had given money to charities of a "public nature," and another lady gave money to each of the public charities which the former lady had mentioned in her will, and the question arose whether those charities were of a public nature. Lord Hardwicke, L.C. used language in that case which is useful to assist us here, where he says "I am rather of opinion that the word 'public' was meant only by way of description of the nature of them, and not by way of distinguishing one charity from another; for it would be almost impossible to say which are public and which are private in their nature. The charter of the Crown cannot make a charity more or less public, but only more permanent than it would otherwise be, but it is the extensiveness which will constitute it a public one." Surely this is an extensive charity. It extends to the whole of the railway servants all over England. I think we clearly ought to hold that this orphanage is occupied exclusively for the purposes of a public charity. I will only mention one other case, viz., that of the *Governors of St Thomas's Hospital* v. *Stratton* (L. Rep. 7 H. L. 477), where the question was whether St. Thomas's Hospital was exempt from rateability, where Lord Hatherley, L.C. says, "I cannot find anything which ought to authorise us to distinguish this case from any other public charity." I have come to the conclusion that the decision of the justices was erroneous, and that the premises are exempt.

SMITH, J.—I am of the same opinion. The question is not whether the orphanage is rateable to the poor, but whether it comes within the proviso of the local Act, that is to say, whether it is "used and occupied exclusively for the purposes of public charity." The facts stated in the case show that the whole or the greater part of this fund comes from the public. It is also stated that the objects of the charity are to board, clothe, and educate children of deceased railway servants who have lost their lives in the performance of their duties, till they have arrived at fourteen years of age, and that the benefits thereof should be open to the children of both sexes of deceased station-masters, clerks, &c., and other *bonâ fide* railway servants, including workmen employed by contractors in the construction or repair of a railway who have lost their lives in the performance of their duty, such children being in needy circumstances. It seems to me that the objects of these subscriptions are, that they are to provide for the whole of the orphan children of the whole railway staff of the kingdom so far as the means of the institution will go. It was not contended in the very able argument which we have heard that this is not a charity. The question is whether it is a "public charity." It is clear to me that there can be only two classes, viz., "private" and "public" charities. I ask myself, is this a private charity? Of course it is not. Then, apart from any decided cases, I should have been prepared to hold that, not being a private, it was a public charity. I read the expression "public charity" in the Act to mean a charity for public purposes as distinguished from private. We are not laying down any general definition of a public charity, which may be hard

or impossible to do; but I am of opinion that this institution comes within the words "public charity" used in the local Act, and that the justices were wrong.

Judgment for the appellant.

Solicitors for the appellant, *Beale, Marigold,* and *Co.*

Solicitors for the respondents, *Satchell* and *Chapple.*

Saturday, Nov. 14, 1885.

(Before MANISTY and SMITH, JJ.)

KIRK *v.* COATES. (*a*)

Adulteration — The Sale of Food and Drugs Act 1875 (38 *&* 39 *Vict. c.* 63), *s.* 6—*Representation as to quality before sale.*

No offence is committed within sect. 6 *of the Sale of Food and Drugs Act* 1875 (38 *&* 39 *Vict. c.* 63), *if the article is correctly described at the time the sale actually takes place, although a false representation as to the "nature, substance, and quality" of the article has been made by the seller a short time prior to the sale.*

CASE stated by justices under 20 & 21 Vict. c. 43.

The appellant, who was the sanitary officer for the borough of Huddersfield, preferred an information against the respondent under sect. 6 of the Sale of Food and Drugs Act 1875, for having unlawfully sold to the prejudice of the purchaser, the appellant, one pint of milk which was not of the nature, substance, and quality demanded by the purchaser, and at the petty sessions held at Huddersfield, on the 27th May 1885, the justices dismissed the summons.

The facts stated in the case were as follows:—

The respondent was found by the appellant carrying in his hand a small milk-can, which he informed the appellant contained new milk. The respondent had a cart with him, in which four milk-cans were placed, three large and one small. Two of the large cans were at the back of the cart, and the respondent informed the appellant that the can on the near side contained "new milk," and the one on the off side "old milk." The appellant asked the respondent what was contained in the two cans in the front of the cart, and the latter replied "new milk."

The appellant then went to his assistant, who was a short distance off, to obtain bottles for the purpose of taking a sample of the milk, and he kept the cart in sight until he returned. When the appellant returned he placed his hand upon the large can in front of the cart which the respondent had previously said contained new milk, and at the same time said to the respondent, "Let me have a pint of milk out of this can, which you have just told me is new." The respondent said, "That is old milk." The appellant said, "How is it that you first told me it was new?" and insisted on being supplied with one pint of the milk for which he paid 1*d.*, the ordinary price in the district for a pint of old milk.

The expression "old milk" is understood in the district to mean milk which has stood for twelve hours, and from which the cream has been removed.

The sample was submitted to the borough analyst, from whose certificate it appeared that the sample had been impoverished by the removal of at least 52 per cent. of butter fat. The sample contained 1·43 butter fat, and 10·21 of solids, not fat. This was admitted to be a good result for "old milk," but below the standard for pure unimpoverished milk.

It was contended for the appellant that when the respondent had once stated that the milk was "new," he could not, on finding that the milk was required for analysis, evade the statute by disclosing the real nature of the milk, viz., by stating that it was "old milk," even though he did so before the actual sale took place; and that, if he could do so, he ought not only to have stated that it was "old milk," but also that the cream had been abstracted.

The justices were of opinion that, as the real nature of the milk had been disclosed to the appellant before the sale took place, no offence had been committed, and they dismissed the summons.

The question for the opinion of the court was, whether the respondent, having brought to the knowledge of the appellant the real nature of the article before the sale actually took place, was liable to be convicted of having sold milk "to the prejudice of the purchaser which was not of the nature, substance, and quality demanded," he having previously stated that the milk was "new milk."

Moorsom, Q.C. for the appellant.—The justices ought to have convicted the respondent. He represented that the milk was new milk, and there was a clear attempt to evade the statute. [MANISTY, J.—When?] Before the sale actually took place. At the time he sold it the respondent told the purchaser that the can from which he demanded to be supplied contained "old milk." [SMITH, J.—He intended to cheat, but he did not cheat. Telling a lie is not an offence within sect. 6.] I submit that the sale was complete, and the offence committed, when the respondent first told the appellant that the can contained new milk. To describe a liquid from which so large a portion of butter fat as 52 per cent. had been removed as milk was an offence within the Act. [MANISTY, J.—The result of the analysis, according to the facts stated, shows a very good result for "old milk."] Unless the evidence here stated discloses an offence within the Act it will be almost impossible to obtain a conviction for the sale of adulterated milk.

The respondent did not appear.

MANISTY, J.—I am of opinion that the justices were right. There was no sale here until the respondent had informed the appellant that the article he was buying was old and not new milk. The fact of his having previously told the appellant that the contents of the particular can was new milk cannot alter that which actually took place at the time of sale. In reality the corporation want a new law declaring that the having in his possession for sale and offering for sale an inferior or adulterated article for a genuine one shall render a person liable to a penalty.

SMITH, J.—I am of the same opinion.

Judgment for the respondent.

Solicitors for the appellant, *Bolton, Robbins, Busk* and *Co.*

(*a*) Reported by H. D. BONSEY, Esq., Barrister-at-Law.

Wednesday, Nov. 25, 1885.

(Before Mathew and Smith, JJ.)

Sheffield Waterworks Company (apps.) *v.* The Mayor, Aldermen, and Burgesses of the Borough of Sheffield. (*a*)

Rating—General district rate—Enforcing payment—Jurisdiction of magistrate—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *s.* 256—"*If no sufficient cause for nonpayment is shown*"—*What is sufficient cause.*

The appellants were summoned by the respondents before a court of summary jurisdiction to recover payment of the amount of a general district rate on certain property of the appellants, which rate had been made by the respondents for the borough of Sheffield on the 8th Oct. 1884.

The rate was made, as regards some property of the appellants, on the basis of a supplemental valuation list, and as regards the remainder of the property on the basis of the valuations on which the previous rates had been made.

It was proved before the stipendiary magistrate that, after the rate had been demanded and before the summons was issued, the assessment committee had reduced the net rateable value of the hereditaments and premises occupied by the appellants.

Held, that sufficient cause was shown for nonpayment of the rate within the meaning of sect. 256 (*b*) *of the Public Health Act* 1875 (38 *&* 39 *Vict. c.* 55).

Sandgate Local Board *v.* Pledge (52 *L. T. Rep. N. S.* 546; 14 Q. B. Div. 730) *commented on.*

Case stated by the stipendiary magistrate for the borough of Sheffield, the material part of which was as follows:—

The Sheffield Waterworks Company were summoned by the mayor, aldermen, and burgesses of the borough of Sheffield to appear before the court of summary jurisdiction on the 16th May 1885. to answer a claim made by the corporation for the payment of the sum of 827*l.* 1*s.* 1*d.*, that being the amount of a general district rate of 1*s.* 6*d.* in the pound on certain property of the waterworks company in the borough of Sheffield. Supplemental or substitutional valuation lists were duly signed on behalf of the overseers of the three townships of Sheffield, Brightside Bierlow, and Attercliffe-cum-Darnall in the Sheffield Union, and approved by the assessment committee and delivered to the overseers of the townships respectively, in accordance with the provisions of the Union Assessment Committee Act 1862 as follows, viz., the list for the township of Brightside Bierlow on the 30th Sept. 1884, and the lists for the townships of Sheffield and Attercliffe-cum-Darnall on the 4th Nov. 1884.

In these supplemental valuation lists the rateable value of the premises in the occupation of the company in each of the three townships was very largely increased.

On the 8th Oct. 1884 the corporation made a general district rate under the Public Health Act 1875 for the borough of Sheffield, on the basis, as regards the property of the company in the township of Brightside Bierlow, of the supplemental valuation list, but as regards the property of the company in the townships of Sheffield and Attercliffe-cum-Darnall on the basis of the valuations on which the previous rates had been made.

On the 19th Nov. 1884 the company gave notice of their objection to the supplemental valuation list.

On the 4th Dec. 1884 the chairman of the company attended before the assessment committee and urged his objections to the said supplemental valuation list, but failed to induce the committee to grant him the relief he asked for. On the 20th Dec. 1884 the assessment committee gave notice to the company that they had reduced the net rateable value of the land occupied by the water-mains, pipes, and appurtenances of the company in the township of Brightside Bierlow, and mentioned in the substitutional valuation list for such township, from 3200*l.* to 2700*l.*, and that the committee had also reduced the rateable value of the hereditaments and premises occupied by the company in the township of Sheffield from 8400*l.* to 6300*l.* The company not being satisfied with the reductions made by the assessment committee, gave notice on the 27th Feb. 1885 of their intention to appeal to the quarter sessions against the district rate made on the 8th Oct. 1884; but such notice was admittedly too late, and was subsequently withdrawn.

On the 10th Oct. 1884 a poor rate had been made for the above-named townships upon the basis of the supplemental valuation list, and an appeal by the company against this rate was pending at the time the summons was heard by the magistrate.

It was contended on behalf of the corporation that, as the general district rate was good on the face of it, and based on the valuation lists for the time being in force, and unappealed against, an order for payment thereof ought to be made against the company in pursuance of sect. 256 of the Public Health Act 1875.

It was contended on behalf of the company that, under the circumstances, an appeal to the quarter sessions was unnecessary and would only cause useless expense, and that the sessions could not grant any relief to the appellant company upon an appeal against a general district rate, and had no jurisdiction to order any alteration to be made in the valuation list upon which the rate was based and depended, and that all that the sessions could do would be to make an order to enter and respite from time to time any appeals against the current district rates, until the appeals against the poor rates and valuation lists were finally decided.

It was also contended on behalf of the company that the valuation list for Brightside Bierlow, upon which the general district rate was

(*a*) Reported by H. D. Bonsey, Esq., Barrister-at-Law.

(*b*) Sect. 256: If any person assessed to any rate made under this Act by any urban authority fails to pay the same when due and for the space of fourteen days after the same has been lawfully demanded in writing, or if any person quits or is about to quit any premises without payment of any such rate then due from him in respect of such premises, and refuses to pay the same after lawful demand thereof in writing, any justice may summon the defaulter to appear before a court of summary jurisdiction to show cause why the rate in arrear should not be paid; and if the defaulter fails to appear, or if no sufficient cause for nonpayment is shown, the court may make an order for payment of the same, and, in default of compliance with such order, may by warrant cause the same to be levied by distress of the goods and chattels of the defaulter. The costs of the levy of arrears of any rate may be included in the warrant for such levy.

based, was admittedly erroneous at the time when the rate was made (though this was denied by the corporation), and that, therefore, it would be unjust to order payment of the whole amount claimed by the corporation, and that sufficient cause for nonpayment had been shown within the meaning of sect. 256 of the Public Health Act 1875.

The magistrate decided that no sufficient cause for nonpayment of the rate had been shown within the meaning of sects. 211 and 256 of the Public Health Act 1875, inasmuch as the valuation lists for the time being in force had been taken for the rate, and to inquire into their fairness upon the occasion of another rate being made would be going beyond the ministerial powers generally considered to belong to courts of summary jurisdiction as to orders such as those under sect. 256 of the Public Health Act, and he ordered the company to pay to the corporation the sum of 827*l.* 1*s.* 1*d.*, with 5*l.* for costs.

The question for the opinion of the court was, whether there was a sufficient cause shown for nonpayment of the rate within the meaning of sect. 256 of the Public Health Act 1875.

Barker for the waterworks company.—The magistrate ought not to have made any order until the appeal which is pending against the poor rate is disposed of, because the district rate depends on the poor rate, and the company have done everything within their power to obtain a reduction. In the next place the valuation was admittedly erroneous, and since the rate was made it has been reduced by the assessment committee, although not to the extent sought for by the company, and therefore it would be unjust to make the company pay upon a valuation which the corporation now admit to be wrong.

Glen for the corporation.—I do not admit that the valuation was at any time erroneous. The rate is good on the face of it, and the magistrate had no discretion in the matter; he only acted ministerially. The rate was made upon a valuation which, at the time, was perfectly good, and whether that valuation was reduced or not before the summons was heard makes no difference. That is a matter which the magistrate cannot inquire into. He referred to

The Sandgate Local Board v. *Pledge*, 52 L. T. Rep. N. S. 546; 14 Q. B. Div. 730.

Mathew, J.—I think that there was sufficient cause shown to the magistrate for nonpayment of the whole amount of the rate. It was shown that after the rate was made a successful appeal was made to the assessment committee to reduce the valuation. It is suggested that the magistrate was bound to act on the valuation which stood at the time the rate was made, and that he could not take into consideration the fact that the valuation had been reduced; but at the same time the learned counsel could not point out any ground why, in fairness and honesty, this money should be handed over by the company to the corporation. I am therefore of opinion that we must answer the question put to us in the affirmative; that is to say, that there was sufficient cause shown for nonpayment of the rate within the meaning of sect. 256 of the Public Health Act 1875.

Smith, J.—I am of the same opinion. All that we said in the case of *The Sandgate Local Board* v. *Pledge* (52 L. T. Rep. N. S. 546; 14 Q. B. Div. 730) was, that the justices could only inquire into their own jurisdiction, and not into the question of the validity of the rate, there being no appeal before them against the rate itself. It is a mistake to apply that case to the present one. Here there was nothing in dispute. At the time of the demand the valuation was at 3200*l.*, but before the summons had been taken out for an order for payment, that valuation had been reduced by the assessment committee to 2700*l.*, and the corporation had upon the face of the documents clearly been demanding too much. The decision of the stipendiary magistrate was wrong, and a new demand must be made for the proper amount.

Appeal allowed.

Solicitors for appellants, *Pattison, Wigg,* and *Co.*, agents for *B. P. Broomhead*, Sheffield.

Solicitors for the respondents, *Smith* and *Wilmer.*

Friday, Dec. 11, 1885.

(Before Mathew and Smith, JJ.)

The East London Waterworks Company v. The Vestry of the Parish of St. Matthew, Bethnal Green. (*a*)

Waterworks—Right of company to place stop-valves in footway — "Reinstatement" of footway — Waterworks Clauses Act 1847 (10 *Vict. c.* 17), *ss.* 28-34 — *The Metropolis Water Act* 1852 (15 *&* 16 *Vict. c.* 34), *s.* 26—*The Metropolis Water Act* 1871 (34 *&* 35 *Vict. c.* 113), *ss.* 17, 24.

By special Acts, which incorporate the provisions of the Waterworks Clauses Act 1847 (10 *Vict. c.* 17), *ss.* 28-34, "*with respect to the breaking up of streets*," *the East London Waterworks Company are empowered to supply water in a district which includes the parish of St. Matthew, Bethnal Green.*

By certain "regulations," made by the company under the Metropolis Water Act 1871 (34 *&* 35 *Vict. c.* 113), *it was provided that every communication pipe for the conveyance of water to be supplied by the company into any premises should have at or near its point of entrance into the premises, and if desired by the consumer within the premises, a sound, suitable stop-valve, of the screw-down kind, with an area of waterway not less than that of a half-inch pipe, and not greater than that of the communication pipe, and if placed in the ground the stop-valve should be protected by a proper cover and guard-box.*

Held, that the waterworks company were entitled to place stop-valves, protected by guard-boxes, in the public footway.

Special case, stated by consent, for the opinion of the court, pursuant to the R. S. C. 1883, Order XXXIV.

1. The following are the material parts of the plaintiffs' claim, as indorsed upon the writ:

The plaintiffs' claim is for damages for the defendants' removal of, and interference with . . . . certain covers or guard-boxes protecting the plaintiffs' stop-valves in the Bethnal Green-road, and elsewhere in the said parish. The plaintiffs also claim an injunction to restrain the defendants from continuing or repeating such removal or interference.

(*a*) Reported by H. D. Bonsey, Esq., Barrister-at-Law.

2. By the special Acts enumerated in the schedule to this case, which incorporate the provisions of the Waterworks Clauses Act 1847, ss. 28-34, "with respect to the breaking up of streets," the plaintiffs are empowered to supply water in a district which includes the parish of St. Matthew, Bethnal Green.

3. By the Metropolis Water Act 1852 (15 & 16 Vict. c. 34), s. 26, it was enacted as follows:

26. It shall be lawful for any company from time to time (with the approval of the Board of Trade) to make such regulations as shall be necessary or expedient for the purpose of preventing the waste or misuse of water, and therein, amongst other things, to prescribe the size, nature, and strength of the pipes, cocks, cisterns, and other apparatus to be used, and to interdict any arrangements, and the use of any pipes, cocks, cisterns, or other apparatus, which may tend to such waste or misuse as aforesaid.

4. By the Metropolis Water Act 1871, ss. 17 and 24, it is enacted as follows:

17. Every company shall, within six months after the passing of this Act, make regulations for the purposes for which regulations may be made under the authority of sect. 26 of the Metropolis Water Act 1852, and the provisions of that section shall apply also to the prevention of undue consumption or contamination of water.

24. All regulations and every repeal or alteration in any regulation made, shall, after publication in manner by the last preceding section of this Act directed, be binding upon and be observed by all parties, and shall be sufficient warrant for all persons acting under the same, and a company shall not be bound under any agreement to supply or continue to supply water to any premises unless such regulations as are for the time being in force are duly observed in respect of those premises.

5. Regulations have accordingly been made by the plaintiffs, and having been confirmed by the Board of Trade, have been duly published by the plaintiffs; the 12th of the said regulations is in the following words:

Every communication pipe for the conveyance of water to be supplied by the company into any premises shall have at or near its point of entrance into such premises, and if desired by the consumer within such premises, a sound, suitable stop-valve of the screw-down kind, with an area of waterway not less than that of a half-inch pipe, and not greater than that of the communication pipe, the size of the valve within these limits being at the option of the consumer. If placed in the ground such "stop-valve" shall be protected by a proper cover and "guard-box."

6. The plaintiffs, claiming to act under these regulations, placed stop-valves in the communication pipes supplying water to certain houses in Bethnal Green-road, and placed such stop-valves outside the said houses, in the ground at or near the point of entrance of such pipes, not within the said premises, but on the public footway. For the purpose of protecting the said stop-valves and obtaining convenient access to them, and of detecting waste, the plaintiffs placed on the pavement above the said stop-valves, and on the public footway, certain covers and guard-boxes as provided by the 12th regulation. The shape and situation of the said covers and guard-boxes are shown in the plan which is annexed to and forms part of this case.

7. The defendants have the control or management of the Bethnal Green-road, within the meaning of the Waterworks Clauses Act 1847, s. 30, and are the vestry under the Metropolis Management Act 1855, ss. 96, 98, 109-114, and the Metropolis Management Amendment Act 1862, s. 82.

8. The plaintiffs, after completing the work of placing the covers and guard-boxes mentioned in paragraph 6, filled in the ground and reinstated and made good the pavement, so far as was possible during the continuance of the covers and guard-boxes, but the footway was not completely repaved in so far as the insertion of the guard-boxes as shown in the plan was inconsistent with a complete repaving, but only so far as the existence of the covers and guard-boxes made it inconsistent.

9. The defendants required the plaintiffs completely to repave those portions of the road which they had occupied by their covers and guard-boxes, with the intent that the pavement should be as continuous as it was before the works undertaken by the plaintiffs, and the plaintiffs declined to do so, and claimed by virtue of their special Acts, referred to in the schedule to this case, and by virtue of the 12th regulation made under the Metropolis Water Act 1871, and the other powers thereto enabling them, and set out in this case, to fix the said covers and guard-boxes in the footway pavement as shown on the plan hereto annexed.

10. In some instances in which a stop-valve with cover and guard-box was placed in the footway pavement at or near the entrance of the communication pipe into premises, there already existed a stop-valve placed inside the same premises, and at or near the point of entrance of the communication pipe, at the desire of the consumer occupying such premises, and the plaintiffs had power, under the said regulations and with the consent of the consumer, to place the stop-valves and guard-boxes within the premises.

11. The defendants, claiming to act under and by virtue of the powers conferred by 57 Geo. 3, c. 29, ss. 22, 23, by the Metropolis Management Act 1855, ss. 96, 98, 109-114, and the Metropolis Management (Amendment) Act 1862, s. 82, whereby, whenever the permanent surface or soil of any street is broken up or opened, the defendants, as pavement authority, are empowered to fill in the ground and to make good the pavement or surface of the street, removed the said covers and guard-boxes so placed by the plaintiffs in the Bethnal Green-road, in order to make good the pavement so broken up, and to make the footway pavement continuously of the same material and construction as it was before the operations of the plaintiffs.

12. Either party is to be at liberty to refer to the special Acts of the plaintiffs and the above-mentioned regulations.

The question for the opinion of the court is, whether the plaintiffs are entitled to maintain this action.

If the above question is answered in the affirmative, judgment is to be entered for the plaintiffs for an injunction, and damages to be assessed in such manner as the court directs; if otherwise, the judgment is to be entered for the defendants. All questions of costs to be in the discretion of the court.

Sir *Richard Webster*, A.G. (*R. S. Wright* with him), for the plaintiffs.—Under the Waterworks Clauses Act of 1847 the company have power to break up the streets for the purpose of putting down the pipes and other things necessary for supplying water to the houses in their district. The case does not find that these stop-valves create a nuisance.

Reinstating the roadway or pavement must mean a reinstatement with reference to that which the company is authorised to construct, and not an actual replacing of the pavement with the same material. It is necessary for the purpose of fulfilling their statutory duty that the company should put these stop-valves in the roadway. They have no power to put them on the premises of the occupiers of the houses. I submit that the plaintiffs are entitled to judgment.

Henry Matthews, Q.C. (*Thomas Beven* with him) for the defendants.—I do not admit that it is a suitable stop-valve within the meaning of the regulation, and therefore may be a nuisance. Although it is not found as a fact in the case that it is a nuisance, the court will draw that inference if, in the ordinary course of things, it will become a nuisance:

Kent v. *Worthing Local Board*, 48 L. T. Rep. N. S. 362; 10 Q. B. Div. 118.

It is not necessary for the performance of their statutory duty that the company should put these stop-valves in the roadway or footway. They are not bound to put them in at all unless requested by the occupier of any house, and then the company may refuse unless allowed to place the stop-valve on the premises. Further, it is incumbent on the company to prove their right by pointing to some statutory authority, and this they cannot do. They have to rely on an implied authority, and the court will not make any such inference unless there is an absolute necessity. The powers of the company are clearly defined by statute, and they must be strictly confined within the limits of such rights and powers.

Mathew, J.—I am of opinion here that our judgment must be that the defendants had not the right to do what they are stated to have done in this case, namely, as it appears to me, to prohibit this waterworks company from placing the apparatus described in the case, and which we have seen, in the streets in Bethnal Green, the district over which the defendants have control. The defendants say that they were entitled to prevent the apparatus from being used by reason of the powers conferred upon them, in regard to which there is no question that there are a variety of statutory powers by which vestries are enabled to call upon waterworks companies, or any other person mentioned in the Act, who break up the streets, to reinstate them, such obligation being described in various ways, but practically coming to this, that they are to reinstate them with the material and in like manner as they were before. It is agreed that the apparatus put down here is a suitable stop-valve of the screw-down kind, such stop-valve being protected by a proper cover and guard-box. That is admitted, but it is said when the waterworks company put this apparatus down they were impliedly violating the previous statutes which entitled the vestry to call upon them to reinstate the street in such manner that it would be impossible that they should use it as it was proposed it should be used. Now let us apply the Act of Parliament under which the waterworks company have placed the apparatus in question in the streets. The Act of Parliament is one which in most emphatic terms imposes upon the company certain obligations. It is the Metropolis Waterworks Act 1871, and the 17th section is: "Every company shall, within six months after the passing of this Act, make regulations for the purposes for which regulations may be made under the authority of sect. 26 of the Metropolis Water Act 1852, and the provisions of that section shall apply also to the preventing of undue consumption or contamination of water;" they are bound to observe these provisions. Public purposes are served, and I should gather by that demand of the Legislature that those regulations shall be made to prevent undue consumption or contamination of water. To show how extensive their powers were meant to be, and how clearly it was meant that those powers should be conferred, sect. 24 says: "All regulations, and every repeal or alteration in any regulation made, shall, after publication in manner by the last preceding section of this Act directed, be binding upon and be observed by all parties, and shall be sufficient warrant for all persons acting under the same, and a company shall not be bound under any agreement to supply, or continue to supply, water to any premises, unless such regulations as are for the time being in force are duly observed in respect of those premises." That, of course, means duly observed by the occupier in respect of the premises. Then under the powers contained in their Act, and with the sanction required by the Board of Trade, the 12th regulation was passed, which is in these terms: "Every communication pipe for the conveyance of water to be supplied by the company into any premises, shall have at or near its point of entrance into such premises" (I omit for the moment what comes next) "a sound suitable stop-valve, of the screw-down kind, with an area of waterway not less than that of a half-inch pipe, and not greater than that of the 'communication pipe,' the size of the valve within these limits being at the option of the consumer. If placed on the ground such 'stop-valve' shall be protected by a proper cover and 'guard-box.'" What is the Legislature dealing with?—because this regulation has the force of a legislative enactment. It is dealing with a street in Bethnal Green, in the centre of which would be ordinarily a main of the waterworks company, and houses upon each side supplied from that main by a communication pipe, and apparently it was intended, dealing with the mains and pipes in that position, and with the houses in that street, that there should be put at or near the point of entrance into the premises a sound and suitable stop-valve, which has been already described, and of which we have had a specimen before us. Now, did that imply that that apparatus in question might be put in the roadway? Where else was it to be put? Where else could it be put? It could only be put, if not in the roadway, upon the premises of the consumer. Was there any right to put it upon the premises of the consumer? If you turn to the regulation there is no doubt about it. The waterworks company are not entitled to have this apparatus put upon the premises of the consumer, because the regulation contains, as if in parenthesis, the few words I have already omitted, and which I will now read, "And if desired by the consumer, within such premises." That being so, it appears to me there is a right in the consumer to call upon the waterworks company to put it within his premises;

but if not, it left them the right to put the apparatus where alone it could be put, namely, outside the premises, and therefore in the street. That appears to me to be the clear construction of the section, and as a general rule the apparatus would be put in the street outside the premises, and that must have been clear to those who framed the regulation, and those who sanctioned it, because the stop-valve is intended to be used during the night as well as day, and if it were used at night, being placed upon the consumer's premises, it might turn out to be a great inconvenience and annoyance. Seeing the apparatus before us, we are asked to say that it must be an inconvenience, and must be a nuisance. The case does not find anything of the sort, and speaking for myself I do not see how it could be a nuisance in its present condition, and the pavement in its neighbourhood brought flush to the top, and a proper guard; but whether that be so or not, I am satisfied it was not intended, because of those old powers which these parochial authorities possessed as if by a side wind—and I use that expression because it has been used in the course of the argument—to control the operation of these regulations, and deprive the waterworks company practically of the right of doing that which according to this regulation they may do. That being my view of the construction of this regulation my judgment must be for the plaintiffs.

SMITH, J.—I am entirely of the same opinion, and have very little to add. I will not go over that part of the case my learned brother has dealt with, namely, the true construction of the regulation, because I agree with every word he has said, and have nothing to add. But I also wish to give a reason why I think, assuming the construction which my learned brother puts upon it is the right one, it can be demonstrated that Mr. Matthews' clients are wrong. There are two Acts of Parliament which deal with the taking up and reinstating of streets, and one is the Waterworks Act 1847, which Act without reading the section says, if you take up a street you shall reinstate it as it was before, "and make good the road, or pavement, or the sewer, drain, or tunnel so opened or broken up, and carry away the rubbish occasioned thereby." According to that, when a gas or waterworks company take up a street they are to reinstate it. Now, in that statute of 1847, there was power to lay down a fire-plug, and I only mention that in passing. Then there is an Act of Parliament which applies to the vestry, Mr. Matthews' clients, and sects. 109, 110, and 111 deal with this matter, sect. 111 being the strongest, which says, "If any waterworks company takes up a street for the purpose of their undertaking" (which this waterworks company did, and it is conceded that they were not wrong in that), "the waterworks company shall reinstate the street, or else be liable to a penalty of 5*l.*;" and then the section goes on and adds, "and no such pavement shall be considered to have been reinstated in a proper and substantial manner by any such company, or other person, unless the same have been reinstated with the same or similar materials of the like quality and thickness, and cemented and bound together in the same or in an equally substantial manner as those of which it was composed, in such manner as is satisfactory to the vestry or board." That was the Act that was passed in 1855. Now, I ask myself this: supposing in the year 1856 or afterwards, a waterworks company took up the streets, and laid down a main, and put in a fire-plug (they would be entitled to do that under the Act of 1847), could it be said because they left the fire-plug, as they were entitled to make it, flush with the street, that they have not reinstated the street? It seems to me that it would be impossible to argue that point, and Mr. Matthews very properly did not; but what he says is: "The meaning of this regulation is not to give a right in the same way as the sections of the Act of 1847 gave the right to a water company to lay down a fire-plug." My brother Mathew has pointed out how he thinks it does give the right to lay down a fire-plug in the Act of 1847. I think the Attorney-General is right in his contention when he says, both dealing with the Act of 1847 and the Act of 1855, that reinstatement must mean ordinary reinstatement in reference to that which a company is authorised to construct. I think that is the proper construction, and, in my opinion, the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

Solicitors for the plaintiff, *Birchams.*
Solicitor for the defendant, *Robert Voss.*

Monday, Nov. 2, 1885.

(Before Lord COLERIDGE, C.J., GROVE and CAVE, JJ.)

WELLS (app.) *v.* STANFORTH (resp.). (*a*)

Election law—Parliamentary registration—County vote—Occupiers' and lodgers' claims—Omission by overseers to sign and publish lists of, in due time—Effect of such omission on validity of claims—Registration Act 1885 (48 *Vict. c.* 15), *s.* 18, *and sched.* 2, *part* 2, *paragraphs* 42, 43, 44, *and* 45—*Registration Act* 1844 (6 *Vict. c.* 18), *s.* 38.

Overseers, having received in due time claims from persons claiming to be registered in the occupiers' list, and also from persons claiming to be registered as lodgers but not comprised in the old lodgers' list, omitted to sign and publish the lists of such claims respectively until three days after the time (the 25th Aug.) specified for that purpose in sched. 2 *part* 2, *par.* 43 *of the Registration Act* 1885 (48 *Vict. c.* 15) *and it was*

Held, by the Queen's Bench Division (Lord Coleridge, C.J., Grove and Cave, JJ.), affirming the decision of the revising barrister, that the claims of the several persons to be registered, and their right to the franchise, were not invalidated by such omission on the part of the overseers.

CASE stated, on appeal from the decision of a revising barrister, for the opinion of the Queen's Bench Division of the High Court of Justice:—

1. At a court held by one of the barristers appointed to revise the lists of voters for the county of Middlesex, the following lists among others, which had been forwarded to the barrister by the clerk of the peace, now came before him for revision: (*a.*) A supplemental list of occupiers' claims in respect of property situated in the Hornsey polling district of the Hornsey division of Middlesex. (*b.*) A supplemental list of occupiers' claims in respect of property situate in the

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

South Hornsey polling district of the said division. (*c.*) A supplemental list of lodger claimants (not already on the register) in the parish of Hornsey in the said Hornsey polling district. (*d.*) A supplemental list of lodger claimants (not already on the register) in the said South Hornsey polling district.

2. The said lists are hereunto annexed, and are marked respectively A., B., C., and D.

3. The overseers of the parish of Hornsey received all the said claims in due and proper time, but the said overseers did not sign or publish the said supplemental lists of claims, or any of them, on or before the 25th Aug. 1885, and they did not sign or publish the said supplemental lists, or any of them, until two or three days after the said 25th Aug.

4. It was contended, on behalf of the appellant, before the revising barrister, that the barrister had no power to accept, revise, or allow the said supplemental lists, or any of them, on the ground that the said supplemental lists had not been signed or published by the said overseers, in accordance with precepts Nos. 43 and 45 in the 2nd schedule, part 2, to 48 Vict. c. 15.

5. The revising barrister decided that a disregard of the said precepts Nos. 43 and 45 did not of itself invalidate the said supplemental lists, and he disallowed the objection and revised and allowed the said supplemental lists of claims, together with the other lists forwarded to him by the clerk of the peace, and thereupon the objector appealed from such decision.

The following paragraphs of the precept of the clerk of the peace to the overseers in schedule 2, part 2, to the Registration Act 1885 are material.

Paragraph 42 directs that

On or before the 25th day of August next the overseers are to make out (in accordance with paragraphs 9 to 17 of this precept, and according to the forms sent herewith) occupiers' and lodgers' claims lists, that is to say, lists containing the name of every person who has given or caused to be given to you or any one of you, on or before the 20th day of August next, notice of his claim to be registered in any list of voters for your parish (or township) in respect of a 50*l.* rental, 10*l.* occupation, household, or lodger qualification, making separate lists of (*a*) persons claiming to be registered on the occupiers' list, and (*b*) persons claiming to be registered as lodgers but not comprised in the old lodgers' list.

By paragraph 43 a copy of every list made by the overseers in pursuance of paragraph 42 is to be signed and published by them on or before the 25th Aug. next.

Paragraph 44 directs the overseers to keep a copy of each list signed by them, and during the fourteen days next after the 25th Aug. next to allow the same, and also the original notices of claims and objections, to be open to public inspection, &c.

By paragraph 45 a copy of each of the occupiers' and lodgers' claim and objection lists, so made and signed by the overseers as aforesaid, is to be delivered by them to the clerk of the peace on or before the said 25th Aug.

By sect. 18 of the Registration Act 1885, the forms and instructions in the 2nd and 3rd schedule to the Act are to be observed and used in all cases to which they apply, and to be substituted for the forms, instructions, and directions contained in the previous Parliamentary Registration and Representation of the People Acts, respectively, from the year 1843 to 1884 both inclusive, and it is by the same section provided that "a disregard of any form or instruction shall not of itself invalidate any list, notice or other thing."

The Parliamentary Registration Act 1843 (6 Vict. c. 18), sect. 38, enacts that

The revising barrister shall insert in any list of voters for any city or borough the name of every person omitted, who shall be proved to the satisfaction of such barrister to have given due notice of his claim to be inserted in such list and to have been entitled, on the last (now the 15th) day of July then next preceding, to have his name inserted therein in respect of the qualification described in such notice of claim.

Grantham, Q.C. (with him was *Julian Robins*) appeared for the appellant objector.—The question involved in the present case was, though of a technical nature, an important one, not only as regarded some 400 claimants in this particular instance, but as affecting the cases of claimants in general. These supplemental lists of claimants were sent in to, and received by, the overseers in due time, and, according to the instructions to the overseers contained in the clerk of the peace's precept, part 2 in schedule 2 of the Registration Act 1885, the overseers were bound to sign and publish the said lists on or before the 25th Aug. Instead of that, however, the lists were not signed or published until the 28th Aug. Moreover, a copy of such lists, signed by the overseers, and also the original notices of claims, &c., are to be open to public inspection during the fourteen days next after the 25th Aug. (see paragraph 44 of the precept). The omission, therefore, to observe the directions of the statute was a material one. [CAVE, J.—What do you say to sect. 38 of the Registration Act 1843, that "the barrister shall insert the name of any person who shall have given due notice?"] That is not in point. It must be due notice, and with publication. [CAVE, J.—The section says nothing about publication.] By the omission to publish in due time other electors are prejudiced. [CAVE, J.—They may object at the revision court under sect. 39 of the Act of 1843.] That is so, but by non-publication at the proper date they are deprived of the full and proper time for making inquiries.

Sir *Henry James*, Q.C. (with *H. Greenwood*), who appeared *contra* for the respondent, were not called on to argue; but were prepared to contend that non-signature by overseers did not invalidate the lists, sect. 13 of the Act of 1843 being only directory as regards signing the lists (see *Morgan* v. *Parry*, K. & G. 53; 17 C. B. 334; 25 L. J. 144, C. P.); and that sect. 27 of that Act remedied an omission to make out or to publish the list by declaring that the old or previous year's list should remain in force. They observed also that the appellant's argument, if upheld, would enable overseers to disfranchise a whole parish.

Lord COLERIDGE, C.J.—I am clearly of opinion that the revising barrister was right in his decision, and that the objection taken at the Revision Court by the appellant was an invalid one. It has been laid down and acted upon over and over again as a general principle, that persons who have themselves omitted nothing, but have done all that they are called upon by the statute to do, are not to be deprived of their votes by reason merely of the neglect or omission

of the overseers to do something. In the present case it is said that a large number of persons are to lose their votes not because they themselves have omitted to do anything, but simply because the overseers have failed to do their duty in due time. The consequences of our so holding and yielding to the appellant's objection here would be very disastrous, involving the disfranchisement of large numbers of voters, and possibly of a whole parish, by the mere omission of the overseers to publish the lists in proper time, although the voters had themselves done all that was required of them. Now, even if the statutes were silent on this point, it would require very strong arguments to show such an intention on the part of the Legislature, and to induce this court to uphold a contention fraught with such mischievous and disastrous consequences. But the statutes are not silent upon the subject, for, in the first place, sect. 38 of the Act of 1843 imperatively enacts that the revising barrister *shall* insert on the list the names of any persons omitted who shall have given due notice of their claims and whose qualification shall be proved to his satisfaction. That section has not been repealed and is still in force, and the claimants here did everything that the statutes required them to do, the omission of publication being the act and omission of the overseers. In addition to that, we now have the Registration Act of 1885, by sect. 18 of which new forms and instructions, which are set out in the schedule of the Act, are substituted and directed to be used in all cases to which they apply in the place of the forms and instructions contained in the previous Representation and Registration Acts, and by which section it is expressly provided that the mere disregard of any of such new forms and instructions shall not invalidate any list or notice. These lists therefore in the present instance were not invalidated, and the barrister's decision being right must be affirmed and the appeal dismissed.

Grove and Cave, JJ. concurred.

Judgment for the respondent, affirming the decision of the revising barrister.

Solicitors for the appellant, *Dubois, Reid,* and *Williams.*

Solicitors for the respondent, *Corbin* and *Greener.*

Thursday, July 2, 1885.

(Before Lord Coleridge, C.J., Grove, Denman, and Mathew, JJ.)

The School Board for London (apps.) *v.* Wood (resp.). (*a*)

Elementary Education Acts 1870 *and* 1876 (33 *&* 34 *Vict. c.* 75, *s.* 74, *and* 39 *&* 40 *Vict. c.* 79, *s.* 4) *—Bye-laws under—Prescribed fees for instruction in board school—Parent sending child to school without paying the fee—Child admitted and instructed—Liability of parent to penalty for breach of bye-law—Meaning of "causing child to attend school"—Effective attendance under the Act, what is.*

The appellants, the London School Board, having, under the provisions of sect. 74 *of the Elementary Education Act* 1870, *made certain bye-laws, inter alia* (1) *requiring the parent of every child, of not less than five nor more than thirteen years of age, to cause such child to attend school unless there be some reasonable excuse for non-attendance; and* (2) *rendering a parent liable on summary conviction for breach of any bye-law to a penalty; and having also, with the consent of the Education Department, prescribed a weekly fee of one penny to be paid by each child, the respondent sent his child of ten years old to one of the appellants' board schools at which the child was admitted and instructed, notwithstanding that the respondent, though able to pay the prescribed fee, had not sent or paid it.*

Upon a case stated by a metropolitan magistrate who, under the circumstances above mentioned, dismissed a summons against the respondent for "unlawfully neglecting to cause his child to attend school, there being no reasonable excuse for such non-attendance," it was

Held, by Lord Coleridge, C.J., Grove, Denman, and Mathew, JJ., that the decision of the magistrate was wrong, and that the respondent, by not sending the child with the prescribed fee, necessary as a condition precedent to its right to admission and instruction at the school, had not "caused the child to attend school" within the meaning and intention of the Education Acts and the bye-laws made under them, and was therefore liable on summary conviction to the penalty imposed by the statute for a breach of the bye-law.

Saunders *v.* Richardson, *in the Queen's Bench Division* (45 *L. T. Rep. N. S.* 319; 7 *Q. B. Div.* 388; 50 *L. J.* 137, *Mag. Cas.*), The School Board for London *v.* Wright, *in the Court of Appeal* (50 *L. T. Rep. N. S.* 606; 12 *Q. B. Div.* 578; 53 *L. J.* 266, *Q. B.*), *discussed and followed.*

Case stated by a metropolitan magistrate, at the request of the appellants dissatisfied with his determination upon the question of law arising before him at the police-court on the 19th Sept. 1884, as hereinafter stated:—

1. Upon the hearing of a summons, taken out by an officer of the appellants on their behalf, against the respondent, under the bye-laws made by the appellants in pursuance of the powers conferred on them by sect. 74 of the Elementary Education Act 1870 (33 & 34 Vict. c. 75), as amended by the Elementary Education Act 1876 (39 & 40 Vict. c. 79), on the ground that the respondent, residing within the district of the said School Board for London, and being a parent of a certain child residing with him, and being not less than five nor more than thirteen years of age, did unlawfully neglect and omit to cause the said child to attend school on the 2nd Sept. 1884, and on the 9th Sept. 1884, and on divers other days, as required by the bye-laws of the said School Board for London, there being no reasonable excuse for non-attendance according to the said bye-laws, the said magistrate dismissed the said summons.

2. The following facts were proved before him:

(*a*) The child being of the age of ten years, was sent by the respondent to the board school in Mansfield-place on Monday, the 2nd Sept., and on Monday, the 9th Sept., but the respondent did not pay the fee of one penny due and payable on each of those days respectively, being the weekly fee prescribed by the said School Board with the consent of the Education Department.

(*a*) Reported by Henry Leigh, Esq., Barrister-at-Law.

(*b*) The respondent did not appear before the magistrate, nor was the board represented by counsel or attorney, although the case was put forward as a test case.

(*c*) The respondent was in a position to pay the said fees, but at the time of the hearing of the summons they had not been paid.

(*d*) The said child was not excluded from the school by reason of the nonpayment, but was admitted thereto and received instruction therein.

3. It was contended on the part of the appellants that, although, as a matter of fact, the child had been admitted at the school and received instruction therein, the respondent had not complied with the bye-law and had not caused the child to attend the school within the meaning of the Act, inasmuch as he did not pay the school fee, the payment of which fee was a condition precedent to the parent's having a right to require that the child should be admitted into the school. It was urged that, by not causing the child to attend the school with the fee, the respondent had broken the bye-law and made himself liable to a penalty, and that then, his offence against the law being thus complete, the subsequent conduct of the appellants in admitting and instructing the child was a mere act of grace and could not affect the criminality of the respondent. The appellants contended also that they were justified in their view by the terms of the judgment given by the full Divisional Court in the case of *Saunders* v. *Richardson* (*ubi sup.*). The defendant in that case sent his child to school without the fee—the child was excluded, and it was held that the parent was liable to be convicted for a breach of the bye-law, on the ground that the word "attend" means effective attendance, and is not satisfied by merely sending the child to the door of the school. The appellants also relied upon the terms of the judgment given by the Appeal Court in the case of *The School Board for London* v. *Wright* (*ubi sup.*), which decided that the appellant could not recover by action fees in arrear and unpaid from the parent of a child who had attended one of their schools and received instruction therein; and the appellants quoted specially the following words in the judgment in that case: "We are of opinion that it was the duty of the parent, when sending his child to the board school, to pay the prescribed school fees, and that having failed to perform that duty, he did not cause the child to attend the school within the intent and meaning of the Education Acts."

The magistrate was of opinion:

1. That the respondent having sent, and the child having in fact been admitted into the school, and received education therein, the respondent could not be convicted of wilfully omitting and neglecting to cause the child to attend school, within the meaning of the words of the bye-law, and the summons framed thereon.

2. That the case of *Saunders* v. *Richardson* (*ubi sup.*) was an authority against rather than in favour of the contention of the appellants, inasmuch as the decision in that case turned entirely upon the fact that the child had not attended school; whereas, if the court had been of opinion that the offence on the part of the parent was complete when he neglected to pay the fee, whether the child attended school or not, it would have been unnecessary for the court to consider the latter point. And in that case the court plainly intimated that there was no power to make a bye-law to enforce the payment of fees, which led the School Board to endeavour to recover the fees which were unpaid by action in the County Court.

3. That although the words relied upon in the judgment of Baggallay, L.J. when deciding the case of *The London School Board* v. *Wright* (*ubi sup.*) would, if taken alone, favour the contention of the appellants, yet the sense in which they were used was explained by the reference made immediately afterwards to the case of *Saunders* v. *Richardson* (*ubi sup.*), and the next paragraph in the judgment, which is as follows: "If the defendant's daughter had been refused admission into the school, on the ground that she had not brought the fee with her, we entertain no doubt that on his continued refusal to pay it the defendant would have been liable to have been convicted under the 4th bye-law for non-observance of the 2nd." And, moreover, in that case the court had to decide an entirely different question from that raised in the present case.

4. That there is nothing in the Act or the bye-laws which says that, when there is an effective attendance of a child at school, the nonpayment of the fees by the parent is an offence for which he can be punished by the infliction of a fine.

The magistrate, therefore, on those several grounds, dismissed the summons, and the question of law upon which this case is stated for the opinion of the court is, whether he was justified in dismissing the summons. If he was justified the dismissal is to stand; if he was not justified the case is to be remitted to him to be dealt with according to law.

The following are the sections of the several Elementary Education Acts which are material:

The Education Act of 1870 (33 & 34 Vict. c. 75), s. 17, enacts that,

> Every child attending a school provided by any school board shall pay such weekly fee as may be prescribed by the school board, with the consent of the Education Department; but the school board may from time to time, for a renewable period not exceeding six months in the case of any child, remit the whole or any part of such fee in the case of any child when they are of opinion that the parent of such child is unable from poverty to pay the same.

By sect. 74:

> Every school board may from time to time, with the approval of the Education Department, make bye-laws for all or any of the following purposes: (1) Requiring the parents of such children of such age not less than five nor more than thirteen years as may be fixed by bye-laws, to cause such children, unless there be some reasonable excuse, to attend school. (2) Determining the time during which children are so to attend school. . . . . (3) Providing for the remission of payment of the whole or any part of the fees of any child where the parent satisfies the school board that he is unable from poverty to pay the same. (4) Imposing penalties for the breach of any bye-laws.

And by the same section (74) it was further enacted that,

> Any proceeding to enforce any bye-law may be taken, and any penalty for the breach of any bye-law may be recovered in a summary manner; but no penalty imposed for the breach of any bye-law shall exceed such amount as, with the costs, will amount to 5*s.* for each offence.

By the Act of 1873 (36 & 37 Vict. c. 86), s. 24, sub-sect. 3, it is enacted that,

In any proceeding for an offence under a bye-law the court may, instead of inflicting a penalty, make an order directing that the child shall attend school, and that, if he fail so to do, the person on whom such order is made shall pay a penalty not exceeding the penalty to which he is liable for failing to comply with the bye-laws.

The Elementary Education Act 1876 (39 & 40 Vict. c. 79) enacts (sect. 4) that,

It shall be the duty of the parent of every child to cause such child to receive effective instruction in reading, writing, and arithmetic, and if such parent fail to perform such duty he shall be liable to such orders and penalties as are provided by this Act.

And by sect. 23 it is enacted that,

For the purposes of this Act sect. 74 of the Elementary Education Act 1870, and all enactments of that or any other Act relating to bye-laws under that Act, shall be construed as if "school board" included the authority authorised by this Act to make bye-laws. . . . . And further on, it is provided that it shall be the duty of every local authority to enforce the bye-laws made by that authority in pursuance of sect. 74 of the Elementary Education Act 1870.

The bye-law in question follows the words of sect. 74 of the Act of 1870, and directs

That the parent of every child of not less than five nor more than thirteen years of age shall cause such child to attend school unless there be a reasonable excuse for non-attendance.

Sir *F. Herschell*, Q.C. (with him was *Arnold Forster*) for the appellants (the School Board).—The point for decision in this case has arisen before, and in prior similar cases two other metropolitan magistrates decided them in the same way as the magistrate has done here. If these decisions correctly represent the law on the matter, there will be very great difficulty in carrying out the intention and objects of the Education Acts. The question, therefore, though a small point, is one of considerable importance both to all school boards and to the community in general. By sect. 74 of the first of the Elementary Education Acts, that of 1870 (33 & 34 Vict. c. 75), the School Board is empowered to make bye-laws requiring (*inter alia*) the parents of children of not less than five nor more than thirteen years old, unless there be some reasonable excuse, to attend school, and imposing penalties for the breach of any of these bye-laws; and the same section provides that such penalties may be recovered in a summary manner, but that no penalty shall exceed with the costs the sum of 5*s.* for each offence. Coupling together that section and the bye-law made in pursuance of it, and which follows the words of the section, the result is, that the respondent was bound, in the absence of reasonable excuse, to cause his child to attend school, and not having done so, and no reasonable excuse being shown, he has committed a breach of the bye-law, and is therefore liable to the statutory penalty. It is, I submit, clear, upon the authorities referred to by the magistrate in the case, that a parent sending a child to the school without the prescribed fee does not "cause the child to attend school" within the meaning of the statute, inasmuch as he has sent it there in a condition in which neither its admission nor its instruction can be of right demanded. [Mathew, J.—Suppose someone else pays the fee?] Nevertheless, I submit, the offence would be committed by the parent. The obligation is upon him to cause the child to attend, and that obligation is not shifted from his shoulders by some third person having intervened and taught the child. [Grove, J.—The parent not being the *causa causans* of the instruction given by the kindness and good nature of the master?] Just so. The importance of this view of the case is apparent; for, if a child sent to school without the fee is sent back and turned adrift and loose upon the streets, the resulting mischief and misery to the child cannot well be over-estimated. It has therefore been thought advisable to admit the child, when possible to do so, and to proceed against the parent for the penalty for breach of his duty. The magistrate has found, in terms, that there was no excuse, and that the respondent was in a position to pay, and he has not found that he had any reasonable expectation that the child would be taken in without the fee. In the case of *Saunders* v. *Richardson* (*ubi sup.*) it was held by a full divisional court of five judges, overruling a previous decision of two judges in the same case, *Richardson* v. *Saunders* (44 L. T. Rep. N. S. 474; 6 Q. B. Div. 313; 50 L. J. 65, M. C.), that where a child sent to school without the fee was not admitted, the parent had incurred the penalty, and it is submitted that it made no difference in that respect that here the child, although sent without the fee, was received through the kindness of the master. The respondent here no more caused his child to attend school than did the parent in *Saunders* v. *Richardson*. The mere act of sending a child to the school door is not causing it to "attend" the school and to be admitted and to receive instruction. There is another case subsequent to *Saunders* v. *Richardson*, viz., *The London School Board* v. *Wright* in the Court of Appeal (*ubi sup.*), which, if properly looked at, is, I submit, conclusive in the present case. There a child had been sent to a board school, and received instruction for six weeks, and in an action in the County Court against the parent to recover the school fees the Court of Appeal held that the parent could not be sued as in a civil action for these fees, but they so held really upon the ground that the remedy provided by the Education Acts in such a case for making a parent discharge his duty was by proceeding against him for a penalty. The judgment of the Court of Appeal, delivered by Baggallay, L.J., in that case is a clear expression of view upon this very case. He did not say that the parent had performed his duty because the child had been in fact attending school, but he said that, although the child had been attending for six weeks, the defendant had not caused her to attend within the meaning of the Education Acts, and therefore would be liable to the penalties. [Lord Coleridge, C.J.—We none of us see any difference. Does anyone appear on the other side?] No.

Lord Coleridge, C.J.—I am of opinion in this case that the judgment of the learned magistrate was wrong. The question is whether a person, the father of a child, who sends a child to a School Board school without the penny, or other fee prescribed by the School Board for the purpose of prepayment, "causes that child to attend the school." It was held distinctly in *Saunders* v. *Richardson* (*ubi sup.*) that a man did

not cause his child to attend school by sending her to the door of the school from which she was sent away. In the case of the *London School Board* v. *Wright* (*ubi sup.*), although it was, perhaps, not actually necessary for the decision of the case, the unanimous judgment of the Court of Appeal, expressing a very strong and clear opinion on the point, was that, in a case where the father had sent the child to a School Board school without the fee, and the child had been instructed in the school, no action lay for the recovery of the school board fees for such instruction; and they went on to say that one main reason for their so holding was, that their judgment would not make the statute inoperative by allowing a person to send his child to school and taking the chance of the school authorities not liking to turn the child into the street, and then that the school authorities should be without any redress; for, as the Court in their judgment pointed out, one of the reasons for holding as they did that there was no contract was, that there was a remedy for non-compliance with the provisions of the Act provided under the Act itself, and that remedy was a penalty. In that case, although the child had been sent to the school without a fee, and had been received and taught for six weeks without a fee, the Court of Appeal intimated a clear opinion that the father had not "caused the child to attend," although the child had, in fact, attended and received instruction. It appears to me, putting the two cases together, and looking at the words of the Act and the construction which they have received in the Court of Appeal, that it is plain that the question put to us by the learned magistrate must be answered in the negative, namely, that he was not justified in dismissing the summons, and that the respondent has not, within the meaning of the Act of Parliament and of the bye-law, "caused his child to attend school," because, although he sent the child to the school, he did not send him there with that condition precedent fulfilled which would enable him therefore to insist that that for which the child was sent to the school, namely, the reception of instruction, should be given to him. It follows, therefore, that he has not *caused* the child to attend the school. That the child has, in fact, attended may be true; that the child has, in fact, received instruction may be true; but it is none the less true that he has not attended within the meaning which that word has received, and that he has not received instruction in any sense by the causation, or by the act, of the father. The father has not therefore "caused the child to attend," and so has committed a breach of the Act and of the bye-law, and has thereby exposed himself to the penalty imposed by the Act. The decision of the learned magistrate must therefore be reversed.

Grove, J.—I am of the same opinion. All that the parent did here was to cause the child to attend at the school, or to go, so to speak, to the school door. He knew, or must be taken to have known, that except for the good nature of the master, which the master might show to any child or under any circumstances, he had not provided that which was necessary to enable the child to attend the school—that is, to attend and receive instruction. Then, can it be said that he caused the child, not merely to be at the school in expectation and waiting to be received by the good nature of the master, but to attend the school so as to receive and be entitled to receive instruction? It clearly cannot. He only caused the child to go there without, as my Lord has called it, the requisite condition precedent—without, that is, providing that which he knew was necessary, namely, the prescribed fee, in order that the master might be compelled to give that instruction. Here the instruction given to the child by the master was purely voluntary. I am therefore of opinion that judgment should be given for the appellants.

Denman, J.—I also am of the same opinion. The decision of the Court of Appeal, in the case of *The London School Board* v. *Wright* (*ubi sup.*), in my judgment, covers and concludes this case, because Baggallay, L.J. there clearly laid it down that a person who sent his child several times to school without the fees, did not *cause* that child to attend school. It seems to me that the proper decision in this case is really a mere corollary from the case of *Saunders* v. *Richardson* (*ubi sup.*). In that case two of our learned brethren had held that the parent did cause the child to attend school who sent the child to the school door without the fee. Then subsequently a court of five judges sat for the purpose of considering that decision, and were unanimously of opinion that sending the child to the school door without the fee was *not* a causing the child—to use the very words of the Act and the bye-law—to attend school; for the attending school does not merely mean going to the school door, but actually going to school in the ordinary sense of the word, and so as to be a scholar in the school, and to get the benefits of the teaching of the school. What the parent, the respondent, did in the present case is, as stated in the special case, as follows: On two occasions he sent the child to the school; the child by the good nature of the teachers, who were not willing to turn him away from the door, was taken in and allowed to attend the school; but, according to my judgment, it would be a perfect mockery to attribute to the parent the virtue or the act of having caused that child to attend school; the expression "attending school" having the construction which was put upon it in *Saunders* v. *Richardson* (*ubi sup.*). I think, therefore, that the magistrate was wrong in this case in refusing to convict, the other circumstances being clear, and it also being, I think, quite clear that there was no reasonable excuse within the meaning of the Act for not sending the child with the proper means to enable it to attend. Nothing of that sort can be relied upon here. The mere fact that it went twice to the school and was not sent away would not, in my judgment, be sufficient; although I do not say that there may not be certain cases in which a parent might have a reasonable excuse, as if, for instance, he had been told by the master, "If you send your child twenty times, and pay at the end of those twenty times, we may be prepared to take the money in a lump sum at the end, instead of a penny every week." That might be a case raising possibly different considerations, but there is nothing of that sort here, and so it cannot, I think, be said that this case comes within the exception of a case where there is "a reasonable excuse."

Mathew, J.—I agree entirely with the view expressed by my Lord and by my brothers Grove

and Denman in this case. The object of the Act of Parliament was to compel a father to educate his children, and to take the proper steps for providing for their education in compliance with the terms of the Act. The respondent here has no more provided for the education of his child than a father could be said to provide for the support of his children by sending them from his house to rely upon the voluntary charity of others.

Judgment for the appellants. Case remitted to the magistrate.

Solicitors for the appellants, *Gedge, Kirby,* and *Millett.*

Monday, Nov. 2, 1885.

(Before Lord COLERIDGE, C.J., GROVE and CAVE, JJ.)

STRIBLING (app.) *v.* HALSE (resp.). (*a*)

Parliament — Registration of borough voters — Service franchise — Shop assistants — Representation of the People Act 1884, *sect.* 3 — *Registration Act* 1885, *sect.* 18, *and sched.* 3, *Form A.*

The appellant, by virtue of his employment as a shop assistant, inhabited solely a furnished bedroom in a dwelling-house belonging to his employer, which contained other bedrooms similarly inhabited by other shop assistants in the same employment, and also a sitting-room in which the appellant and the other assistants took their meals in common, such meals being provided for them by their employer. Neither the appellant nor any of the other assistants had a key to their bedroom doors. The employer exercised general control over the whole house by means of a resident caretaker, who every night, at a certain hour, after first requiring all visitors to leave the house, locked the street door and took possession of the key, after which, except under special circumstances, he allowed no ingress or egress to any of the inmates during the night; he then turned off the gas in all the rooms, and saw that no light was thereafter kept burning in any of them. The employer also performed, by a resident servant, not under the orders of the inmates, all the domestic service required for the bedrooms and the house generally. Save as aforesaid, the house was not inhabited by the employer, or by any person under whom the appellant and the other shop assistants served.

Held, by Lord Coleridge, C.J., and Grove and Cave, JJ., that the separate occupation of the several bedrooms by the appellant and his fellow shop assistants, was an inhabiting by each of them of a dwelling-house by virtue of service or employment, within the terms of sect. 3 *of the Representation of the People Act* 1884, *notwithstanding the joint use by them of another room in the house, and that they were therefore all of them entitled to the franchise.*

CASE stated, on appeal from the decision of the revising barrister for the borough of St. Pancras, Middlesex, for the opinion of the Queen's Bench Division of the High Court of Justice.

At a court held on the 2nd Oct. 1885 by the barrister appointed to revise the lists of the borough of St. Pancras, John Stribling (hereinafter called the appellant) duly claimed to be inserted in the list of occupation voters for the south division of the said borough; and the following facts were established by the evidence:—

1. The appellant, during the period of twelve months and upwards previously to the 15th July 1885, had been employed as a shop assistant, and in virtue of such employment had, during the same period, inhabited solely one furnished bedroom in a dwelling-house belonging to his employers, situated within the said south division of the said borough.

2. The house had not, during any part of such period, been inhabited by any person under whom the appellant served in his said employment, unless, upon the facts herein appearing, the court should hold that it had been in law inhabited by his employers.

3. The appellant's bedroom was not structurally severed from the rest of the house, nor separately rated. The appellant had no key of the room door.

4. The house contained other bedrooms similarly inhabited by other persons in the same employment as the appellant, who, with the appellant, are hereinafter referred to as "the inmates." It also contained a sitting or dining room, in which the inmates took their meals in common, such meals being provided for them by their employers.

5. The employers had exercised throughout the said period general control over the whole of the house, such control being enforced through a resident caretaker.

6. The facts of this paragraph are stated by way of illustrating the duties performed by the said caretaker. At a certain hour every night he locked the street door, by which alone ingress and egress to and from the house were obtained, and took possession of the key. Before locking the door he required all visitors to leave the house. After locking the door he did not, during the remainder of the night, except under special circumstances, open it, or suffer it to be opened, to allow any of the inmates to come in or go out. Shortly after locking the door he turned off the gas by which all the rooms throughout the house were lighted, and saw that no lamp or other light was thereafter kept burning in any of the rooms.

7. The employers also performed, by a resident servant, who was not under the orders of the inmates, the domestic service requisite for the bedrooms of the inmates, and for the house generally.

8. Subject to the question whether the bedroom so inhabited by the appellant was or was not a dwelling-house for the purposes of the Representation of the People Acts 1867 and 1884, he was in all respects qualified to be inserted in the said list.

9. Twelve other persons, whose names are set out in the schedule hereunto attached, claimed to be inserted in the said list under similar circumstances.

10. It was contended before the revising barrister, on behalf of the appellant and the said twelve other persons, that the several bedrooms inhabited by them respectively as aforesaid were dwelling-houses for the purposes of sect. 3 of the Representation of the People Act 1884, and that each of them (the appellant and such twelve other persons) was under that section entitled to be

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

placed on the list as an inhabitant occupier of a dwelling-house as tenant.

11. The revising barrister decided that, by reason of the control exercised and service performed by the employers, as above stated, the bedrooms inhabited by the appellant and by the twelve other persons were not separately occupied as dwellings within the meaning of the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 5, and therefore were not dwelling-houses for the purposes of the Representation of the People Acts 1867 and 1884, and he disallowed the claims accordingly.

12. Due notice of appeal from the barrister's decision was given, and he ordered the appeals in all the before-mentioned cases to be consolidated.

13. If the court should be of opinion that the barrister's decision was wrong, the register is to be amended by inserting the names of the appellant and of the said twelve other persons in the said list.

Beddall, for the appellant, contended that the revising barrister was wrong in deciding that the appellant had no right to the franchise. The question was rather one of fact than of law. Upon the finding in the case it is clear that he inhabited the room, or, in other words, the dwelling-house in question, inasmuch as he slept there; it was, so to say, his residence, and residing is and means the same thing as inhabiting. [CAVE, J.—The real question is, Did he inhabit a dwelling-house?] It is submitted that he did. The instructions given in sched. 3 of the Act of 1885 expressly show that this is so, where it is said that in the case of the service franchise, "A part of a dwelling-house separately occupied as a dwelling; for example, a room over a stable, or a caretaker's room in an office," will be sufficient. This bedroom was so occupied by the appellant, and not as a lodger; so that the question raised in *Bradley* v. *Baylis* in the Court of Appeal (46 L. T. Rep. N. S. 258; 8 Q. B. Div. 210; 51 L. J. 183, Q. B. Div.) does not arise here. It is stated as a fact that for the requisite period he had solely occupied this room—that is, as a dwelling-house. [Lord COLERIDGE, C.J.—How does that appear?] In what other way, if not a lodger, which he was not, could he have inhabited it? And with respect to the condition in sect. 3, as to the non-inhabitancy of the dwelling-house by the master, the case shows, and the barrister found as a fact, that there was no such inhabitancy by the master here as would be necessary under the statute in order to destroy the appellant's right to the franchise.

R. M. Bray, for the respondent, *contra*, was here called on to support the barrister's decision.—It was found by the revising barrister that the room was not separately occupied by the appellant, by reason of the control exercised and the service performed by the master, the employer. [Lord COLERIDGE, C.J.—His decision on that point he submits to the consideration and judgment of the court.] There must, I contend, be separate and exclusive occupation of a dwelling-house, which the merely sleeping in the same room in a house for the requisite period of time cannot be said to be. No doubt, under certain circumstances, "part of a house" may be a "dwelling-house," but, it is submitted, not necessarily so. Here the occupation was not separate and exclusive, as the whole building or house was under the master's control. The occupation under sect. 3 of the present Act, must be of the same nature as in ordinary cases of occupation; the mere fact of living in the room or house is not enough There must be a separate and exclusive independent occupation, which was not, and could not be, the case here, consistently with the rights and control of the employer or master, who could at any moment enter this bedroom. [Lord COLERIDGE, C.J. and CAVE, J.—That would be so also in the case of the master and the butler, put in the schedule to the Act.] But the master there could not turn the man out during the existence of their contract, without committing a breach of it. Sect. 11 of the Franchise Act of 1884, the Representation of the People Act 1867, and the Parliamentary and Municipal Registration Act 1878, must be looked to for a proper definition of the requisite occupation under sect. 3 of the Act of 1884—that is to say, the sole, exclusive and separate occupation of the room as a dwelling. [CAVE, J.—He separately occupied this room in the only way in which he could occupy it, that is by sleeping in it.] But not as a dwelling-house, because he dwelt during the day in another part of the house. A person does not "dwell" in a legal sense, or live entirely in his sleeping room, who passes all the rest of the twenty-four hours in another place. As was said by Lord Esher, M.R. (then Brett, L.J.) in his judgment in the Court of Appeal in *Bradley* v. *Baylis*, "If a person occupies two rooms which are not on the same floor, but are separated by a staircase which is not demised to him, and of which he has not the sole use, and in one of these rooms he and his family sleep, and in the other he and his family live and take their meals by day, it will, to my mind, be difficult to say whether he occupies one room or the other as a dwelling. You do not dwell in your bedroom; you do not dwell in your sitting-room; you do dwell in the two things jointly; but where these two things are separated by something which does not belong to you, I doubt whether you can be said to dwell in either of them." That well applies to the present case, where it cannot be said that this bedroom was separately occupied as a dwelling. By sect. 11 of the Act of 1884, it is to be noted, too, that the expression in that Act, and in the other Acts applied by that Act, are to have the same meaning as in the said other Acts.

Lord COLERIDGE, C.J.—I am of opinion that the revising barrister was wrong in disallowing the appellant's vote in this case, and that he and the twelve other persons named in the schedule in the case are entitled to the franchise. We have here to deal with the 3rd section of the Franchise Act 1884, the 18th section of the Registration Act 1885, and the forms and instructions contained in the second schedule to the last-mentioned Act, which also are made part of, and must be taken as showing and explaining what the intention of the Legislature was in passing, the first-mentioned Act of 1884. Now that Act of 1884 enacts that, where a man inhabits a dwelling-house by virtue of any office, service, or employment (which includes the case of a servant), and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of the Act of 1884, and the Representation of the People Acts, to be an inhabitant occupier of such dwelling-house as a tenant. There is no doubt that under

the term "dwelling-house" a room separately occupied is now included. There is also the condition in the section that the "dwelling-house" is not inhabited by any person under whom the man claiming the franchise serves. In my opinion, the word "dwelling-house," in that clause of the section, must necessarily mean something other than, and different from, the "dwelling-house" mentioned in the previous part of the section as inhabited by the man himself; for, if that is not so, there would be the monstrous absurdity of supposing that the master and his man are inhabiting and living in the same room together. The section means, therefore, that the servant occupier is to be entitled to the franchise in cases where the house or building, of which his particular "dwelling-house" or room forms a part, is not inhabited by his master—that is to say, by the person under whom he serves. Now, are the conditions of the statute in these respects fulfilled in the present case? It is found as a fact in the case that the appellant and the twelve other several shop assistants who are joined with them in this appeal have each of them a separate room in a house, separate and distinct from the house of business, but belonging to the same master, and under the control of a caretaker; and in the same house there is a common room for the inmates, in which they take their meals together. It appears, also, that each assistant has his separate room allotted to, and separately occupied by, himself, so long as he remains in the employment of the firm under whom he serves. It is found, therefore, as a fact that each of them separately inhabits his room as a dwelling, and the only question, then, is whether this same house, containing the common sitting-room and the several separate sleeping-rooms, is or is not inhabited by the person under whom the claimants served. Now, it is plain from the statement in the case that it is not, for the master never goes there, nor does he in any sense of the term inhabit the house. No doubt the house belongs to him, and, before the passing of the Franchise Act 1884, the assistants would not have been entitled to the franchise. Sect. 3, however, of the recent Act has given them the franchise in very plain terms; and, but that the learned counsel for the respondent relied so strongly upon a doubt said to have been expressed by the present Master of the Rolls, when Brett, L.J., in a dictum of his in the case in the Court of Appeal of *Bradley* v. *Baylis*, I confess I should have thought the present case was perfectly clear. There is, in my judgment, no authority on the point that is binding on us prior to the Franchise Act of 1884, and indeed I think it is doubtful whether any decision anterior to that Act would be an authority in the present case, for the decision of which, and the true construction of that Act, we must look to the Act itself and the instructions in the schedule to the Registration Act 1885. Upon those materials, I am of opinion that the case is perfectly clear, that these persons are entitled to be on the register, and that our judgment, therefore, must be for the appellants.

Grove, J.—With some hesitation, I have come to the same conclusion. Upon one point raised by the learned counsel for the respondent I had for a time some doubt, in deference to a doubt said to have been felt by Brett, L.J., whether a person who has the exclusive use of a bedroom and the joint use of a sitting-room can be said to dwell exclusively in the bedroom. That doubt, however, has been removed; and now, therefore, looking at the recent Franchise Act of 1884, and the instructions and forms given in sched. 3 to the Registration Act 1885, it appears to me that a man may occupy a room as a dwelling without passing the whole of the day and night in it, but being in some other place during the daytime. I agree, therefore, with my Lord and my learned brother that our judgment must be for the appellants.

Cave, J.—The first question in this case is, whether the claimant inhabits a dwelling-house by virtue of his service. Now, he does, in point of fact, inhabit a room by virtue of his service, and separately inhabits it as a dwelling-house. The room is occupied by the claimant separately, for no one but himself sleeps in it, and it is occupied by him as a dwelling-house, and in no other way and for no other purpose than as a room for sleeping in, which is one of the purposes of a dwelling. Now, if a man has the sole and exclusive use of a part of a house, that part is not to be deemed to be occupied otherwise than separately by reason only that the man is entitled to the joint use of some other part of the house with some other persons; and I think it is quite clear, on the statement of the facts here, that the claimant has the sole and exclusive use of his bedroom, and that it was not occupied by him otherwise than separately, and none the less so because he had the joint use of another part of the house for the purpose of taking his meals. He comes, therefore, clearly within the first part of sect. 3, and is not deprived of the franchise by the condition imposed by the other portion of the section, for it cannot possibly be said that the master, his employer, who never went to the house, inhabited it, nor that the caretaker's living there and exercising control by order of the master was an inhabiting by the master, nor can a mere caretaker be said to be a person under whom the appellant served. The decision, therefore, of the revising barrister must be reversed.

Judgment for the appellant, reversing the decision of the revising barrister. Leave to appeal refused.

Solicitors for the appellant, *Lumley* and *Lumley*.

Solicitors for the respondent, *Halse, Trustram*, and *Co.*

Monday, Nov. 30, 1885.

(Before Mathew and Smith, JJ.)

The Churchwardens and Overseers of St. Gabriel, Fenchurch (apps.), v. Williams (resp.). (a)

Poor rates—Rating—Premises acquired by Postmaster-General for telegraphic purposes—Premises ceasing to be used as a telegraph-office—Subsequently leased by Postmaster-General to tenants for private purposes—Re-assessment at increased value—Rateable value at which such premises are assessable—Telegraph Act 1868 (31 *&* 32 *Vict. c.* 110), *s.* 22.

Premises purchased by the Postmaster-General,

(a) Reported by Henry Leigh, Esq., Barrister-at-Law.

under the provisions of the Telegraph Act 1868, *as part of the undertaking and property of the Electric Telegraph Company, and occupied and used for some time afterwards by the Post Office for telegraphic purposes, upon ceasing to be so used, and being leased by the Postmaster-General to tenants for their own business purposes, unconnected with telegraph work, remain within the operation of sect.* 22 *of the Act, although no longer occupied or used for telegraphic purposes, and are not therefore, upon a subsequent general re-assessment of property in the parish at an increased amount, liable to be assessed or rated at a sum exceeding the rateable value at which they were properly assessed or assessable at the time of such purchase.*

So held by Mathew and Smith, JJ.

Case stated on the 18th Sept. 1885 by the Right Hon. the Lord Mayor and one of the aldermen of the City of London, being two of Her Majesty's justices of the peace in and for the said city and the liberties thereof, under 42 & 43 Vict. c. 49 on the application of the appellants, who were dissatisfied with the determination of the said justices upon the question of law which arose before the said justices, as hereinafter stated, on the 10th July 1885, at the Mansion House Justice Room, in the said city.

Upon the hearing of a certain complaint preferred by the appellants against the respondent, for that the said respondent, being rated and assessed to the relief of the poor of the above-mentioned parish, had failed to pay the sum of 38*l.* 19*s.* 4*d.*, being the amount claimed to be due to the said parish for two years amount of poor rate, calculated upon an assessment of 334*l.*, we dismissed the complaint, and refused to issue a warrant of distress against the respondent for the said amount.

1. The following facts were either proved before the said justices or admitted by both parties, viz.:—

A. That the respondent was, during the period in respect whereof the said poor rates were claimed as aforesaid, the occupier, as the assignee of an underlease granted by the Electric Telegraph Company to one William Hoporaft, in the year 1868, of certain rooms forming part and portion of a messuage, tenement, and premises situate and being at the north-west corner of the junction of Fenchurch-street with Mincing-lane, in the said parish, the whole of which said premises was formerly held by the said Electric Telegraph Company as part of their undertaking, under a lease thereof for twenty-one years granted to them in the year 1868, and the remaining part or portion of which said premises was, up to the year 1870, occupied and used by the said Electric Telegraph Company for the purposes of their undertaking.

B. That in the year 1870 the said messuage or tenement and premises were (*inter alia*) purchased by Her Majesty's Postmaster-General, as part of the undertaking of the said Electric Telegraph Company acquired by him under the Telegraph Acts 1868-1869; and under and by virtue of sect. 6 of the Telegraph Act 1868, the said underlease under which the respondent, at the time of such purchase and acquisition, held the aforesaid rooms, part of the said premises, remained in full force, and accordingly all the covenants in the said underlease contained, and on the part of the said company to be performed, had thenceforth and still have to be performed by the Postmaster-General instead of the said Electric Telegraph Company.

C. That the said underlease of the said rooms and premises occupied by the respondent as aforesaid, and used by him solely for the purposes of his own business as an advertising agent, contained (*inter alia*) a condition on the part of the said Electric Telegraph Company for the payment by them of all taxes, rates, charges, assessments, and impositions whatsoever, whether purely parochial or otherwise, which at any time during the term thereby granted should be levied, rated, charged, assessed, or imposed upon, or in respect of, the said demised premises, or the premises of which they formed a part.

D. That, from and after the time of such purchase and acquisition by the Postmaster-General as aforesaid, and up to the year 1878, the part of the said premises which had theretofore been occupied and used by the said Electric Telegraph Company for the purposes of their undertaking as aforesaid was occupied and used by the Postmaster-General for the public purposes of the Post Office; but in the year 1878 the said last-mentioned portion of the said premises was demised by the Postmaster-General by underlease to Messrs. Hardy and Jackson, who thenceforth occupied and used the same as and for the purposes of their business as chemists, and the remaining portion of the said premises, consisting of the aforesaid rooms in the occupation of the respondent, continued to be used by him as theretofore solely for the purposes of his own business, and accordingly no part of the said premises was thenceforth used for the purpose of the Post Office.

E. That, at the time of the said purchase and acquisition by the Postmaster-General of the property and undertaking of the said Electric Telegraph Company as aforesaid, the said premises in their entirety were properly assessed to the poor rate of the aforesaid parish at the total rateable value of 280*l.* per annum, of which said annual sum a certain proportion—that is to say, the sum of 108*l.* being five-thirteenth parts of the said sum of 280*l.*—represented the rateable annual value at which the part or portion of the said premises occupied by the respondent as aforesaid would have been properly assessable if the same had, at the time of such purchase and acquisition aforesaid, been assessed to the said poor rate as an independent tenement, and separately from the residue of the said premises.

F. That the said entire premises continued to be assessed to the poor rate of the said parish at the stated rateable value of 280*l.* per annum until the general assessment in the year 1880, when the assessment committee, for the purpose of assessing the said premises, divided the same into two portions, which they assessed as separate tenements; and accordingly the portion thereof occupied by the respondent was called No. 1, Mincing-lane, and re-assessed at a rateable value of 334*l.* per annum, and the residue of the said messuage or tenement, distinguished as No. 42, Fenchurch-street, was re-assessed at an equal rateable value of 334*l.*, making a total rateable value at which the said entire premises were thus re-assessed of the sum of 668*l.* per annum.

G. That notice of the sub-division and separate assessment of the premises was served on the respondent, who did not appeal against such assessment.

2. On the part of the respondent reference was made to the 22nd section of the Telegraph Act 1868 (31 & 32 Vict. c. 110), the words of which are as follows:

All land, property, and undertakings purchased by the Postmaster-General under the Act shall be assessable and rateable, in respect of local, municipal, and parochial rates, assessments, and charges, at sums not exceeding the rateable value at which such lands, property, and undertakings were properly assessed or assessable at the time of such purchases or acquisition.

It was contended on the part of the respondent that, by virtue of that section (22), the premises could only be rated at a sum not exceeding the amount at which they were rated when the Post Office acquired the premises; that the parish authorities were therefore not entitled to be paid on the increased assessment; and that the respondent was only liable to pay on 108*l.*, being his due proportion (five-thirteenths) of 280*l.*, the amount at which the whole of the premises were rated when they were acquired by the Post Office.

3. On the part of the appellants it was contended that, the Post Office having ceased to occupy the premises, the Act 31 & 32 Vict. c. 110, had no application whatever to the case; that the claim was not made against the Post Office but against the respondent as occupier of the premises now called No. 1, Mincing-lane, who was liable to pay according to the value of his occupation; and that the parish authorities had nothing to do with the contract between the Post Office and the respondent.

The justices, however, being of opinion that (as contended on the part of the respondent) the parish authorities were not entitled to be paid on the increased assessment, dismissed the complaint of the appellants.

The question of law upon which the case is stated for the opinion of the Queen's Bench Division of the High Court of Justice is—

Whether, seeing that the said premises are not now in the occupation of the Post Office, and having regard to the words of the above-recited section, the parish authorities are entitled to be paid poor rate at a higher assessment than that in force at the time when the said premises were acquired by the Post Office.

By sect. 14 of the Telegraph Act 1868 it is enacted that

It shall be lawful for Her Majesty's Postmaster-General, with the consent of the Lords of Her Majesty's Treasury, from time to time to lease any part or parts of the undertaking or property purchased or acquired by him under the power of this Act.

E. A. Nicoll for the appellant parish.—The point contended for by the appellants is that the Postmaster-General, not being now the occupier of the premises in question, is not in law liable to be rated. Having in 1878 ceased to occupy or use the premises for telegraphic purposes, sect. 22 of the Telegraph Act 1868 no longer applies to any part of them, and the respondent, as the occupier for his own business purposes, entirely unconnected with telegraph work, of that portion of the premises for which the rate is now demanded of him, is the person liable to be rated according to the ordinary law, and to pay the ordinary rates. The whole and sole purpose of the Act of 1868 was that parishes might recover from the Crown that which the Crown would otherwise not be liable to pay, viz., a contribution to the poor rate; but so limiting the Crown's liability that the property acquired by the Postmaster-General under the Act should not be assessed beyond its rateable value at the time of its acquisition by him, so long as it is acquired and held for the purposes of the Act. [Smith, J.—The Act does not in so many words say that.] That is true, but the court will construe the intention of the Legislature from the whole of the Act. That intention was to promote the development of the electric telegraph throughout the country, and to give the public the full benefit of it at a cheap rate, and for that purpose, therefore, property, when held or occupied by the Postmaster-General for telegraphic purposes, was not to be assessed beyond its rateable value at the time of its acquisition by him. It was not intended to stamp the property for all time at the value it might acquire during the time it might be, and by reason mainly of its being, occupied and used by the Post Office. The Postmaster-General in 1878 altogether abandoned the use and occupation of the whole and every part of the premises, and at the last quinquennial assessment the authorities re-assessed the premises, dividing them into two parts, and assessing each part, one of them being that part occupied by the respondent, in the sum of 334*l.*, making an aggregate total of 668*l.*, and the respondent refused to pay rates on this increased amount of 334*l.*

The *Solicitor-General* (Sir John E. Gorst, Q.C.) and *Casserley* for the respondent, *contra*.—When these premises were purchased by the Post Office in 1870, a Mr. Hopcraft occupied that part of them now occupied by the respondent under a twenty-one years lease granted to him by the Electric Telegraph Company in 1868, by which lease the company (the lessors) covenanted to pay all taxes, rates, and other assessments upon the premises, and they were therefore interested in the assessment. Upon the Postmaster-General purchasing the premises in 1870 he stepped into the shoes of the company under certain clauses of the Act of 1868, and became liable to pay these assessments for Hopcraft, the lessee, and subsequently for the respondent, to the assignee of Hopcraft's lease, in the same way as the company had been. At that time the whole of the premises was assessed at a lump sum of 280*l.*, and so remained until 1880, when they were divided by the assessment committee into two, and re-assessed at an increased aggregate amount for the whole of 668*l.*, or 334*l.* for each part. The Post Office is still the owner of the whole premises, and neither the respondent nor the other tenants who are in the occupation of them respectively have hitherto paid rates upon the increased assessment. Upon that portion of the premises which was for a few years after its acquisition occupied by the Post Office, and which is now let to another person, and is quite unconnected with telegraphic work, the Postmaster-General, as the owner and lessor, is under no liability or covenant to pay rates; but upon that portion occupied by the respondent he is under an obligation to pay rates. The Act of 1868, however, is conclusive that he is not bound to pay upon an amount exceeding that at which the premises were assessable and rateable at the

time of their acquisition in 1870. It is clear from sect. 14 of the Act that the Legislature contemplated the possibility of the Postmaster-General letting off part of the premises acquired by him under the Act, and then comes sect. 22. The Postmaster-General has not sold, but is still the lessor of the property, which is still part of the "undertaking" purchased by him in 1870, though it has been found expedient to move the office elsewhere. If the assessment is raised, there will be an additional burden cast upon the Postmaster-General, contrary to the intention of the Act, which, unless words which are not now there are read into sect. 22, is conclusive against the appellants.

Nicoll in reply.

MATHEW, J.—I am of opinion that our judgment must be for the respondent. The question we have to decide turns upon the true and correct construction to be put upon the 22nd section of the Telegraph Act 1868 (31 & 32 Vict c. 110). That section enacts that "all land, property, and undertakings purchased or acquired by the Postmaster-General under this Act shall be assessable and rateable in respect of local, municipal, and parochial rates, assessments, and charges at sums not exceeding the rateable value at which such land, property, and undertakings were properly assessed or assessable at the time of such purchases or acquisition." Now, it is perfectly clear that that section is a compromise between two conflicting claims, viz., the claims of parishes on the one hand to be paid rates in respect of properties which had been previously rated, and the claims on the other hand of the Crown to be relieved of assessments in respect of property held for public purposes. The compromise appears to me to be, that the property purchased or acquired by the Postmaster-General, under the Act in question, should continue to be rateable, but that its rateable value should not be deemed to be enhanced by reason of the use to which it would be put; and that the assessment therefore would be on the rateable value at which the property was properly assessed at the time of the purchase. That is the enactment. Now what has happened in this particular case? The house was acquired by the Postmaster-General under the powers of this Act of Parliament. The whole of the house, however, was not required for telegraphic purposes, and a portion of it was accordingly let by the Postmaster-General under the powers for that purpose conferred upon him by the 14th section of the Act. After a time it was found that the remaining portion of the house, which for some time was occupied by the Postmaster-General for the purposes of the Act, was not required, and leases were granted by him of both portions. The upper part of the premises, viz., that occupied by the respondent Williams, was subject to a covenant by the lessor that he would pay all rents, taxes, and assessments. There was no such clause or covenant, as I understand, in the lease of the lower portion of the premises. The question is, whether the property so dealt with by the Postmaster-General under the powers of the Act still remains under the operation of sect. 22, or whether it has ceased to remain under the operation of that section. The language of the Act is perfectly clear. The learned counsel for the appellants argued that the result of the construction contended for by the respondent's counsel was so unreasonable and absurd that the language of the Act ought not to be interpreted according to its ordinary and natural meaning, but that we ought to read it as saying that all land, property, and undertakings purchased or acquired *and held* by the Postmaster-General for the purposes of the Act shall be rated in accordance with the terms of sect. 22. Now I can see very good reason why the Legislature should have enabled the Postmaster-General to lease the premises on the terms provided for by sect. 22. If the Postmaster-General acquired property for the purpose of the undertaking, then clearly sect. 22 would apply. If the property should be let by him, whether for the purposes of telegraphy or otherwise, to any tenant, it seems to me perfectly reasonable that the Postmaster-General should be allowed to let it upon the same terms as those upon which he himself entered upon it; otherwise indirectly the Post Office would suffer by the transaction, because the rent that he would get would be diminished, owing to the fact that the property was enhanced in its rateable value by reason of its having been used, or the adjoining land having been used, for public purposes. For these reasons it seems to me that the decision of the justices was right, and in my opinion, therefore, that decision should be upheld, and this appeal dismissed with costs.

SMITH, J.—I am entirely of the same opinion, and I have nothing to add except this: We are not here dealing with a case in which the Postmaster-General, if he could have done so, has sold the property after having purchased it under this Act. When that point arises the court can deal with it. Here he purchased the undertaking, and still holds it. It seems to me that, in the face of sect. 22, it is impossible to hold as the appellants desire us to hold with regard to the construction and operation of that section.

Judgment for the respondent, with costs. Leave to appeal granted.

Solicitor for the appellant parish, *Leonard J. B. Rawlins.*

Solicitor for the respondent, *Robert Hunter*, Solicitor to the Post Office.

Tuesday, March 2, 1886.

(Before HAWKINS and MATHEW, JJ.)

JOHNSON (app.) *v.* MAYOR AND CORPORATION OF CROYDON (resps.). (a)

Bye-law — Validity — Unreasonableness — Ultra vires—Municipal Corporations Act 1882—45 & 46 *Vict. c.* 50, *s.* 23.

The Municipal Corporations Act 1882, *s.* 23, *enacts that, "the council may, from time to time, make such bye-laws as to them seem meet for the good rule and government of the borough, and for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the borough."*

In pursuance of that section the Town Council of Croydon made the following bye-law: "No person, not being a member of Her Majesty's army

(a) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

or auxiliary forces acting under the orders of his commanding officer, shall sound or play upon any musical instrument in any of the streets in the borough on Sunday." The appellant, not being a member of the army or auxiliary forces acting under the orders of his commanding officer, was charged with playing a musical instrument in the said borough on a Sunday, and was fined by the magistrates under the above bye-law; it was not proved that any complaint of a nuisance was made in respect of such playing. A case was stated, and the appellant contended that the bye-law was unreasonable and repugnant to the general law of the land.

Held, that the conviction ought to be quashed, as the bye-law was unreasonable, and the facts of the case did not show that any nuisance had been actually committed.

THIS was a case stated by justices under 20 & 21 Vict. c. 43, of which the following are the material parts:—

1. Upon the hearing of a certain information duly preferred by the respondents against the appellant for that he (the appellant) not being a member of Her Majesty's army or auxiliary forces did, on Sunday, the 3rd May 1885, play upon a musical instrument in Tamworth-road, a street in the borough of Croydon, contrary to bye-law No. 237, made for the good rule and government of the said borough, under the provisions of the Municipal Corporations Act, the magistrates, on the said 10th June 1885, convicted the appellant of the said offence, and adjudged him to forfeit and pay for such offence the sum of 10*s.* and 13*s.* costs.

2. The said bye-law, No. 237, was made by the council of the said borough under the authority of the 23rd section of the Municipal Corporations Act 1882, and is as follows: "No person, not being a member of Her Majesty's army or auxiliary forces acting under the orders of his commanding officer, shall sound or play upon any musical instrument in any of the streets in the borough on Sunday."

3. It was proved to the satisfaction of the magistrates, and admitted by the appellant, that (as a fact) the appellant did, on the day and at the place named, play upon a musical instrument, the said day being Sunday.

4. It was contended on behalf of the appellant that the said bye-law was invalid on the grounds: (*a*) That it was unreasonable; (*b*) that it was repugnant to the general law of the land; (*c*) that the respondents had no power to make the said bye-law under the said 23rd section (subsect. 1) of the Municipal Corporations Act 1882, and that the said bye-law was made and was *ultra vires*.

5. The magistrates considered the said bye-law to be a good and valid bye-law, and convicted the appellant as aforesaid. If the court should be of opinion that, on any of the grounds contended for by the appellant, the said bye-law was invalid, then the conviction was to be quashed; if otherwise, affirmed.

By 45 & 46 Vict. c. 50, s. 23:

The council may, from time to time, make such bye-laws as to them seem meet for the good rule and government of the borough, and for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the borough.

Horne Payne (*G. S. Bower* with him) for the appellant.—This conviction ought to be quashed, for the bye-law under which it was made is invalid as being *ultra vires* and repugnant to the general law of the land. [*Pitt-Lewis*, Q.C., as *amicus curiæ*, referred to *Reg.* v. *Gay and Powell*, 51 L. T. Rep. N. S. 92.] A bye-law might be good if it was directed against music being so played as to cause reasonable annoyance to the neighbourhood, but it is not valid if it is not so restricted. The Truro bye-law (*Reg.* v. *Gay and Powell*, *ubi sup.*) was a very different one to this. That ran as follows: "Every person who shall sound or play upon any musical instrument, or sing or make any noise whatsoever in any street, or near any house within the said borough, after having been required by any householder residing in such street or house, or by any police constable, to desist from making such sound or noise, either on account of any illness of any inmate of such house, or for any reasonable cause, may be summarily prosecuted." That case found that a nuisance had been committed by the playing of the appellant's concertina; but here the case does not state that any nuisance had been caused by the appellant's playing. The following cases show that wide and unrestricted bye-laws are invalid and unenforceable:

The Calder and Hebble Navigation Company v. *Pilling and others*, 14 M. & W. 76;
Elwood v. *Bullock*, 6 Q. B. 383;
Everett v. *Grapes*, 3 L. T. Rep. N. S. 669.

Cagney for the respondents.—This bye-law is not bad in itself, and the magistrates may be trusted to use discretion in not putting it into force, if resulting in oppression. As the appellant was convicted, it may be taken for granted that somebody must have been annoyed. The Truro case is in point. [HAWKINS, J.—No; that case found there was reasonable ground for complaint.] The words "reasonable complaint" are really surplusage, for before reasonable complaint was made, or a nuisance actually committed, the justices would not act on it.

HAWKINS, J.—I am of opinion that this bye-law was clearly unreasonable, and so wrong. Its terms are as follows: [His Lordship here read it.] But for this bye-law it could not be contended that any offence was committed. Under its provisions persons are made responsible for certain acts who were not responsible before. In my judgment it is unreasonable and not warranted by the statute under which it professes to be made. I see nothing unreasonable in preventing the playing of music at certain times if the inhabitants of a street or a district object; but, according to this bye-law, a boy going along the street playing a jew's harp, or a man playing on some instrument a beautiful piece of music to the delight of all, would be liable to a penalty. Anything more egregiously unreasonable I have never seen; and it puts it in the power of the justices to be cruelly oppressive. It might be useful to give them power to stop noises which should be deemed a nuisance, and I think this bye-law should be so amended. The Truro case is very different from this one; there the bye-law was made under sect. 90 of 5 & 6 Will. 4, c. 76, and by it persons might be summarily punished who persisted in playing after having been required to desist by those entitled to require them to desist. The appellant was brought before

the justices for playing a concertina on Sunday, and it was proved that many complaints had been made by the inhabitants of the Salvation Army's music; but, before he was summoned, he had been cautioned by the police, and on the morning in question he had been asked to desist from playing on his concertina, and because he refused he was fined. It would be a reasonable bye-law which required the person to desist from playing after complaint; but the absence of any such restriction renders this particular bye-law unreasonable and so invalid.

Mathew, J.—I am of the same opinion. The only real point made by Mr. Cagney was, that the justices ought to be trusted to construe the bye-law properly; but they, I think, would have no discretion in the matter, and would be bound to convict under it, if a person was brought before them charged with having committed a breach of it, for they have no dispensing power. It was made in pursuance of sect. 23 of 45 & 46 Vict. c. 50, but it is not in conformity with it. The magistrates acted on the assumption that the act of the appellant was a nuisance; but there is nothing in the bye-law to make such an act necessarily a nuisance: therefore it is unreasonable.

Conviction quashed.

Solicitors for the appellant, *Ranger* and *Burton*.
Solicitor for the respondents, *E. Dean*, for *C. M. Elborough*, Croydon.

Tuesday, March 16, 1886.

(Before Grove and Stephen, JJ.)

Re The School Board Election for London (Finsbury Division); *Ex parte* Ayres. (*a*)

Election law—School board election petition—Appeal from decision of commissioner—Jurisdiction of the High Court—45 & 46 Vict. c. 50, s. 100, sub-sect. 4—R. S. C. 1883, Order LIX., r. 1.

The High Court has no jurisdiction to entertain an appeal against the decision of a commissioner appointed to inquire into alleged corrupt or illegal practices at a school board election, except on points of law reserved for its decision by way of a case stated by the commissioner.

This was an *ex parte* motion for a rule to refer back his report to the barrister appointed as commissioner to inquire into certain illegal practices alleged to have taken place in the election in the Finsbury Division for the School Board of London, or to grant a new trial of the petition.

At the election the Rev. Mark Wilks was the successful candidate, and the applicant the unsuccessful. The latter preferred a petition against the return of the former on the ground of illegal practices. The commissioner found that the respondent had been guilty of an illegal practice in issuing a bill without having the printer's name on it, but he exempted the respondent from the penalties attaching to such act on the ground that he made the mistake in good faith.

By 45 & 46 Vict. c. 50, s. 100, sub-sect. 4:

The High Court shall, subject to this Act, have the same powers, jurisdiction, and authority with respect to a municipal election petition and the proceedings thereon as if the petition were an ordinary action within its jurisdiction.

By Order LIX., r. 1:

The following proceedings and matters shall continue to be heard and determined before divisional courts:
(*b*) Appeals from revising barristers, and proceedings relating to election petitions, parliamentary and municipal.

Ayres, the applicant, in person.—It is sought to refer the report of the commissioner appointed to inquire into the alleged illegal practices at the election in order that it may be reconsidered by him, as to whether or not he ought to grant the exemption from the penalties which he granted to the respondent, or to have a new trial altogether of the petition. Sect. 100 of the Municipal Corporations Act 1882 confers an appellate jurisdiction in the matter on this court. [Stephen, J.—That section does not give the court power to hear appeals, but only interlocutory matters before the hearing of the case.] Order LIX., r. 1, of the Rules of 1883 then gives this court the jurisdiction to entertain this appeal. [Grove, J.—The distinction is drawn between appeals from revising barristers and proceedings relating to election petitions.]

By the Court.—This court has no jurisdiction on appeal against the decision of the barrister appointed to inquire into corrupt or illegal practices at a school board election, except on points of law reserved for its decision by way of a case stated by the commissioner.

Application refused.

(*a*) Reported by W. P. Eversley, Esq. Barrister-at-Law.

Thursday, March 25, 1886.

(Before Mathew and Smith, JJ.)

Boaler *v.* Holder and others. (*a*)

Practice—Striking out claim as disclosing no reasonable cause for action—Action for malicious prosecution — Charge maliciously preferred — Conviction—R. S. C., Order XXV., r. 4.

The plaintiff was charged by the defendants under 6 & 7 Vict. c. 96, s. 4, with having published a libel knowing the same to be false. At the preliminary stage of the proceedings the charge under sect. 4 was withdrawn, but the prosecution for the minor offence under sect. 5 of the same Act was continued, and the plaintiff was committed for trial under the 5th section. An indictment was preferred against the plaintiff under the 4th section, and, the jury found that the plaintiff issued the libel believing it to be true. This verdict was held to be one of guilty under the 5th section, and, after respite of judgment and argument, the plaintiff was sentenced to two months' imprisonment without hard labour. The plaintiff brought his action for malicious prosecution under the 4th section of the above Act, and set forth the above facts in his statement of claim, in which he alleged that the finding of the jury was an acquittal under the 4th section, under which he had been indicted. The defendants applied to have the statement of claim struck out as not disclosing any reasonable cause of action. The master made the order as prayed, but the judge reversed it. The defendants appealed.

Held, on appeal, that the statement of claim ought not to be struck out as disclosing no reasonable ground of action, and that where a statement of claim discloses some ground of action, the mere

(*a*) Reported by W. P. Eversley, Esq., Barrister-at-Law.

fact that the plaintiff is not likely to succeed on it at the trial is no ground for its being struck out.

THIS was an appeal on behalf of the defendant, St. John Wontner, from an order of a judge at chambers refusing to strike out the amended statement of claim in a action brought against the defendants for (*inter alia*) malicious prosecution. The material portions of the statement of claim were as follows:—

1. Certain of the defendants were directors of a joint-stock company called the Grosvenor Bank Limited; another defendant, one Waram, was the manager thereof; and another, St. John Wontner, acted as their solicitor in the prosecution.

4. On the 16th Dec. 1884 the defendant Waram on behalf of himself and the other defendant directors, falsely and maliciously and without reasonable or probable cause, issued a summons out of the Westminster Police-court and served or caused it to be served on the plaintiff, charging him with an offence therein contained.

5. On the 19th Dec. 1884 plaintiff appeared to the said summons above mentioned, and was charged under sect. 4 of 6 & 7 Vict. c. 96, for that he "on the 8th day of Dec. 1884 did unlawfully and maliciously write and publish and cause and procure to be written and published a certain false and defamatory libel of and concerning the said Thomas Waram and other directors of the Grosvenor Banking Company Limited, well knowing the said libel to be false, contrary to the statute." During the cross-examination of the witness (the defendant Waram) the charge under sect. 4 as aforesaid was withdrawn, but the prosecution for the minor offence under sect. 5 was continued, and the further hearing of the case was adjourned till the 26th Dec., on which day the plaintiff was committed for trial at the Central Criminal Court under sect. 5 aforesaid, and the defendant Waram was bound by recognisance to prosecute the plaintiff under sect. 5 only. The defendant Wontner conducted the said prosecution on both the said occasions as the solicitor for and on behalf of the defendant directors and the defendant Waram.

6. On or about the 2nd Feb. 1885, at the Central Criminal Court, the defendants falsely and maliciously and without reasonable or probable cause caused to be presented to the grand jury a bill of indictment against the plaintiff under sect. 4 aforesaid, and the defendant Wontner, acting as the solicitor for the said defendant directors and the defendant Waram, maliciously assisted and conspired with them in putting the law in motion.

7. The defendants further falsely and maliciously, and without reasonable or probable cause, prosecuted and caused the plaintiff to be tried upon the said false charge under sect. 4 aforesaid, before the Common Serjeant and a jury, and the jury found the following special verdict: "Our opinion is that the directors were not privy to the reports sent to Somerset House being false and fraudulent, but that the prisoner issued the libel believing it to be true, and in view of the gross inaccuracies in the books we recommend him to the lenient consideration of the court." Which finding was in fact a verdict of acquittal under the indictment under sect. 4 aforesaid, under which section the plaintiff had been indicted, but which the Common Serjeant held to be a verdict for the Crown under the 5th section aforesaid, and judgment was respited.

8. Subsequently, in the March Sessions 1885 of the Central Criminal Court, the plaintiff was sentenced under the above-mentioned verdict to two months' imprisonment without hard labour, and the plaintiff has undergone the said sentence.

The plaintiff claimed damages in respect of the above matters.

By 6 & 7 Vict. c. 96, s. 4:

If any person shall maliciously publish any defamatory libel, knowing the same to be false, every such person, being convicted thereof, shall be liable to be imprisoned in the common gaol or house of correction for any term not exceeding two years, and to pay such fine as the court shall award.

By sect. 5:

If any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment, or both, as the court may award, such imprisonment not to exceed the term of one year.

By Order XXV., r. 4:

The court or a judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

Murphy, Q.C. for the defendant Wontner.—This statement of claim ought to be struck out as disclosing no reasonable cause of action. It charges the defendant with maliciously and without reasonable and probable cause preferring an indictment against the plaintiff; but the plaintiff pleads and admits that he was convicted; the conviction is an answer to the charge of malicious prosecution. But the plaintiff says that he was wrongly convicted, and the verdict of the jury ought to have been recorded in his favour. This he pleads, and without it his claim discloses no cause of action. Lord Selborne, in *The Metropolitan Bank* v. *Pooley* (53 L. T. Rep. N. S. 163; 10 App. Cas. 210), said: "An action for malicious prosecution cannot be maintained until the result of the prosecution has shown that there was no ground for it. If a man has been tried and convicted on that prosecution, and there is no writ of error brought and no reversal of the decision, such an action will not lie. And it is manifestly a matter of high public policy that it should be so; otherwise the most solemn proceedings of all our courts of justice, civil and criminal, when they have come to a final determination settling the rights and liabilities of the parties, might be made themselves the subject of an independent controversy, and their propriety might be challenged by actions of this kind." That expression of opinion is conclusive of the present case.

Finch for the plaintiff.—The statement of claim ought to be upheld. It alleges that the prosecution of the plaintiff by the defendants under the 4th section of 6 & 7 Vict. c. 96, was malicious and without reasonable and probable cause. In an action of this sort it is enough if the plaintiff alleges that the defendants maliciously and without probable cause preferred an indictment against him, and if he proves at the trial that some charges in the indictment were maliciously and without reasonable cause preferred against him even though there was good ground for preferring other charges, he is entitled to a verdict:

Reed v. *Taylor*, 4 Taunt. 616.

The plaintiff in the present case is not hampered by his conviction. Before the magistrates the more serious charge, involving *scienter*, was given up, but, though committed for the minor offence, the more serious charge formed the indictment against him at the Central Criminal Court. The verdict of the jury was a distinct acquittal under sect. 4, and, as he was not charged under any other section, he ought to have had a verdict of not guilty recorded in his favour. The plaintiff was willing to have the legal question of the entering of the verdict discussed by the Court for the Considera-

tion of Crown Cases Reserved; but he failed to obtain leave to have the point reserved, and he ought not to be prejudiced by that fact.

MATHEW, J.—I think the order of Wills, J. ought to be affirmed. The question is whether the statement of claim ought to be struck out as disclosing no reasonable cause of action. It appears that the result of the prosecution of the plaintiff was that, though indicted under the 4th section of 6 & 7 Vict. c. 96, he was found guilty by the jury at the Central Criminal Court, under sect. 5 of that Act, and was punished by a sentence of two months' imprisonment without hard labour. Paragraph 7 of the statement of claim shows that the jury took that view. The latter part of that paragraph no doubt puts forward a matter of law rather than of fact, and it is now said that this slip in the pleading renders the statement of claim frivolous and vexatious, as disclosing no reasonable cause of action. The *scienter* was not proved at the trial, and a writ of error was applied for, but the fiat of the Attorney-General was refused, and therefore it must be assumed that the plaintiff was properly convicted and punished. It is a question of principle, and must be so decided. The charge against the defendants is that they knowingly preferred against the plaintiff a charge of greater gravity than they could prove. Suppose, for instance, a charge of murder was deliberately preferred against a person who could only be convicted of grievous bodily harm, in such a case it is clear that an action for malicious prosecution would lie. Of course the defendants may not have been responsible for the indictment, nor is it clear that the plaintiff was not properly convicted within the section under which the charge against him was laid. I do not think he has received any real or substantial damage for which he can recover compensation from a jury; but that is not a matter which can be said to authorise the court to strike out this statement of claim as disclosing no reasonable cause of action.

SMITH, J.—This is an application to strike out this statement of claim under Order XXV., rule 5, as not showing any reasonable cause of action. We cannot look behind a statement of claim if it discloses a reasonable cause of action. As against the defendant Wontner the plaintiff says that the summons for libel was taken out against himself as knowing the libel to have been false, and the prosecution on the more serious charge under sect. 4 of 6 & 7 Vict. c. 96, was withdrawn from before the police magistrate, but on the minor charge under sect. 5 was proceeded with, and he was committed under it. The statement of claim in paragraph 6 then alleges that the defendant Wontner, without reasonable cause, caused a bill of indictment, under sect. 4, to be preferred before the grand jury. The next paragraph goes on to say that the charge was proceeded with before the Common Serjeant and a jury, and the jury found that the plaintiff had published the libel believing it to be true. This the plaintiff says amounts to an acquittal on the charge preferred against him, and entitles him to maintain the present action. The conviction against him stands recorded, and it will, I think, present great difficulties in his way at the trial. But with this we have nothing to do. We cannot say that this statement of claim does not disclose a reasonable cause of action, and the appeal must be dismissed.

Appeal dismissed.

Solicitor for the plaintiff, *W. W. Brown.*

Solicitors for the defendant Wontner, *Wontner and Sons.*

BEAUMARIS WINTER ASSIZE 1886.

Thursday, Jan. 21, 1886.

(Before POLLOCK, B.)

REG. v. THOMAS GRIFFITHS AND THOMAS WILLIAMS. (a)

Justices—Preliminary inquiry—Cross-examination by defendants' solicitor—Discretion of justices to prohibit—Summary Jurisdiction Act 1884 (47 & 48 *Vict. c.* 43), *s.* 7.

Certain justices at a preliminary inquiry into an alleged case of highway robbery declined to permit the solicitor representing the prisoners to cross-examine the witnesses for the prosecution, believing that they possessed a discretionary power in the matter.

Sect. 7 *of the Summary Jurisdiction Act* 1884 *provides that the expression "court of summary jurisdiction" in sect.* 50 *of the Summary Jurisdiction Act* 1879 *shall include justices, a justice or magistrate, whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act, or by virtue of his or their commission or by the common law.*

Held, that the justices had no discretion to prohibit the solicitor to the prisoners from cross-examining the witnesses for the prosecution, and that the right to cross-examine is absolute both under the Summary Jurisdiction Acts and by the common law,

Quære, as to the course to be adopted when justices have prohibited cross-examination.

THOMAS GRIFFITHS and Thomas Williams were brought to Beaumaris Winter Assizes upon an indictment charging them that they, in and upon one Robert Roberts feloniously did make an assault and nine pounds in gold, the moneys of the said Robert Roberts, from the person and against the will of the said Robert Roberts feloniously and violently did steal, take, and carry away.

M. Douglas for the defence.—Before the case is opened I have to make a statement to your Lordship. It appears that at the preliminary inquiry from which the prisoners were committed for trial the justices refused to allow the solicitor for the prisoners to cross-examine the witnesses for the prosecution.

POLLOCK, B.—The fact is mentioned in the depositions, but this is not the proper time or place at which to enter into the question. The trial must proceed.

J. E. Vincent, for the prosecution, opened the case and examined the prosecutor. At the end of the cross-examination,

POLLOCK, B. having ascertained that there was no more direct evidence of the offence charged, asked the jury whether they could satisfactorily convict upon such evidence, and a verdict of "Not guilty" was returned.

(a) Reported by J. E. VINCENT, Esq., Barrister-at-Law.

Douglas.—I should like to mention the point which I raised at an earlier period. The magistrates refused to allow any cross-examination of the witnesses for the prosecution.

Vincent.—My instructions are that the statement made is not precisely accurate. It was attempted to cross-examine the witnesses at a period considerably later than the preliminary inquiry. At the same time, without admitting the facts, it is highly desirable that your Lordship should express an opinion upon the subject in in order that the practice may be settled.

Douglas.—I submit that there is no doubt of the right of prisoners charged with an indictable offence to be represented at the preliminary inquiry by counsel or solicitor, and that counsel or a solicitor representing prisoners have an absolute right to cross-examine the witnesses for the prosecution. There is no discretion in the magistrates, and for very good reason, inasmuch as, if the magistrates possessed a discretion and exercised it by refusing to permit cross-examination, no use could be made at the trial of the depositions of a witness, although death, illness, or other sufficient cause should render it impossible for the witness to be called.

POLLOCK, B.—It is certainly much to be desired that the practice should be settled. I am clearly of opinion that not only under the Summary Jurisdiction Acts, but also by the common law, prisoners at the preliminary inquiry have a right to be represented by counsel or solicitor, and that such counsel or solicitor have an absolute right to cross-examine the witnesses for the prosecution. For the reason which has been given, it would be most unfortunate if magistrates possessed a discretion to prohibit cross-examination, since the exercise of that discretion would prevent the depositions of a witness from being used at the trial under any circumstances, and would tend to impair that appearance of perfect fairness which is the first essential of proceedings in a criminal court. I express no opinion concerning the conduct of the magistrates in this particular case, as there is some dispute in regard to the facts; but, in my opinion, it is desirable that the practice should be settled upon the lines which I have stated.

Solicitor for the prosecution, *R. Jones Roberts*, Menai Bridge.

Solicitor for the defence, *Thornton Jones*, Bangor.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Friday, March 12, 1886.

(Before MATHEW and SMITH, JJ.)

HOMER (app.) *v.* CADMAN (resp.). (*a*)

Highway—Wilful obstruction—Highway Act 1835 (3 *& 4 Will. 4, c.* 50), *s.* 72—*Obstruction of part of highway only.*

The respondent was summoned under the 72nd section of the Highway Act 1835 *for "wilfully obstructing the free passage" of a highway. It was proved that he stood on a chair in the highway and addressed a large crowd of persons who had collected round him. There was space for vehicles and foot-passengers to pass to and fro outside the crowd, but to have attempted to have walked or driven across that part where the appellant and the crowd were stationed would have been attended with inconvenience and danger.*

Held, that the appellant was guilty of wilful obstruction of the free passage of the highway within sect 72.

THIS was an appeal upon a case stated by a justice of the peace for the county of Stafford, pursuant to 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49.

At a petty sessions held at Sedgley, in the county of Stafford, one Frederick Augustus Homer was charged in and by a certain complaint for that on the 12th day of Sept. 1885 he did unlawfully and wilfully obstruct the free passage of a certain public highway; to wit, the Bull Ring at Sedgley aforesaid.

The said complaint was made under sect. 72 of the General Highway Act 1835. Upon the hearing of the said complaint the following facts were proved or admitted:—

1. The whole of the said Bull Ring was and is a public highway, and repaired by the inhabitants of the parish. The said Bull Ring is in the form of an irregular triangle, and is at a spot at which six highways converge.

2. On the 12th Sept. 1885 the defendant marched into the said Bull Ring at the head of a band and took up his position near a lamp-post in the said Bull Ring, the band and crowd, variously estimated at from 150 to 200 people, forming round him and upon the said highway. The defendant stood upon a chair or stool and addressed the said crowd for the space of one hour and a half.

3. During that period no person could, without considerable inconvenience and danger, have either walked or driven across that part of the highway where the defendant and his band and crowd were stationed, and the said highway was thereby during such period rendered less convenient and commodious to the public. There was, however, space outside the said crowd and between it and the footpaths for vehicles or foot-passengers to pass and repass.

4. It was thereupon contended on behalf of the defendant that, inasmuch as there was a passage for foot-passengers, horses, and vehicles round the space occupied by the crowd, there was no obstruction within the meaning of the 72nd section of 5 & 6 Will. 4, c. 50. And further, that the defendant had a right to hold the said meeting on the said highway so long as there was a passage round the said crowd for foot-passengers, horses, and vehicles.

I was of opinion that, although there was a passage round the said crowd, along which foot-passengers, horses, and vehicles could pass and repass, the occupation of the part of the highway on which the crowd stood for the period of an hour and a half was a wilful obstruction of the free passage of the highway within the meaning of sect. 72 of 5 & 6 Will. 4, c. 50, and that the defendant had no legal right to appropriate to himself in such manner and for such purpose aforesaid such part of the highway. I therefore convicted the defendant, and fined him one shilling and the costs.

The question for the opinion of the court is, whether the said determination was correct in point of law.

NIGEL C. A. NEVILLE.

(*a*) Reported by DUNLOP HILL, Esq., Barrister-at-Law.

Sect. 72 of the 5 & 6 Will. 4, c. 50, provides:

If any person shall wilfully ride upon any footpath or causeway by the side of any road made or set apart for the use or accommodation of foot-passengers; or shall wilfully lead or drive any horse, ass, sheep, mule, swine, or cattle, or carriage of any description, or any truck or sledge, upon any such footpath or causeway; or shall tether any horse, ass, mule, swine, or cattle on any highway, so as to suffer or permit the tethered animal to be thereon; or shall cause any injury or damage to be done to the said highway, or the hedges, posts, rails, walls, or fences thereof; or shall wilfully obstruct the passage of any footway; or shall wilfully destroy or injure the surface of any highway; . . . or shall in any way wilfully obstruct the free passage of any such highway; every person so offending in any of the cases aforesaid shall for each and every such offence forfeit and pay any sum not exceeding forty shillings over and above the damages occasioned thereby.

H. D. Greene, Q.C. for the appellant.—The conviction was wrong. The obstruction, if any, was occasioned by the crowd of persons who had gathered round the appellant, and for this the appellant should not be responsible. In *Ball* v. *Ward* (33 L. T. Rep. N. S. 170) the appellant had an auction caravan standing in the market-place in a town, for which he paid a rent or toll to the improvement commissioners appointed by a local Act the lords of the manor. The caravan was only three feet from a public street of the town, and many persons obstructed the thoroughfare by stopping to listen to appellant's sales. The justices convicted the appellant under 10 & 11 Vict. c. 79, s. 28, of causing an obstruction in a thoroughfare. Held, that what the appellant did was not an offence within the Act. He also cited

Stinson v. *Browning*, 13 L. T. Rep. N. S. 799; L. Rep. 1 C. P. 321..

The appellant did not "wilfully" obstruct the highway, and could not therefore be convicted. In *Walker* v. *Horner* (33 L. T. Rep. N. S. 601; 1 Q. B. Div. 4) it was held that merely suffering trees and underwood to grow over and across a highway so as to be an obstruction to the free passage along it could not be said to be a "wilful" obstruction within the section.

John Rose, for the respondent, was not called upon.

MATHEW, J.—I am of opinion that the conviction was right, and should be affirmed. It seems clear that, in taking up his position on a chair or stool in the middle of the highway, the appellant's object was to attract persons to listen to his address. Owing to the crowd of persons who had assembled to listen to the appellant the highway was, as the justice has found, rendered less convenient and commodious to the public. With regard to the case of *Ball* (app.) v. *Ward* (resp.), relied on during the argument, it is sufficient to observe that the conviction there was under a different Act, viz., the Town Clauses Act 1847 (10 & 11 Vict. c. 89). The decision, therefore, has no bearing on the present case. I think the appellant "wilfully obstructed" the highway within the meaning of the section.

SMITH, J.—I am of the same opinion. The question for us to decide is, whether or not there was evidence before the justices that the appellant had wilfully obstructed the free passage of the highway. The appellant was only entitled to use the highway in an authorised manner; that is, to pass over it to and fro. He certainly had used it in an unauthorised manner, and the magistrate has found that, as no person could have gone across that part of the highway where the appellant and his band were without considerable inconvenience and danger, there was an obstruction to the highway. The fact that only a part of the highway was so obstructed seems to me to make no difference. That the whole highway was not obstructed does not make what the appellant did any the less an obstruction within the meaning of the section. The appeal must fail. *Conviction affirmed.*

Clarke, Woodcock, and *Ryland*, for *Waterhouse*, Wolverhampton.

Solicitors for the respondent, *Bolton, Robbins, Busk*, and *Co.*, for *Tinsley*, Dudley.

Thursday, Nov. 26, 1885.

(Before MATHEW and SMITH, JJ.)

SMITH v. HUNT. (a)

Ground Game Act 1880 (43 & 44 *Vict. c.* 47), *s.* 6—*Owner occupying his own land—Right to employ spring traps otherwise than in rabbit holes—"Person having a right of killing ground game under this Act or otherwise."*

By the 6th section of the Ground Game Act 1880 (43 & 44 *Vict. c.* 47), *no person having a right of killing ground game under this Act or otherwise, shall use any firearms for the purpose of killing ground game between the expiration of the first hour after sunset and the commencement of the last hour before sunrise; and no such person shall, for the purpose of killing ground game, employ spring traps except in rabbit holes, nor employ poison; and any person acting in contravention of this section shall, on summary conviction, be liable to a penalty not exceeding* 2*l.*

Held, that the section does not apply to an owner of land doing any of the acts prohibited therein upon his own land.

THIS was a case stated by justices of the county of Hereford, to obtain the opinion of the court upon the construction of the 6th section of the Ground Game Act 1880 (43 & 44 Vict. c. 47). (b)

An information having been preferred against the respondent for that he, for the purpose of killing ground game, employed a spring trap, otherwise than in a rabbit hole, contrary to the provisions of the above-mentioned section, it appeared on the hearing thereof that the respondent was the owner and occupier of the land on which it was admitted that he had placed a spring trap otherwise than in a rabbit hole for the purpose of killing ground game.

It was contended on the part of the prosecution that the Act applied to all persons having the right of killing ground game, including owners occupying their own land, and on the part of the defendant that the Act applied to occupiers only and did not apply to owners occupying their own land.

(a) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

(b) The 6th section of the Ground Game Act 1880 (43 & 44 Vict. c. 47) is as follows: "No person having a right of killing ground game under this Act or otherwise, shall use any firearms for the purpose of killing ground game between the expiration of the first hour after sunset and the commencement of the last hour before sunrise; and no such person shall, for the purpose of killing ground game, employ spring traps, except in rabbit holes, nor employ poison; and any person acting in contravention of this section shall, on summary conviction, be liable to a penalty not exceeding 2*l.*"

The justices were unable to agree as to the true construction of the section, two being in favour of a conviction and two in favour of dismissing the information, and they thereupon decided to dismiss the information, but consented to state a case for the opinion of the court, and this was the case which now came on for argument.

Acland for the appellant. — The respondent comes within the terms of the 6th section of the Ground Game Act 1880 (43 & 44 Vict. c. 47). That section prohibits, first, the use of firearms in the night time; secondly, the employment of spring traps except in rabbit warrens; and, thirdly, the employment of poison; and it is submitted that one of the objects of the Act was to prevent the wanton destruction of game by spring traps being left lying about indefinitely and by the employment of poison, while at the same time those persons who use rabbit warrens as a source of profit were protected by being excluded from the section. That being so, the section would apply to owners as well as occupiers. [MATHEW, J.—Why do you say the Act is intended to apply to owners? Why should not they kill rabbits in any way they like?] The section applies to all persons "having a right of killing ground game under this Act or otherwise," and it was clearly the intention of the Legislature, in using the very wide words "or otherwise," to include not only occupiers, but all persons, including owners, who occupy their own land, and, in the absence of any express exception, owners cannot, by any reasonable interpretation of the plain words of the section, be excluded from its operation. [SMITH, J.—But the object of the Act, stated in the preamble, was to make further provision for enabling occupiers to protect their crops from injury and loss by ground game, and so power was given to them to kill the ground game subject to certain restrictions. Why are we to suppose that it was intended to place any restriction on owners killing the ground game in any way they choose?] The Act is not limited by the preamble, and effect must be given to its plain words.

C. A. Russell, for the respondent, was not called upon.

MATHEW J.—In this case the judgment of the court must, in my opinion, be in favour of the respondent. I think the justices were quite right in refusing to punish a man for taking any steps he thought to be necessary for killing the ground game on his own land. The object of the Ground Game Act 1880 (43 & 44 Vict. c. 47) was to enable occupiers to destroy ground game, which otherwise they would have had no right to destroy. The Act is an Act for the better protection of occupiers of land against injury to their crops from ground game, and the preamble runs: "Whereas it is expedient in the interests of good husbandry, and for the better security for the capital and labour invested by the occupiers of land in the cultivation of the soil, that further provision should be made to enable such occupiers to protect their crops from injury and loss by ground game." It is clear, therefore, that the whole Act applies to occupiers, its object being to protect them against landlords who might be inclined to overstock the land with hares and rabbits, and to give landlords and occupiers a concurrent right to kill such game. It is impossible to read through the various sections of the Act without seeing that they were intended to apply to the occupiers of the land, as contradistinguished from the owners; and I think it is clear, from the wording of the Act alone, that the Legislature had no intention of restricting the undoubted rights which landlords possessed before the Act was passed to deal with their land and kill the game thereon in any way they liked. Now, the words of the 6th section, on which the question in the present case turns, are these: "No person having a right of killing ground game under this Act or otherwise shall use any firearms for the purpose of killing ground game between the expiration of the first hour after sunset and the commencement of the last hour before sunrise; and no such person shall, for the purpose of killing ground game, employ spring traps, except in rabbit holes, nor employ poison; and any person acting in contravention of this section shall, on summary conviction, be liable to a penalty not exceeding two pounds," and the words "or otherwise" have been relied on as bringing owners of land within the scope of the Act. I do not see any difficulty in giving due effect to these words without giving them the wide interpretation which it is contended can alone be given to them. I think that they refer to persons of the same class as those previously mentioned—that is, to persons having a right to kill game—and they would, for instance, apply to a case in which a tenant before the passing of the Act had been given by his landlord the right of keeping down the ground game on his land. For these reasons I am of opinion that this appeal must be dismissed with costs.

SMITH, J.—I agree with all that has been said by my learned brother. The first five sections of the Act clearly relate to occupiers, and it is said that the 6th section includes owners of land also. I do not think that, as the first part of the Act deals entirely with occupiers, it can be supposed that the 6th section intends by such general words as those relied on to bring in landlords. On the contrary, I think that the section, so far from being in derogation of the rights of landlords, was intended to be in their favour to prevent the wholesale destruction of ground game. I think, therefore, that the justices were quite right in refusing to convict the respondent.

Appeal dismissed, with costs.

Solicitors for the appellant, *Robinson, Preston,* and *Stow,* for *Rowlands, Bagnall,* and *Co.,* Birmingham.

Solicitors for the respondent, *Maples, Teesdale,* and *Co.,* for *T. Scott,* Bromsgrove.

Thursday, Nov. 26, 1885.

(Before MATHEW and SMITH, JJ.)

THE METROPOLITAN BOARD OF WORKS *v.* NATHAN. (*a*)

Metropolis Management and Building Acts (Amendment) Act 1882 (45 *Vict. c.* 14), *s.* 8—*Forming or laying out a street for foot traffic only—Passage between artisans' dwellings.*

Artisans' dwellings, comprising twenty-six tenements, accommodating about 250 *persons, were built, opening on an approach* 100*ft. long and*

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

16ft. wide entered from a public street through a gateway 10ft. wide over which one of the buildings was carried. A roadway had previously existed on the site with warehouses abutting thereon, and the gateway included the site of a former gateway, which had been pulled down and altered to a greater width. The approach did not afford communication with any other public street, and was for the sole use and convenience of the tenants of the dwellings, to the exclusion of the public, no right of way over the same having ever been dedicated to or used by the public at large.

Held, that the approach had not been laid out as "a street for foot traffic only" within the meaning of the 8th section of the Metropolis Management and Building Acts (Amendment) Act 1882 (45 *Vict. c.* 14), *so as to require the sanction of the Metropolitan Board of Works to the laying out thereof.*

THIS was a case stated by T. W. Saunders, Esq., one of the magistrates of the police courts of the metropolis, sitting at the Thames Police-court, in the county of Middlesex, and within the metropolitan police district, on the application in writing of the appellants, who were dissatisfied with his determination upon the questions of law which arose before him as hereafter stated.

Upon the hearing at the Thames Police-court, on the 22nd May 1885, of a certain summons upon complaint made by the Metropolitan Board of Works, the appellants, against Edward Nathan, the respondent, that the respondent did unlawfully form or lay out a road, passage, or way for building as a street for foot traffic only without the sanction of the appellants and contrary to the provisions of the 8th section of the Metropolis Management and Building Acts (Amendment) Act 1882 (45 Vict. c. 14), a plan was produced, showing the road, passage, or way alleged to have been formed or laid out leading out of Emmett-street, in the parish of Poplar, in the county of Middlesex, 100ft. long and 16ft. wide, and showing four buildings which had been erected by the respondent at the time of the hearing of the summons, and it was proved that two other similar buildings were proposed to be erected by the respondent on the north side of the road, passage, or way.

These buildings are what are known as artisans' dwellings, intended to be let out in separate tenements, opening on an approach not open to the public, comprising in all, when finished, twenty-six such tenements, and capable of accommodating about 250 persons, and are approached from Emmett-street through a gateway, not open to the public, 10ft. wide, over which one of the buildings is carried, and are entered from the road, passage, or way alleged to have been formed or laid out, each building having a separate doorway opening thereon.

The respondent gave notice to the district surveyor, in compliance with the Metropolitan Building Act 1855, of his intention to build six artisans' dwellings, but no application was made by him to the appellants, and their sanction was not obtained to the forming and laying out of the alleged road, passage, or way as a street for foot traffic only.

The road, passage, or way alleged to have been formed or laid out does not afford any communication with any street other than Emmett-street, and was intended, and is, for the sole use and convenience of the tenants of the artisans' dwellings, to the exclusion of the public, no right of way over the same having ever been dedicated to or used by the public at large.

It was contended for the respondent that no road, passage, or way had been formed or laid out for building as a street within the meaning of the said Act of Parliament, because a road, passage, or way had existed prior to the passing of the said Act or to the planning or erection of the said artisans' dwellings.

A plan was produced showing the premises with the roadway prior to the present buildings, and showing the position of the buildings which abutted upon the old roadway at the time of the planning and erection of the said artisans' dwellings, and it was proved that the present entrance and gateway included the site of the former gateway, which had been pulled down and altered to a greater width.

It was also contended for the respondent that the alleged road, passage, or way was in all respects a private entrance for the use and convenience of the tenants of the said artisans' dwellings, and, not being dedicated to or used by the public, was not a street within the meaning of the said Act of Parliament.

The magistrate dismissed the summons on the ground that the respondent by building in the manner hereinbefore mentioned had not formed or laid out a new road or way within the meaning of the said Act, as there was a former passage, and the respondent was only putting it to a new purpose or use.

The questions for the opinion of the court are:

1. Whether the respondent, by building in the manner hereinbefore mentioned, had formed or laid out a road, passage, or way within the meaning of the said Metropolis Management and Building Acts (Amendment) Act 1882.

2. Whether the alleged road, passage, or way, being solely intended for the use and convenience of the tenants of the said dwellings, and not being open to the public, was a street within the meaning of the said Act.

Lumley Smith, Q.C. and *Avory* for the appellants, the Metropolitan Board of Works.—This is a question of the construction of the 8th section of the Metropolis Management and Building Acts (Amendment) Act 1882 (45 Vict. c. 14.) (*a*) It is

(*a*) The 8th section of the Metropolis Management and Building Acts 1882 (45 Vict. c. 14) is as follows: Where after the passing of this Act it is intended by any person to form or lay out any road, passage, or way for building as a street for foot traffic only, such person shall, at least three months before such road, passage, or way is begun to be so formed or laid out, make an application to the board, giving notice of such intention, and setting out a plan of the proposed street, with such particulars in relation thereto as may be required by the board, and if it appears to the board that it is expedient that such road, passage, or way should not be formed or laid out for foot traffic only, or that such road, passage, or way should be formed or laid out for foot traffic only, subject to any conditions which the board may prescribe, the board may, by order made at any time before the expiration of the said period of three months, decline to sanction the forming or laying out of the same for foot traffic only, or may sanction the formation or laying out of such road, passage, or way for foot traffic only, subject to such conditions as they may think proper to prescribe, and thereupon and until the board shall otherwise direct, such road, passage, or way shall not be formed

contended on behalf of the appellant that the respondent has formed or laid out a road, passage, or way for building as a street for foot traffic only within the meaning of the section. A private street such as this is exactly the mischief to which the Act was intended to apply. If this passage with dwelling-houses on either side were not approached through a gateway, there could be no pretence for the contention that what has been formed and laid out in this case is not a street for foot traffic only, and it is submitted that the existence of a gateway is not sufficient to distinguish this case and take it out of the operation of the Act. Nor is it distinguished by the fact that it is not a thoroughfare, but intended for the use of the tenants of the dwellings only. These are numerous, and the road must, of course, be used by all those having business with them. If this were a valid distinction there could be found many instances of streets which are not thoroughfares and only used by the occupiers of the houses situate in them and their friends and business connections, as to which it would be impossible to contend that they were not streets. Further, there is no force in the contention that this is a rebuilding merely of buildings existing in somewhat the same position before, since it appears from the plans that the buildings which existed there before the alteration were not inhabited, but were merely warehouses approached by a narrow gateway and passage. The formation of a new street may consist of a very small change. In the case of *The Vestry of St. Mary, Islington*, v. *Barrett* (30 L. T. Rep. N. S. 11; 9 Q. B. 278) the respondent was the owner of houses on both sides of a road, the footpaths of which on each side had been paved by the appellants, the vestry of the parish, and were used by the public. The carriage way had never been dedicated to the public. The appellants paved the carriage way and sought to recover the expense from the respondent under 18 & 19 Vict. c. 120, s. 105, on the ground that the carriage way was a new street; and it was held that, although the carriage way had not been dedicated to the public, it was a new street within 25 & 26 Vict. c. 102, s. 112, and that the respondent was liable to pay the expense of paving it under 18 & 19 Vict. c. 120, s. 105. In that case Quain, J. says: "We see no language in the Act which confines the expression 'new street' to streets dedicated to the public," and: "The object of the enactment is explained by Alderson B., in the case of the *Local Board of Health of Kingston-upon-Hull* v. *Jones* (1 H. & N. 489; 26 L. J. 34, Ex.): 'The object of the section is plain. Where a road has been made which is not repairable by the parish, it may become a public nuisance or injurious to the public health, because there is nobody bound to put it into a proper state, and the Legislature thought it right that those who owned the property, for the convenience of whom the street is made, should be at the expense of preventing it from being a mischief to the public at large.' It is obvious that the mischief may be the same whether the new street is or is not dedicated to the public, for, though dedicated to the public, it may not be repairable by the parish." Those observations exactly apply in the present case. The object of giving the board power to prevent the formation of a *cul de sac* is to insure the provision of proper light and access of air, for which in this case no provision has been made. The case of *Lord Auckland* v. *The Westminster Local Board of Works* (26 L. T. Rep. N. S. 961; L. Rep. 7 Ch. App. 597) is distinguishable. There the question was as to the right to rebuild old buildings beyond a general line laid down by the Board of Works; and Jessel, M.R., in *Kerr* v. *The Corporation of Preston* (6 Ch. Div. 463) says as to it: "Now, I have been referred to the case of *Lord Auckland* v. *The Westminster Local Board of Works*, and, speaking with all deference to the eminent judges who decided it, it appears to me that sufficient attention was not paid to the real facts of that case." The proper meaning of the case is, however, explained in the case of *Barlow* v. *The Vestry of St. Mary Abbotts, Kensington* (48 L. T. Rep. N. S. 348; 27 Ch. Div. 362), where Cotton, L.J. says: "The first point one has to consider is whether this house is within the provision of the 75th section. (*a*) Now that section, after repealing previous sections, says this: 'Be it enacted that no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate.' The first point is this, To what does that apply? Does it apply to a house which is built on the site of an old house which has been pulled down, and which has occupied a more prominent position? By which I mean a position stretching farther towards the roadway than the other houses. In my opinion, the rule was correctly laid down by Mellish, L.J., and also by James, L.J. in the case of *Lord Auckland* v. *The Westminster District Board of Works*—a case which has been much referred to. Mellish, L.J. says, after referring to sect. 74: "To make the two sections consistent with each other I think that we must construe the words 'no building, structure, or erection' in the 75th section to mean no building, structure, or erection built or erected for the first time." The language is imperfect; "for the first time" requires some explanation. Of course, every new house that is put up must be erected for the first time, but what he means obviously is this: a house which is not built as a restoration of an old house—a building which is not built as

or laid out for building as a street for foot traffic only where the board have declined their sanction, or shall not be formed or laid out for building as a street for foot traffic only, except in accordance with the conditions prescribed, where the board have given their sanction subject to such conditions. Any person forming or laying out, or commencing to form to lay out, or keeping open any such road, passage, or way for foot traffic only, contrary to the provisions of this section, shall for every such offence be liable to a penalty not exceeding forty shillings, and to a further penalty not exceeding twenty shillings for every day on which such offence is continued after the day on which the first penalty is incurred.

Provided always, that in case the said person so intending to form or lay out any road, passage, or way as aforesaid, considers that any of the conditions prescribed by the board are unreasonable, then the said person so objecting to the said conditions may appeal to the police magistrate for the district in which the said road, passage, or way is situate, and his decision shall be final upon the question.

(*a*) The Metropolis Management Amendment Act 1862 25 & 26 Vict. c. 102), s. 75.

a restoration of an old building, but one which is to be considered as built *de novo* as regards the rights of a house." In the present case what has been done is not in any sense the erection of a building built as a restoration of an old building, but these dwellings have been built *de novo* as habitable dwellings. The case, however, is really decided in favour of the appellants by the judgment of Jessel, M.R. in *Robinson* v. *The Local Board for Barton* (47 L. T. Rep. N. S. 286; 21 Ch. Div. 621). That was a case under the Public Health Act 1858, and there Jessel, M.R. says: "Now, the general intent was evidently this: to give in every district to some local authority the power of regulating the mode of laying out and building new streets—a power to be exercised for the public benefit, and of course imposing a restriction on the ordinary rights of proprietorship. We have, then, to consider what the meaning of a 'new street' is. I should say that laying out a new street means making a street where there was no street before, and the term 'street' is *primâ facie* to be understood in its ordinary meaning. . . . Now, there are two ways in which a street may come into existence where there was no street before. A person may take a grass field or a country lane (for, in my opinion, it makes no difference whether or not there was a public highway and lane or a footpath existing before which is thrown into the street and is utilised, or whether there was nothing but a mere plot of grass land out of which a new roadway is made), he may take it and build continuous lines of houses so as to form what is commonly known as a street. When I say continuous lines, I do not mean that there are to be no breaks or intervals, but there must be a certain degree of continuity. A new street may arise in another way, and that is where it is not from the first laid out as a street in a formal manner, but may be considered to grow up, so to say, of itself. This often happens where there is an existing highway, and people build houses along the sides of that highway, so that, without any intention of laying out a street, the street grows." On the authority of these cases, this road, passage, or way has now become a street, and the respondent has, in building these dwellings, laid it out as a street for foot traffic only within the meaning of the 8th section of the Act of 1882.

Cripps for the respondent.—In this case there has been no forming or laying out of a street. The respondent has merely pulled down the buildings which formerly stood there, and built other buildings on much the same site. It makes no difference that the new buildings are artisans' dwellings in the place of warehouses. This passage, being intended for the use of the tenants of the dwellings only, and not being dedicated to the public, is in the position of a courtyard only, which is essential to the building, since without it the tenants could not get access to the entrances of their several dwellings, and it is in no sense in the nature of a street.

Avory in reply.—Looking at the interpretation which has been placed upon the term "street" in the various cases, that which at present exists on this site is a street. [MATHEW, J.—If large warehouses had been built instead of artisans' dwellings, there would have been no foundation for your contention. SMITH, J.—Would you say that the quadrangle of Trinity College, Cambridge, was a street if it were within the area to which the Act applies?] Yes; the Legislature clearly thought so. The 24th section of the Act provides that, "nothing in this Act shall apply to the Inner Temple, the Middle Temple, Lincoln's Inn, Gray's Inn, Staple Inn, Furnival's Inn, or the close of the collegiate church of Saint Peter, Westminster." The Legislature, therefore, clearly thought that these places would, unless specially excluded, come within the operation of the Act. [MATHEW, J.—Does not the exclusion of the Inns of Court show that the Act was not intended to apply to buildings of a similar character?] It is contended that it does not, or the Legislature would have so provided in express terms. The Act is a sanitary Act, and, as is said in the case of *The Vestry of St. Mary, Islington*, v. *Barrett* (30 L. T. Rep. N. S. 11; 9 Q. B. 278), it is obvious that the mischief may be the same whether the new street is or is not dedicated to the public, and for sanitary purposes it was equally necessary for the Legislature to provide against a private as a public way.

MATHEW, J.—In this case the magistrate has submitted to us, with reference to the matters which were brought before him on the hearing of this summons, two questions. The first question is, whether the respondent, by building in the manner mentioned in the case, has formed or laid out a road, passage, or way within the meaning of the Metropolis Management and Building Acts (Amendment) Act 1882; and the second, whether the alleged road, passage, or way, being solely intended for the use and convenience of the tenants of the dwellings, and not being open to the public, is a street within the meaning of the same Act. Now the facts stated in the case show what has been done with this piece of ground. It was formerly occupied by warehouses. Recently alterations have been made, the warehouses have been pulled down, and artisans' dwellings have been constructed, and between them is an approach on which the dwellings open, and the former entrance from Emmett-street has been pulled down and somewhat widened. Under these circumstances we are asked to say whether the respondent, in effecting these alterations, has formed or laid out a road, passage, or way as a street for foot traffic only within the meaning of the 8th section of the Act of 1882. The magistrate has come to the conclusion that it is not a street within the meaning of the Act of Parliament, and in that conclusion I agree. I do not think that a street is constituted solely by buildings being erected on each side. If that were so, this approach would be a street within the meaning of the Act. It seems to me that if in this case the new buildings had been warehouses instead of artisans' dwellings, the argument on behalf of the appellants would have been just the same; and could it have been said then that the respondent had laid out a street? Another analogous case may be put. Supposing these buildings had been laid out with a courtyard in the middle into which the various buildings opened, would anyone say that courtyard would have been a street, and subject to the control of the Metropolitan Board of Works? I think that the materials before the magistrate were such as to entitle him to find that this approach was not a street, and

that that was the view he took is, I think, clear from his finding in the case that the road, passage, or way alleged to have been formed or laid out does not afford any communication with any street other than Emmett-street, and was intended and is for the sole use and convenience of the artisans' dwellings, to the exclusion of the public, no right of way over the same having ever been dedicated to or used by the public at large. On that statement I think there was evidence on which the magistrate was justified in finding that this was not a street, but in the nature of a court-yard. Then, as to the entrance as distinct from the approach, as far as I am able to see, all that was done was to widen it and make it more suitable for the purpose for which the site was being used, and I do not think that it can be said that the mere widening of the entrance brings this approach within the meaning of the Act, and under the control of the Metropolitan Board of Works, nor that a street has thereby been formed or laid out. I think that it would be an abuse of language to say so. I think, therefore, that this decision of the magistrate was right, and that the appeal must be dismissed with costs.

SMITH, J.—I am entirely of the same opinion. I only wish to add that, taking into consideration all that was said by Jessel, M.R., in the case of *Robinson* v. *The Barton Local Board* (47 L. T. Rep. N. S. 286; 21 Ch. Div. 621), as to the ways in which a street may come into existence where there was no street before, I do not think that what has been done here has been to make a new street within the meaning of the Act.

Solicitor for the appellants, *The Solicitor to the Metropolitan Board of Works.*

Solicitors for the respondent, *Speechly, Mumford,* and *Landon.*

Dec. 8 *and* 9, 1885.

(Before HUDDLESTON, B. and WILLS, J.)

HEDGES AND SON (apps.) *v.* THE LONDON AND ST. KATHARINE DOCKS COMPANY (resps.). (*a*)

Ship and shipping—"Vessel"—Barge solely propelled by oars—The London and St. Katharine Docks Act 1864 (27 *&* 28 *Vict. c. lxxviii.*), *ss.* 100, 101, 102—*The Harbours, Docks, and Piers Clauses Act* 1847 (10 *&* 11 *Vict. c.* 27), *ss.* 3 *and* 4.

A barge simply propelled by oars is not a "vessel" within the meaning of section 101 *of the London and St. Katharine Docks Act* 1864, *notwithstanding that the Harbours, Docks, and Piers Clauses Act* 1847 *incorporated therewith, provides that the word "vessel" shall include ship, boat, lighter, and craft of every kind, and whether navigated by steam or otherwise, and a barge owner is therefore not liable under that section to a penalty for leaving his barge in the docks without any person on board.*

THIS was a case stated by J. Rowland Phillips, Esq., a stipendiary police magistrate, under the statute 20 & 21 Vict. c. 43, as amended by the Summary Jurisdiction Act (42 & 43 Vict. c. 49), for the purpose of obtaining the opinion of the court on a question of law which arose before him as hereafter stated.

(a) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

CASE.

1. At the Police-court, West Ham-lane, Stratford, in the county of Essex, on the 26th March 1885, a complaint was preferred by George Reader, who was acting as agent of the London and St. Katharine Docks Company, hereinafter called the respondents, against George Hedges and Son, hereinafter called the appellants, charging them under the London and St. Katharine Docks Company Act 1864 (27 & 28 Vict. c. clxxviii.). s. 101, for that a certain vessel, to wit, the barge *Grace*, was on the 12th March 1885 left in the Royal Albert Docks without any person on board, of which vessel the appellants were the owners.

2. The said complaint was on the 30th March 1885 heard by me, when it was proved and I fonnd that at 8 a.m. on the 12th March 1885 the said vessel, to wit, the barge *Grace*, was left in the Royal Albert Docks without any person on board, and that the appellants were the owners of the said vessel, to wit, the barge *Grace*, and that it was simply propelled by oars.

3. It was contended on the part of the respondents under the London and St. Katharine Docks Act 1864 (27 & 28 Vict. c. clxxviii.), s. 101, and under the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27), s. 3, which is incorporated in the former Act, that the barge *Grace* was a vessel within the meaning of the above-mentioned Acts of Parliament, and that the fact of the vessel, to wit, the barge *Grace*, having been left in the Royal Albert Docks without any person on board rendered the master or owner of the said vessel, to wit, the barge *Grace*, liable to forfeit a sum not exceeding 5*l.*

4. It was contended on the part of the appellants that the barge *Grace* was a barge simply propelled by oars, and it was admitted that at the time of the alleged offence there was no person on board the said barge, and it was contended that the said barge *Grace* was not a vessel within the meaning of the 101st section of the London and St. Katharine Docks Act 1864, and the 3rd section of the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27), and that the appellants as owners of the said barge *Grace* were therefore not liable to the penalties mentioned in the said 101st section of the London and St. Katharine Docks Act 1864.

5. I being of opinion that the barge *Grace* was a vessel within the meaning of the above Acts of Parliament as charged in the summons, convicted the appellants in a penalty of 2*l.*, and ordered them to pay 2*l.* 3*s.* 6*d.* costs.

The question for the opinion of the court is, whether the barge *Grace* is a vessel within the meaning of both the above-mentioned Acts of Parliament. If so then my conviction was right, but if the barge *Grace* is not a vessel within the meaning of the said Acts, then my conviction was wrong.

The Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27), s. 3. is, so far as material, as follows:

3. The following words and expressions in both this and the special Act, and any Act incorporated therewith, shall have the meanings thereby assigned to them, unless there be something in the subject or context repugnant to such construction, that is to say:

The word "vessel" shall include ship, boat, lighter, and craft of every kind, and whether navigated by steam or otherwise.

The 3rd section of the London and St. Katharine Docks Act 1864 (27 & 28 Vict. c. clxxviii.) incorporates the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27) with that Act, and the 4th section provides that "the several words and expressions to which by the Acts in whole or in part incorporated with this Act meanings are assigned, have in this Act the same respective meanings, unless excluded by the subject or context."

The 100th, 101st, and 102nd sections of the London and St. Katharine Docks Act 1864 (27 & 28 Vict. c. clxxviii.), are as follows:

100. The dock master shall have full power and authority to order all ships and vessels entering the docks, basins, locks, cuts, or entrances of the amalgamated company, or any of them, to be dismantled in such manner as he thinks proper and safe for the vessel so entering, and for the prevention of accident or mischief to other ships and vessels, or to lighters, or craft, or to the docks and works; and during the time of every ship's delivery or when discharged her cargo, to have such quantity of ballast on board or deadweight in her hold as he judges requisite; and no ship or vessel shall be allowed to enter the docks, basins, locks, cuts, or entrances, unless she be so dismantled, nor shall any ship or vessel therein be unladen so far as to render her insecure through the want of weight in her hold, or of such quantity of ballast on board as the dock master thinks expedient; and the dock master shall have full power and authority to give directions for topping, bracing, or striking yards, masts, and taking in running bowsprits, and for having substantial hawsers and tow lines and fasts to the dolphin mooring craft, buoys, mooring-posts, or rings, and also to regulate the equipment, rigging, and lading of all ships and vessels in the docks, basins, locks, cuts, or entrances, as he thinks necessary.

101. In case the dock master judges any act or proceeding in the rigging, lading, or equipment of any ship or vessel injurious to the ship or vessel, or to other ships or vessels lying in or entering or departing from the docks, basins, locks, cuts, or entrances, or to the docks and works, he shall give notice to the master of the ship or vessel, or to some other person on board, and appearing to be in charge of the ship or vessel, to discontinue and alter the same, and in case the master shall not, according to the direction, suspend or alter the act or proceeding immediately after notice so given for that purpose, or if any ship or vessel be left in the docks, basins, locks, cuts, or entrances, without any person on board, the master or owner of the ship or vessel shall, for every such offence, forfeit not exceeding five pounds; and the owner of the ship or vessel shall also be answerable for all the damage or injury sustained by any other ships or vessels or by the amalgamated company through neglect thereof.

102. At any time after the expiration of twenty-four hours after the time when any lighter, barge, or like craft, enters any dock, basin, cut, lock, or entrance of the amalgamated company, the dock master or his assistant may, by notice in writing, require the removal of the same out of the docks and works, and the notice may be served by being delivered to the owner, or left for him at his then usual or last known place of abode or business, or by being forwarded by post, directed to him at his then usual or last known place of abode or business, or at his address as appearing on the craft, or if not appearing thereon, then as appearing by the books of the master, wardens, and commonalty of watermen and lightermen of the River Thames; and if within twelve hours after the delivery or sending of the notice the craft is not removed as thereby required, the owner thereof shall for every such default forfeit not exceeding forty shillings, and a further sum of twenty shillings for every twenty-four hours or less period after the first twenty-four hours during which the delay continues; and at any time after the expiration of twenty-four hours after the delivering or sending of the notice the dock-master or his assistant may remove the craft out of the docks and works and leave the same safely moored, and the owner or master of the craft shall pay to the company the reasonable expense of the removal, and the same may be recovered as damages or a penalty.

Finlay, Q.C. (with him *Cranstoun*).—A barge simply propelled by oars is not a vessel within the meaning of the 101st section of the London and St. Katharine Docks Act 1864, and the magistrate was wrong in convicting the appellants under this section for leaving their barge in the docks without any person on board. It is true that the Company's Act of 1864 incorporates the Harbour Docks and Piers Clauses Act 1847, and that that Act interprets the word "vessel" as including "ship, boat, lighter, and craft of every kind, and whether navigated by steam or otherwise," but it is contended that the context precludes that meaning from being assigned to the word "vessel" in the 101st section. The 100th section begins by giving the dock master power to dismantle all ships and vessels entering the docks. The word "dismantle" is not applicable to lighters and barges. The object of this "dismantling" is to prevent accidents to "other ships and vessels, or to lighters, or craft, or to the docks and works." Here if the word "vessel" included lighters, the words "or to lighters and craft" would have been necessary, but a distinction is clearly drawn for the purposes of this section between "vessels and lighters." The section then proceeds to make regulations as to ballast, which again do not apply to barges, and the section concludes with giving the dock master authority to give directions for topping, bracing, or striking yards, masts, and taking in running bowsprits, and for having substantial hawsers and towlines, and also to regulate the equipment, rigging, and lading of all ships and vessels in the docks. None of these provisions apply to barges. To this section the 101st section is clearly ancillary, prescribing the course to be taken by the dock master in exercising the authority bestowed by the 100th section. The first provision is that "in case the dock master judges any act or proceeding in the rigging, lading, or equipment of any ship or vessel injurious to the safety of the ship or vessel, or to other ships or vessels" in the docks, he shall give notice to the master or some other person on board, and appearing to be in charge to alter it. Again, the words "rigging, lading, or equipment of a ship or vessel" clearly do not apply to a barge solely propelled by oars. Then follows the provision we are dealing with, that in case the master does not alter the injurious proceeding after notice, and if any ship or vessel be left in the docks without any person on board, that is, to whom notice may be given to alter the proceeding, then the owner shall forfeit a penalty. All these provisions have to do with the dismantling and unlading of vessels, and clearly do not apply to barges. This argument is fortified by the 102nd section, which, ships and vessels having been dealt with in the preceding sections, proceeds to deal with lighters and barges specifically and by name. It provides that after twenty-four hours after the time when any lighter, barge, or like craft enters the docks the dock master may require by notice in writing its removal, and it is to be observed that there is no provision as to serving the notice on the person on board and appearing to be in charge, the statute on the contrary appearing to contemplate it as a probable occurrence that a barge might be left without any person on it, and consequently providing for sending the notice by post to

certain addresses mentioned in the section. The section further contemplates that barges may be left without anyone in charge for some time, and gives the dock master power after twelve hours to remove them at the expense of the owner. As this section therefore clearly contemplates barges being left without any person in charge, it is clearly repugnant to it that the word "vessel" in the 101st section, which provides for fining the owner of a vessel left without anyone in charge, should include a barge simply propelled by oars. Further, the Legislature has not usually included barges under the term "ship or vessel:"

The Bilboa, Lush. 149;
Everard v. *Kendall*, 22 L. T. Rep. N. S. 408; L. Rep. 5 C. P. 428.

In *Everard* v. *Kendall*, Keating, J. says: "It is remarkable that whenever a definition is given in any Act of Parliament of 'ship' or 'vessel' barges have invariably been excluded;" and Montague Smith, J. says: "What, then, is the meaning of 'ship?' It is conceded that in the Court of Admiralty the jurisdiction exercised in respect of collisions is confined to cases of vessels not propelled by oars alone. I can see no intention on the part of the Legislature to alter the jurisdiction of the Court of Admiralty as to the definition of 'ship.' In the 24 Vict. c. 10, the preamble of which declares it to be passed for the purpose of extending the jurisdiction of the Court of Admiralty, 'ship' is defined in sect. 2 to mean 'any description of vessel used in navigation not propelled by oars.'"

Clarke, Q.C. (with him *Grain*), *contra*.—It was the intention of the Legislature that the 101st section should apply to all vessels, including barges, and there is nothing in that section or in the context repugnant to this construction. The Harbours, Docks, and Piers Clauses Act 1847, which is incorporated by this Act, assigns (ss. 3 and 4) a distinct meaning to the word vessel, making it include ship, boat, lighter, and craft of every kind, and whether navigated by steam or otherwise, and it will require very strong affirmative considerations, which do not exist here, to induce the court to hold that the word "vessel," in the 101st section, has a different meaning from that assigned to it by the interpretation clause. On the contrary, all the arguments of expediency and the proper construction of the sections require that barges should come within the operation of the 101st section. The distinction between the 100th and 101st sections and the 102nd consists only in the two former sections containing provisions applicable to all vessels including barges, whereas the provisions of the 102nd are applicable to lighters and barges only. It is further of the highest importance to the dock company that the 101st section should be held to apply to barges, since that section has always been applied to them, and without the section it will be difficult for the company to control the large numbers of barges entering the docks. The 101st section provides against the mischief of vessels being left unattended in the docks, and this mischief is greater in the case of barges than of any other vessels, as they are more likely to be cut adrift by the departure of ships or other barges to which they may be moored. The magistrate was right in deciding that a barge is a vessel within the meaning of the 101st section.

Finlay, Q.C., in reply, was not called upon.

Huddleston, B.—The question we have to decide in this case is whether the barge *Grace* belonging to the appellants, a barge simply propelled by oars, is a vessel within the meaning of the 101st section of the London and St. Katharine Docks Act 1864 (27 & 28 Vict. c. lxxviii.), which provides that if any ship or vessel be left in the docks, basins, locks, cuts, or entrances without any person on board, the master or owner of the ship or vessel shall, for every such offence, forfeit not exceeding five pounds. Under this section the appellants have been convicted, but we are of opinion that the magistrate was wrong in so convicting them. The whole question turns on the interpretation we put upon the different sections of the Act. If it were a mere question of the meaning of the word "vessel" in the Act, we should be bound to say that this barge was a vessel within its meaning, for the 3rd section of the Act incorporates the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27), which, by its 3rd section, provides that "the word 'vessel' shall include ship, boat, lighter, and craft of every kind, and whether navigated by steam or otherwise." If, therefore, it were a mere question as to whether a barge were a vessel under this Act, that would be conclusive; but the 4th section of the Act provides that "the several words and expressions to which by the Acts in whole or in part incorporated with this Act meanings are assigned, have in this Act the same respective meaning unless excluded by the subject or context." Now, when we come to look at the 100th and 101st sections of the Act, we think it is clear that the Legislature never contemplated that a barge should be considered a vessel within the meaning of those sections, and I think that to hold that it was a vessel within their meaning would be repugnant to the context and circumstances contemplated by those sections. Now, in dealing with the 100th and 101st sections, it is obvious at once that they must be taken together, and it was the obvious intention of the Legislature to give to the dock master certain powers with reference to ships and vessels, and to order alterations which he might judge to be requisite to be made. Notice of these alterations has to be given to some definite person or persons on board, and then to ensure the carrying out of the dock master's orders, a punishment is provided for disregard of them. Then there is also an ancillary provision, that if a ship or vessel be left in the docks without any person on board, the owner shall be liable to a fine in just the same way as if the notice had been given and disregarded. Now, this is not, as Mr. Clarke has endeavoured to put it, a specific enactment that if a vessel is without any person on board the owner is to be liable to a fine, but it is coupled to the previous part of the section by the word "or," that is to say, if there is no one on board on whom a notice can be served then the owner shall be fined. Now, what do the full powers given to the dock master by these sections deal with? He may order all ships or vessels to be dismantled so as to prevent damage to themselves or to other vessels or the docks. The word "dismantled" has to my mind a very clear significance, and then going on through the section we find these words, "during the time of every ship's delivery," "ballast," "lopping, bracing or striking yards

and masts," "taking in running bowsprits," "substantial hawsers and tow lines," "equipment, rigging and lading." These things are not applicable to barges. Then by the 101st section, if the dock master thinks any act or proceeding in rigging, lading, or equipment of a ship or vessel injurious to its own safety or the safety of the other ships, notice is to be given to the master, or failing the master to some person on board and appearing to be in charge. If there is no one at all on board then the master is fined. It seems to me that this is not a penalty for having no one on board, but a provision ancillary to the other provisions of the section, that if a notice is sent and there is neither the master nor any person in charge on board to serve it upon, then it shall be an offence to have no person on board. Nor do I think that there is any error on the part of the Legislature in omitting lighters and barges from the earlier sections, because when we look at the 102nd section we find that they had before them the difference between barges and other vessels, and made numerous distinctions between the two cases. Under these circumstances, I think it is clear that it was not the intention of the Legislature that a barge of this description should be brought within the operation of this section, and I think that the magistrate was wrong in convicting the appellants. The case of *Everard* v. *Kendall* has been quoted, but I do not think that, turning as it does on the construction of another Act of Parliament, it affects this case. Mr. Clarke has argued that this section has always been acted upon as including barges, and that if we hold that barges are not included within it the company will find a difficulty in dealing with them; but I think that it will be found that the company has ample power to make bye-laws to meet the case, and such a consideration ought not to influence us when upon the whole scope and context it is perfectly clear that it was not the intention of the Legislature that a barge solely propelled by oars should be considered a vessel within the meaniug of this 101st section.

Wills, J.—I am of the same opinion. It is impossible to read these three sections together without seeing that they deal with the powers which the dock master is to have with reference to ships and vessels, and with reference to lighters, barges, and like craft, a distinction being made between the two classes, and the provisions relating to ships and vessels applying to ships and vessels, and the other provisions applying to lighters, barges, and the like craft. Where ships and vessels are mentioned, then we find the provisions are applicable to the things which we ordinarily mean when we use those words, namely, large craft with rigging and equipment. Amongst these provisions we find one which says that where it is necessary to discontinue or alter the manner of effecting the dismantling, discharging, lading, or equipment of any vessel, a notice which is clearly to be immediately acted upon is to be given to some person on board, and the intention evidently is that some person must be left on board to receive it, and therefore a penalty is provided if a master leaves his vessel in the docks without some person on board to receive such a notice. With regard, however, to lighters and barges and small craft which have no rigging, and to which there is therefore no necessity to give any notice regulating their dismantling or equipment, we find in the 102nd section a totally different scheme, and if it becomes necessary to remove them, and no one can be found belonging to them to remove them, then notice is to be sent by post or in some other way to the owners, and if they do not appear or send someone within twelve hours, then the dock master may move them at their expense. This interpretation appears to me to be perfectly clear and intelligible, and I think that the language of the sections is perfectly consistent with it. All we have to do is to place the clause of the 101st section, which we are considering—that is, "or if any ship or vessel be left in the docks, &c., without any person on board"—into a parenthesis, and then the whole clause is intelligible. It seems to me that Mr. Finlay has shown that the contrary interpretation is repugnant to the context, which shows that it was not the intention of the Legislature to include barges in the operation of these sections. Mr. Clarke, however, has argued that althongh barges may not be affected by the parts of the sections dealing with dismantling and equipment, because those things are not applicable to them, yet there is no reason for excluding them from the operation of the other parts which deal with lading and discharging, since barges are particularly liable to be overladen and so sunk, and it is very necessary that the dock master should have authority to prevent this. I do not think that, where a section is dealing so evidently with the lading and discharging of ships, a portion which may possibly apply to both can be taken out and said to apply to barges. Barges too, it is said, may very well come within the clause providing for the prevention of injury to other ships and vessels. I do not think that it is likely that a small barge having no rigging, and out of the way of rigging, was intended to be included in this provision. These are the only two passages where it is suggested that there is any necessity for a wider interpretation of the sections. I do not, however, think there is any necessity for the construction, because, under the 83rd section of the Harbours, Piers, and Docks Clauses Act 1847, the dock company has, I think, ample powers to make bye-laws to meet the case. Mr. Clarke argues that there is no power under that section to make a bye-law to keep some person on board; but I think that, however that may be, there is ample power to make bye-laws sufficient to prevent the mischief contemplated in these sections. Enactments of this kind are always meant to be construed with reference to the habits of the people engaged, and I do not see that there is any necessity to keep a man on board every lighter at all times. I cannot help thinking that the Legislature would be slow to give such a power directly, because one cannot ignore the common knowledge of mankind, and such a necessity would involve the reconstruction of large numbers of these barges for the purpose of making a cabin for the person on board. On the questions, therefore, submitted to us I think that the sections, if carefully considered, leave no doubt that the appellants' barge is not a vessel within their meaning, and that the conviction is therefore wrong. *Conviction quashed.*

Solicitors: For the appellants, *J. A.* and *H. E. Farnfield*; for the respondent company, *C. O. Humphreys* and *Sons.*

Friday, Dec. 18, 1885.

(Before CAVE and WILLS, JJ.)

REG. on the prosecution of THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF TWEEDMOUTH AND THE ASSESSMENT COMMITTEE OF THE BERWICK-UPON-TWEED UNION *v.* SMITH. (*a*)

Poor rate—The Parochial Assessment Act 1836 (6 *& 7 Will.* 4, *c.* 96), *s.* 1—*Rate levied under the Tweed Fisheries Act* 1857 (20 *&* 21 *Vict. c. cxlviii.*)—*Expense necessary to maintain rateable subject in a state to command rent.*

In estimating the rateable value at which the owners of salmon fisheries in the Tweed ought to be assessed to the poor rate in respect thereof, the rate levied by the commissioners under the 59th section of the Tweed Fisheries Act 1857 (20 *&* 21 *Vict. c. cxlviii.*) *is deductable from the gross estimated rental as "an expense necessary to maintain them in a state to command such rent" within the meaning of the 1st section of the Parochial Assessment Act* 1836 (6 *&* 7 *Will.* 4. *c.* 96).

THIS was a rule obtained by the defendant James Smith calling upon the churchwardens and overseers of the poor of the parish of Tweedmouth, in the county of the borough and town of Berwick-upon-Tweed, and the assessment committee of the Berwick-upon-Tweed union, to show cause why an order of sessions made upon the appeal of the defendant against a certain rate made for the relief of the poor of the parish of Tweedmouth, on the 20th Nov. 1884 in respect of certain properties, —to wit, Bailiff's Bat Gards and Crow's Bat Fisheries—in the occupation of the defendant, should not be quashed for the insufficiency thereof.

The said appeal was heard at the Court of Quarter Sessions holden for the county of the borough and town of Berwick-on-Tweed, on the 2nd April 1885, and on the hearing thereof the learned Recorder allowed the said rate, subject to the following case for the opinion of the High Court.

CASE.

The appellant is the tenant of the several piscaries or salmon fisheries of Bailiff's Bat Gards and Crow's Bat, situate within the parish of Tweedmouth, on the south shore of the river Tweed, together with the Bat's landing-places, easements, and appurtenances thereunto respectively belonging, under a lease granted by the Berwick Harbour Commissioners, the owners of the said fisheries, dated the 13th Dec. 1882 for a term of ten net fishing seasons at a rent of 305*l.* per annum. By the said lease the appellant covenants (*inter alia*) to pay and discharge, and keep the lessors indemnified against, all rates, taxes, assessments, and impositions whatsoever, including any taxes or assessments that may from time to time be imposed upon or in respect of the said fisheries, or any of them, under any Act now existing or hereafter to be passed for the regulation or protection of the salmon fisheries in the river Tweed, or which at any time during the said term shall become payable in respect of the said premises (landlords' property tax only excepted).

In the year 1857 an Act of Parliament, called the Tweed Fisheries Act 1857, was passed to consolidate and amend the Acts for the more effectual preservation and increase of salmon, and the regulation of the fisheries in the river Tweed, and by virtue of the said Act commissioners are appointed to carry out the provisions contained therein. To this Act each party is to be at liberty to refer in the argument of this case.

The salmon fisheries occupied by the appellant as aforesaid are within the operation of the said Act, and are rated under sect. 79 thereof, for and in respect of the purposes for which the same was passed, at the sum of 61*l.* per annum, which sum has been duly paid by the appellant since he became tenant of the said fisheries.

From an abstract of the revenue and expenditure account of the said commissioners, it appears and is to be taken as a fact in this case, that the revenue raised by means of the rate levied under the said Act from the 30th June 1883 to the 30th June 1884, including the sum of 170*l.* 5*s.* 2*d.* for fines and expenses recovered for the year to the 1st June 1883, amounted to 2915*l.* 8*s.* 4*d.*, which sum was expended as follows:

	£	s.	d.
I. Expenses of protection forces for year from the 30th June 1883 to the 30th June 1884:			
(1) In the lower district, including Berwickshire and English side	656	9	7
(2) In Roxburghshire, being wages and contingent expenses of inspector and bailiffs, &c.	589	0	5
(3) In Selkirkshire, being wages and contingent expenses of inspector and bailiffs, &c.	310	12	9
(4) In Peebleshire, being wages and contingent expenses of inspector and bailiffs, &c.	435	9	0
(5) In these three counties generally, being salary and contingent expenses of the superintendent	237	16	0
II. Expenses of prosecutions	275	0	11
III. Rent of station-house, at Peel, Selkirkshire	20	17	0
IV. Rent of boathouse and net depôts	15	11	0
V. Stationery, printing, and advertising ...	36	10	7
VI. Expenses in connection with the annual meeting of commissioners, and meetings of police committee	5	1	10
VII. Salaries	156	6	0
VIII. Miscellaneous	32	17	3
	£2771	12	4

The appellant is assessed in respect of the premises occupied by him as aforesaid to a rate, dated the 20th Nov. 1884, and made for the relief of the poor of the said parish of Tweedmouth, and is appealing against such assessment. The following is a copy of the ratebook containing the said rate, so far as it relates to the appellant:

No.	Name of Occupier.	Name of Owner.	Description of Property.	Gross estimated Rental.	Rateable Value.	Value at 8d. in the £.	Total amount to be collected.
328	James Smith	Harbour Commissioners	Crow's Bat Gards, Bailiff's Bat & Tithes	£366	£366	£12 4 0	£12 4 0

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

This sum of 366*l.* has been arrived at as the rateable value, by adding the Tweed tax of 61*l.* to the rent of 305*l.* actually paid.

The appellant contended that, assuming that for the purpose of ascertaining the gross estimated rental of the fisheries in question it was proper to add the sum of 61*l.* to the rent paid by him under his lease, this sum for the purpose of ascertaining the net annual or rateable value of the said fisheries ought to be deducted from such gross estimated rental, and he so contended on the ground that the sum of 61*l.* was an expense *ejusdem generis* with repairs and insurance which, by sect. 1 of 6 & 7 Will. 4, c. 96, are to be deducted from the gross estimated rental in ascertaining the rateable value of the hereditaments, and he further urged that the principle laid down in the case of *Reg.* v. *The Gainsborough Union* (L. Rep. 7 Q. B. 64) applied in his favour. On behalf of the respondents it was contended that the Tweed tax was not an expense *ejusdem generis* with the expense of repairs and insurance, and was not an expense which was deductable within the meaning of 6 & 7 Will. 4, c. 96, s. 1; that the tax was not directly connected with or applied solely to the premises occupied by the appellant; that it was applied mainly for the suppression of poaching, and was not so connected with the premises as to be deductable under the statute of Will. 4, but was a landlord's tax and to be added to the rent payable by the appellant under the lease in order to ascertain the actual rent paid.

The recorder upheld the rate and dismissed the appeal with costs on the ground that the Tweed tax is not an expense necessary to maintain the premises, in respect of the occupation of which the appellant was rated, in a state to command the rent.

The question for the opinion of the court is whether or not the said sum of 61*l.* is, under the circumstances set forth in this case, an expense within the meaning of sect. 1 of 6 & 7 Will. 4, c. 96.

If the court should be of opinion in the affirmative, the order of sessions is to be quashed. If the court should be of opinion in the negative, the order of sessions is to be affirmed.

A rule was then obtained on the part of the defendant calling upon the prosecutors, the churchwardens and overseers of the parish of Tweedmouth, and the assessment committee of the Berwick-upon-Tweed Union, to show cause why the order of sessions made on the defendant's appeal against the rate should not be quashed for the insufficiency thereof, and this was the rule which now came on for argument.

The Tweed Fisheries Act 1857 (20 & 21 Vict. c. cxlviii.) is an Act to consolidate and amend the Acts for the more effectual preservation and increase of salmon and the regulation of the fisheries in the river Tweed. The preamble is as follows:

Whereas an Act was passed in the eleventh year of the reign of his Majesty King George the Fourth, intituled "An Act for the more effectual preservation and increase of the breed of salmon and for better regulating the fisheries in the river Tweed and the rivers and streams running into the same, and also within the mouth or entrance of the said river;" and another Act was passed in the sixth year of the reign of his late Majesty King William the Fourth, intituled "An Act to alter, amend, and enlarge the powers of an Act passed in the eleventh year of the reign of his late Majesty, intituled 'An Act for the more effectual preservation and increase of the breed of salmon and for better regulating the fisheries in the river Tweed and the rivers and streams running into the same, and also within the mouth or entrance of the said river;'" and whereas the salmon fisheries in the river Tweed of late years have been much less productive and have greatly decreased in value, and it is of public importance that more effectual means should be adopted for the preservation and increase of the breed of salmon, and for that purpose it is necessary and expedient that the said Acts should be consolidated and amended, and that further provisions should be made for the regulation of the said fisheries, for the removal of nuisances and obstructions, and the prevention of illegal fishing in the said river; but these objects cannot be effected without the authority of Parliament: May it therefore please your Majesty that it may be enacted, &c."

And the 79th section provides that:

For defraying the expenses to be incurred in carrying this Act into effect it shall be lawful for the commissioners at any general, special, or adjourned meeting, and they are hereby required to make, impose, and levy an annual rate or assessment of twenty pounds per centum per annum until the debts and obligations contracted by the commissioners and overseers acting under the recited Acts, and due and subsisting at the passing of this Act, and the costs of obtaining and passing this Act and incidental thereto, are paid, and annually thereafter of such amount as the commissioners shall fix and determine, not exceeding twenty pounds per centum per annum, to be paid by the whole owners of salmon fisheries in the river in proportion to the rents or yearly value of their several fisheries as such rents or yearly value shall be ascertained and fixed by the commissioners, or by the sheriff or justices on the application of any owner who may think himself aggrieved by any such assessment, provided notice of such application be given to the clerk within ten days after notice of such assessment is given to such owner, and which rate shall be payable either yearly or half-yearly, as the commissioners may from time to time direct and appoint, by the several tenants or occupiers of the said several fisheries for and on behalf of the respective owners of the same and for which payments such tenants or occupiers shall be entitled to relief from the respective owners on settling or paying their rents; and if any such rate shall not be paid to the collector appointed under this Act by any tenant or occupier when required, the same shall on demand be payable by the owner of the fishery possessed by such tenant or occupier.

Gainsford Bruce, Q.C. (with him *Manisty*) for the appellant.—The Tweed tax is a rate levied for the protection of the fisheries, and it is therefore an expense necessary to maintain the fisheries, in respect of which the appellant is rated, in a state to command the rent. That being so, it is an expense *ejusdem generis* with that of repairs, and is deductable under the 1st section of 6 & 7 Will. 4, c. 96. (*a*) In the case of *Rex* v. *Adames* (4 B. & Ad. 61) it was decided that an occupier (whatever be his interest) of land which requires to be protected from floods at an occasional expense, defrayed by a sewers rate, is not rateable to the poor at the same sum as the occupier of lands of similar quality and equal annual produce in the same parish not liable to the sewers rate, but he should be rated at that sum minus the

(*a*) By the Parochial Assessment Act 1836 (6 & 7 Will. 4, c. 96), s. 1, a poor rate is to be made "upon an estimate of the net annual value of the several hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation, rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent."

sewers rate. Again, in *Reg.* v. *Hall Dare* (5 B. & S. 785) it was held that, in assessing land to the poor rate, the owner and occupier is entitled, under the section mentioned, to have deductions made from the gross rateable value of his property in respect of the general sewers tax imposed by the Court of the Commission of Sewers under 4 & 5 Vict. c. 45, in respect of the amount at which he is rated by the Court of Commission of Sewers for the maintenance and cleansing of the sewers and works in a level by which the rated lands are benefited; in respect of the average sum annually expended by him in the maintenance and repairs of a sluice or flood-gate and gote, under the jurisdiction of the commissioners, and on his lands, by which his lands alone are benefited, and which works are necessary to maintain the lands in a state to command their rent; and in respect of the sum annually expended by him on the maintenance and repairs of a sea wall, which the owners of lands fronting a navigable river were bound to keep up under a presentment made at a court of sewers, and the maintenance of which wall was necessary to protect his lands, as all these are tenants' and not landlord's taxes. Then in *Reg.* v. *The Guardians of the Gainsborough Union* (L. Rep. 7 Q. B. 64) an annual rate was, under a local Act for the embanking and draining a district consisting of several parishes, imposed upon the district, and lands occupied by the respondent were rated at a certain proportion yearly. The rate by the Act was expressly made a landlord's tax, and the respondent's landlord had accordingly always paid the amount. The whole rate under the Act was necessary for and was spent in each year in maintaining the drainage works. Without such drainage works the land occupied by the respondent would have been under water at certain seasons, and the annual value would have been considerably diminished. On these facts it was held that, in assessing the respondent to the poor rate, a deduction was to be allowed in respect of the drainage rate, as an expense necessary to maintain the land in a state to command the rent. It is contended that the rate imposed by the Tweed Commissioners under the Tweed Fisheries Act 1857 (20 & 21 Vict. c. cxlviii.) is similar in all respects for this purpose to the drainage rates, which were held to be deductable in the cases cited, and that it must be deducted in like manner from the gross estimated rental in order to ascertain the rateable value of the appellant's fisheries.

Charles, Q.C. (with him *J. L. Walton* and *R. Cunningham Glen*) for the respondents.—The learned recorder was right in the decision at which he arrived, and the cases cited do not apply to this case. The rate made under the Tweed Fisheries Act 1857 (20 & 21 Vict. c. cxlviii.) is in the nature of a general police rate for the benefit of the river from its source to its mouth, which, by the 4th section of the Tweed Fisheries Amendment Act 1859 (22 & 23 Vict. c. lxx.) extends five miles out to sea for a distance of seven miles southward of the actual mouth of the river and northward to the Scotch boundary. With the exception of 260*l.*, the whole of the expenses mentioned in the special case to meet which this tax is levied, were incurred in other counties. In the *Gainsborough Union case* it was stated in the case that without such drainage rate the drainage works by which the land occupied by the respondent is drained could not be maintained, and that without such drainage works the land occupied by the respondent would be under water at certain seasons of the year, and could not be maintained in its present state, and the annual value thereof would be considerably diminished. Here the preamble of the Tweed Fisheries Act 1857 distinctly states as part of the reason for the enactment that "it is of public importance that more effectual means should be adopted for the preservation and increase of the breed of salmon." In the *Gainsborough Union case*, therefore, the land without the works and the rate could not have been kept in a state of cultivation, while here the tax is levied to get the fisheries into an artificially high state of production for the purpose of providing food for the public. [CAVE, J.—The public importance is indirect. Any benefit to the public must be through the owners of the fisheries. The preamble only means that, if the fisheries are made more profitable to the owners, the public will also gain by the cheapness of salmon.] The considerations mentioned bring this case within the authority of *Reg.* v. *The Inhabitants of Vange* (3 Q. B. 242). In that case it appeared that the proprietors of lands situate in the parish of Vange, in Essex, and other parishes of the Isle of Canvey, had granted one-third of all their lands situated in the island in fee to one Cropenburgh in consideration of his embanking and keeping from inundation all the lands in the island. By a local Act passed afterwards commissioners were appointed to keep up the embankment, and empowered for that purpose to tax the owners and occupiers of the granted lands by an annual rate to the full annual rent or value of such lands respectively; and if the moneys so levied should prove insufficient (but not otherwise) to tax the other lands in the island. In 1841 William Hilton, who had taken all the granted lands in Vange subject to the above liability, paying no purchase money, was rated by the commissioners as owner and occupier thereof on an assessment which was equal to the full annual value of the lands, and, although the annual expenditure on the embankment was necessary to maintain the lands within the island in a state to command any rent from a tenant, or to be capable of occupation by the owner, it was held that he was rateable to the poor of Vange for the full annual value of the lands without deduction on account of the embankment tax. [CAVE, J.—There the land was held on the tenure of providing an embankment for other lands.] The owner and occupier was there compelled by a local Act to pay a tax which was necessary to maintain the lands in a state to command a rent. These fisheries have, under a private Act of Parliament, to pay for special police protection over the whole of a large area, and this cannot be said to be an expense *ejusdem generis* with repairs and insurance and necessary to maintain these premises in a state to command the rent within the meaning of 6 & 7 Will. 4, c. 96, s. 1.

Gainsford Bruce, Q.C. was not called upon to reply.

CAVE, J.—I am of opinion that in this case the learned recorder was in error in upholding this

rate and refusing to make the deduction in the rateable value which the appellant claimed. The question is, whether the rate levied under the 79th section of the Tweed Fisheries Act 1857 (20 & 21 Vict. c. cxlviii.), is an expense within the language of the 1st section of the Parochial Assessment Act 1836 (6 & 7 Will. 4, c. 96), which says that a poor rate is to be made "upon an estimate of the net annual value of the several hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." Is this rate, then, an expense necessary to maintain the rateable subject in a state to command the rent? The rateable subject is in this case a salmon fishery, and the heading of the Tweed Fisheries Act 1857, under which the rate which the appellant desires to deduct in estimating its annual value is levied, is, "An Act to consolidate and amend the Acts for the more effectual preservation and increase of salmon, and the regulation of the fisheries in the river Tweed," and in the preamble there is a recital to the effect that "the salmon fisheries in the river Tweed of late years have been much less productive and have greatly decreased in value, and it is of public importance that more effectual means should be adopted for the preservation and increase of the breed of salmon." To my mind, it is perfectly clear that the whole recital is directed to the preservation and increase of salmon, and to making the fisheries more productive and to counteracting the decrease in their value which was going on. Further, when we look at the provisions of the Act itself, we find that the powers bestowed on the commissioners all have for their object the preservation and increase of salmon in the river. By the 36th section, water bailiffs are to be appointed, and by the following sections power is given to them to apprehend offenders, and there is a penalty for resisting them; nets left in the river may be seized, and fixed nets and engines are prohibited; mill-dams are to be constructed in a particular way; obstructions may be removed; no noxious matters are to be put into the rivers; and penalties are provided for killing young and unseasonable fish. In fact, all the provisions of the Act are directed to the preservation and increase of salmon, which is the one essential thing which increases the value of fisheries and makes them more productive. Then the 79th section, under which the rate is levied, says that the rate is "to be paid by the whole owners of salmon fisheries in the river, in proportion to the rents or yearly value of their several fisheries as such rents or yearly value shall be ascertained and fixed by the commissioners;" so that not only is the Act directed to the improvement of the fisheries, but the owners of the fisheries are directed to pay the expenses incurred under it in proportion to the yearly value of their fisheries. If the case rested here without authority, I should say it was clear; but, in the case of *Reg.* v. *The Gainsborough Union* (L. Rep. 7 Q. B. 64), a rate was imposed on the respondent's land, under a local Act, for embanking and draining a district, and it was held that, in assessing the respondent to the poor rate, a deduction was to be made in respect of the drainage rate as an expense necessary to maintain the land in a state to command the rent. There the facts were that without the drainage works the land would have been under water at certain seasons and the annual value would have been considerably diminished. So here the whole scope and intention of the Act is to increase the value of the fisheries by increasing that which is the only foundation of the value of a fishery, namely, the number of fish; and it cannot be doubted that, but for provisions of the nature of those contained in the Act, the fisheries would have become less productive and would have consequently decreased in value. Undoubtedly the provisions of the Act do, as Mr. Charles has pointed out, extend over a very considerable stretch of country, but that is because salmon will not remain in the same place. At one time they are out at sea, at another they are to be found in the upper reaches of the river. It was necessary, therefore, that the provisions of the Act should be made to apply to a large space, and there is really nothing in this to militate against the consideration that the Act was passed solely for making the river more productive and the fisheries more profitable. I think, too, that the case of *Reg.* v. *The Inhabitants of Vange* (3 Q. B. 242), cited by Mr. Charles, is distinguishable. It is quite true that in that case the rate was imposed by an Act of Parliament, but the Act appears to have been passed in accordance with an original agreement. Here the real point is that the rate is paid for the preservation of the salmon, which is better accomplished by concerted action under an Act of Parliament than by leaving each owner to protect his own property. On these grounds I think that the learned recorder was wrong, and that the rate is an expense deductable within the meaning of 6 & 7 Will. 4, c. 96. The appeal must therefore be allowed and the rate quashed.

WILLS, J.—I am of the same opinion. I think that the rate is directly connected with the increase in value of the fisheries. It seems to me that such services as those rendered under this Act, and to pay for which this rate is levied, must necessarily and directly increase the value of the rateable subject, and in that case must be necessary to maintain the rateable subject in a state to command the rent, and be deductable under 6 & 7 Will. 4, c. 96, s. 1, in accordance with the authority of *Reg.* v. *The Gainsborough Union* (L. Rep. 7 Q. B. 64). Mr. Charles, however, says there is an authority the other way, and cites the case of *Reg.* v. *The Inhabitants of Vange* (3 Q. B. 242). But the facts in that case were different. It appears that many years ago, in 1621, Sir Henry Appleton and others joined together to protect their lands in Canvey Island, which at every spring tide were overflowed by the Thames, and contracted with a person named Cropenburgh to fence off the lands from inundation on the terms that he should have a third of the land so reclaimed. Afterwards an Act of Parliament was passed for the purpose of keeping up the embankment, and it provided that the owners of the land so given should be rated for that purpose to the full annual value of the lands. The appellant in *Reg* v. *Vange* attempted to show that, as he was rated to the full annual value of the lands, he had no beneficial occupation of them,

but the Court said that there was a difference between a rate to preserve land from being damaged by water and a charge in perpetuity such as that. "Suppose," said Lord Denman, C.J., "that, instead of having paid nothing for it, and taking it as he has with the incumbrance, he had purchased it and left the whole purchase money unpaid, but secured by mortgage upon the property. In what respect would that charge have differed from the present?" That case, therefore, does not apply here. I am of opinion, for these reasons, that this appeal must be allowed, and the order of sessions quashed with costs.

Appeal allowed.

Solicitors for the appellant, *Shum, Crossman, and Co.*, for *W.* and *B. Wetherhead*, Berwick-upon-Tweed.

Solicitor for the respondents, *E. Bromley*, for *Willoby* and *Peters*, Berwick-upon-Tweed.

Tuesday, Dec. 18, 1885.

(Before CAVE and WILLS, JJ.)

REG. *v.* BRINDLEY. (*a*)

Quarter Sessions—Jurisdiction—Gas company—Gasworks Clauses Act 1847 (10 *Vict. c.* 15), *s.* 35 *—Appointment of accountant to examine condition of gas company's concern—Appointment of gas engineer to assist him—Certiorari.*

The Court of Quarter Sessions has no jurisdiction, under the 35*th section of the Gasworks Clauses Act* 1847 (10 *Vict. c.* 15), *to appoint a gas engineer to assist an accountant appointed thereunder to examine and ascertain the actual state and condition of the concerns of the gas company, and where such order is made, a writ of certiorari will lie to bring up the order to be quashed.*

THIS was a rule obtained on behalf of the British Gas Light Company, calling upon J. B. Brindley, Esq., the Recorder of Hanley, to show cause why a writ of *certiorari* should not issue to bring up, for the purpose of quashing it, an order made by him under the Gasworks Clauses Act 1847 (10 Vict. c. 15), s. 35, for the appointment of a gas engineer to assist an accountant previously appointed by him under that section to examine and ascertain the actual state and condition of the concerns of the gas company, and to make report thereof.

The 35th and 37th sections of the Gasworks Clauses Act 1847 (10 Vict. c. 15) are as follows:—

35. In England or Ireland the Court of Quarter Sessions, and in Scotland the sheriff, may, on the petition of any two gas rate payers within the limits of the special Acts, nominate and appoint some accountant or other competent person, not being a proprietor of any gasworks, to examine and ascertain, at the expense of the undertakers (the amount of such expense to be determined by the said court or sheriff), the actual state and condition of the concerns of the undertakers, and to make report thereof to the said court at the then present or some following sessions, or to the sheriff, and the said court or sheriff may examine any witnesses upon oath touching the truth of the said accounts and the matters therein referred to; and if it thereupon appear to the said court or sheriff that the profits of the undertakers for the preceding year have exceeded the prescribed rate, the undertakers shall, in case the whole of the said reserved fund has been and then remains invested as aforesaid, and in case dividends to the amount hereinbefore limited have been paid, make such a rateable reduction in the rate for gas to be furnished by them as in the judgment of the said court or sheriff shall be proper, but so as such rates when reduced shall insure to the undertakers (regard being had to the amount of profit before received) a profit as near as may be to the prescribed rate.

37. If the undertakers shall, for seven days after being required to produce to the said court or sheriff, or to the said accountant or other person as aforesaid, any books of account or other books, bills, receipts, vouchers, or papers relating to the pecuniary affairs of the undertakers, refuse or neglect to produce such books, bills, receipts, vouchers, or papers, they shall forfeit the sum of one hundred pounds for every such refusal or wilful neglect, and the further sum of ten pounds for every day such refusal or wilful neglect shall continue after the expiration of the said seven days, such respective penalties to be recovered by any person who will sue for the same, with full costs of such in any of the superior courts.

The British Gas Light Company is a gas company existing under the British Gas Light Company's (Staffordshire Potteries) Acts 1853, 1866, and 1880, which incorporate the Gasworks Clauses Act 1847 (10 Vict. c. 15), and the Gasworks Clauses Act (1847) Amendment Act 1871, and it appeared that an application was made under the 35th section of the Act of 1847 to the Hanley Court of Quarter Sessions, and an order obtained for the appointment of an accountant to examine and ascertain the actual state and condition of the concerns of the gas company. The accountant finding himself unable to report fully without assistance, a further application was made to the Court of Quarter Sessions, and an order made by the learned recorder appointing a gas engineer to assist the accountant in making his report. The gas company thereupon obtained a rule calling upon the learned recorder to show cause why a writ of *certiorari* should not issue to bring up this order for the purpose of quashing it, on the ground that the court had no jurisdiction to make the order.

Shiress Will, Q.C. (with him *Littler*, Q.C., and *Alfred Young*), on behalf of the Corporation of Hanley and the Tunstall Local Board, showed cause.—There is no force in the objection that the Court of Quarter Sessions had no jurisdiction in this case, and that its powers were exhausted by the original appointment of an accountant. Every court has power to make such orders as are necessary to enforce its process, and in this case, in order to carry out the provisions of the 35th section of the Gasworks Clauses Act 1847, it was necessary to appoint a gas engineer with a special knowledge of the subject of the investigation to assist the accountant in making his report thereunder, and it was reasonable that the company should allow their books to be inspected in such a manner that the court might have a reliable report presented to it. The case of *Bellamy* v. *Hoyle* (33 L. T. Rep. N. S. 21; L. Rep. 10 Ex. 220) shows that every court has an inherent power to make such orders as the necessity of the case demands. In that case the registrar of a County Court issued warrants of execution against the high bailiff of the court directed to R. and others, and it was held that it must be taken that the appointment of R. as special bailiff was justified by the inherent power of all courts and the necessity of the case. [CAVE, J.—That appointment was made in the exercise of the ordinary jurisdiction of the court. Here we are dealing with the exercise of a statutory power. Why should the express statutory power be exceeded? Why could not the accountant

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

make his report from the books of the company?] It would have been useless without any explanation of the figures. [CAVE, J.—Could it not have been explained by the evidence of a gas engineer?] It was intended by the section that the report made to the court should be a report of all material facts and matters, and the company have defeated the object of the section by refusing to allow their books to be inspected. [WILLS, J.—The section says "some accountant or other competent person." That means some person competent to do the work required. Why did not the court appoint such a person originally?] The gas company is bound under this section to permit such an inspection as is reasonably necessary for making the report. [WILLS, J.—Then why does not the court proceed, under the 37th section, to fine the company for refusing to produce their books?] It is not contended that the gas company have refused to produce the books to the accountant altogether. In the case of *The Caledonian Railway Company* v. *Lockhart* (3 L. T. Rep. N. S. 65; 3 Macq. H. of L. 808) the respondent had entered into a submission with the railway company to refer all claims for lands of the respondent taken and required by reason of their works, the arbitration to be in strict conformity with the Lands Clauses and Railway Clauses Acts, and it was held, objection having been made to the award on that ground, that the arbitrator might employ a valuer to assist him, and in general might consult men of science if necessary, it not being *ultra vires* for an arbitrator to remit a question to an expert unless prohibited by the terms of the submission. [CAVE, J.—The 35th section only mentions an accountant *or* other competent person.] It requires no express power to enable the court to make this order, which is incidental or subsidiary to the express powers of the section. Further, *certiorari* does not lie at all in the case of a purely ministerial act such as this, nor will the court interfere by *certiorari* with an interlocutory order, although made without jurisdiction. [WILLS, J.—Is this a ministerial act? Does it not involve an act of judgment?] The case comes within that of *Reg.* v. *The Churchwardens and Overseers of Sutton Coldfield* (29 L. T. Rep. N. S. 840; L. Rep. 9 Q. B. 153). There the Court of Quarter Sessions granted an application to enter and respite certain appeals against poor rates, subject to a case for the opinion of the court, and the court declined to consider the case, Blackburn, J. saying: "We are of opinion that we ought not to take notice of the facts stated in a case reserved on such an order. This court has not in general any jurisdiction to review the decision of the Court of Quarter Sessions on any matter in which that court has jurisdiction, nor will it take any notice of a case reserved by the sessions on the trial of an indictment: (*Reg.* v. *Salop*, 13 East, 95.) But there is an exception from that general rule in cases where the Court of Quarter Sessions on appeal makes an order either confirming or reversing the decision appealed against, subject to the opinion of this court on some point of law reserved on a case stated by the sessions. This court will then, on a *certiorari* bringing up the order of sessions, take cognisance of the facts stated in the case, and quash or confirm the order of sessions according to their view on the points of law submitted to them by the sessions. But such cases have never been heard except on a *certiorari* to bring up an order of sessions, which, if unreversed, would finally decide the appeal." This is similarly an interlocutory order made by the learned recorder for the purpose of getting before him facts on which to decide on a future occasion, and is not an order finally deciding the appeal, and it cannot therefore be brought up by *certiorari* to be quashed. They also quoted

Reg. v. *Robinson*, 17 Q. B. 466.

Michael, Q.C. (with him *H. T. Boddam*), for the gas company, in support of the rule, was not called upon.

CAVE, J.—I am of opinion that this rule must be made absolute. Two objections in the nature of preliminary objections have been raised by the learned counsel who have shown cause against it. In the first place, it was contended that the powers to be exercised by the Court of Quarter Sessions under the 35th section of the Gasworks Clauses Act 1847 being ministerial only, this was not a case in which *certiorari* could issue at all to bring up the order to be quashed. From the judgment delivered by the learned recorder we find that when this case came before him and the accountant was originally appointed, both sides were represented and the case was fully argued, and after that the appointment was made. It is impossible, I think, to say in the face of this that the act was a ministerial act only, and that the learned recorder did not exercise his discretion as to whether he should or should not make the order, and the act was therefore judicial, not merely ministerial. Secondly, it was said that *certiorari* could not lie, because this was an interlocutory proceeding, and the court will not allow *certiorari* to issue in interlocutory proceedings. There are two classes of cases in which *certiorari* will issue, viz.: first, cases in which there is no jurisdiction to make the order which it is sought to bring up and quash upon that ground; and secondly, where it is desired to bring up an order of sessions for argument, and this court takes cognisance of the facts stated in the case and quashes or confirms the order of sessions according to their view on the points of law submitted to them by the sessions. This last was the class of case in which it was endeavoured to include the case of *Reg.* v. *Churchwardens and Overseers of Sutton Coldfield* (29 L. T. Rep. N. S. 840; L. Rep. 9 Q. B. 153). In those cases the Court of Quarter Sessions must dispose of the case one way or another, and they will not be heard otherwise. The present case, on the contrary, is one of the class in which *certiorari* is moved for on the ground of want of jurisdiction, and in those cases the objection that the order it is sought to bring up is interlocutory does not apply. The question therefore is, as to whether there was or was not jurisdiction to make this order. Now, the jurisdiction conferred on the Court of Quarter Sessions by the 35th section of the Gasworks Clauses Act 1847 is not an usual, but a peculiar and extraordinary, jurisdiction. Its object is to enable the court to ascertain when the undertakers have received a greater amount of profit than they are by the provisions of their Act to receive for themselves, and it is conferred in these words: "The Court of Quarter Sessions may, on the petition of any two gas rate payers within the limits

of the special Act, nominate and appoint some accountant or other competent person, not being a proprietor of any gas works, to examine and ascertain, at the expense of the undertakers, the actual state and condition of the concern of the undertakers, and to make report thereof to the said court at the then present or some following sessions." In this case an application was made under this section, and the court appointed an accountant, who made a report which nowhere alleges that he required the assistance of a competent engineer to enable him to understand any technical difficulties he had met with. Another application, however, was made to the court, and the court made an order for the appointment of a gas engineer to assist the accountant, and that the books should be shown to him. I find no authority in the Act empowering the court to make such an order. The jurisdiction conferred by the Act is that the court may "appoint some accountant or other competent person," and there is no suggestion made now, nor has any been made at any time, that there is power under the section for the court to appoint more than one person. The person appointed must make the best report he can, and the court will then be able, by the examination of proper witnesses, to clear up any difficulty there may be in them, and come to a proper conclusion. The second part of the order requires the gas company to produce their books. Now the 35th section, it is to be observed, gives no power to the Court of Quarter Sessions to order the books of the company to be produced to the accountant. There is in the 37th section an implied power given to the accountant to see the books, and a penalty if the gas company refuse to produce them; but, when we find a right given by an Act of Parliament, it is necessary to look at the statute to see if a remedy is also given for the infringement of the right, or whether it is the intention of the Legislature that the matter should be left to the ordinary remedy by action or any other of the ordinary remedies, such, for instance, as indictment. Here, looking at this 37th section, I think that, inasmuch as the right to have the books and accounts produced is to be gathered from the same section which creates a penalty for the refusal to produce them, the court had no authority to order the company to produce their books to the accountant. The 35th section, I think, gives power simply to appoint an accountant, not to examine the books of the company, but to examine and ascertain the actual state and condition of the concerns of the undertakers, and of the books there is no mention until the 37th section. I can find, therefore, no express authority in the 38th section giving the Court of Quarter Sessions power either to appoint another person in conjunction with the accountant, or to direct the books of the company to be produced to the accountant; and in matters of this kind an express power must be given in clear language, and nothing must be implied. The section confers wide powers, but those powers must not be extended beyond the limits which the Legislature has clearly expressed. The Legislature intended that one person should be appointed competent to understand what was shown to him, and that witnesses should be called, if necessary, to put a right interpretation on the matters contained in his report; but it was not, I think, the intention of the Legislature that he should take with him an engineer or some other person competent to do what he cannot. This is, I think, the true construction of these sections, and if there were any doubt the court would not, I think, be disposed to listen to a construction calculated to increase the burden of expense entailed by the inquiry. It has been said, however, that although no express power is given by the section to make this order, yet that, where jurisdiction is conferred upon a court to do a certain thing, we ought to imply all the subsidiary powers necessary to enable the court to exercise that jurisdiction with effect. This, I acknowledge, is a good rule within its proper limits, but I do not think that it ought to be extended. I am not satisfied that the Legislature meant the accountant to understand and put a value upon everything that he saw. I should rather infer that it was intended that he should take out the figures from the books, and that the recorder should by the aid of proper evidence decide what they represented. Otherwise it would follow that, whenever the figures represented the value of buildings, or chemical products, or any other thing, the accountant would be entitled to have an expert to tell him the value of each thing. I do not think, therefore, that the case comes within the doctrine laid down in the case of *Bellamy* v. *Hoyle* (*ubi sup.*), and am of opinion that it was not within the jurisdiction of the recorder to make the order complained of. The rule will therefore be made absolute to bring up the order.

WILLS, J.—I am of the same opinion. I think that the Court of Quarter Sessions had no jurisdiction to do more than appoint an accountant to examine and ascertain the condition of the concerns of the gas company. In such a matter as this, whatever is done must be done in accordance with some jurisdiction, and in this case I think that the Court of Quarter Sessions had no jurisdiction at common law or by statute to make this order. Mr. Will alleges that the Act of Parliament compels the gas company to afford facilities which they have refused to afford. If so, then Mr. Will must take such proceedings as by the law of the land are provided, where statutory provisions are not complied with. He may be entitled to a *mandamus* or to a remedy by indictment, and in addition to this there is the 37th section which provides formidable penalties in cases where gas companies refuse to produce their books. But there is no authority for saying that the Court of Quarter Sessions can be called upon to make such an order as this to assist him. That court derives its power of acting from statute only, and here the statute gives no jurisdiction. If it is really the case that the gas company are endeavouring to dam up the sources of evidence, the judge will know how to make such conduct recoil upon them. I think it is clear that this rule must be made absolute, and that a writ of *certiorari* must issue to bring up the order to be quashed, and I should suggest that, for the purpose of saving expense, both parties should consent that the order should be quashed when brought up without further argument.

Rule absolute. Order to be quashed by consent when brought up, without prejudice to the petitioners' right to appeal.

Solicitors for petitioners, *Wedlake, Letts,* and *Wedlake,* for *W. Keary,* Stoke-upon-Trent.

Solicitors for the gas company, *H. T. Raw,* for *Llewellyn* and *Ackrill,* Tunstall, and *A. Challinor,* Hanley.

Monday, Feb. 22, 1886.

(Before Lord COLERIDGE, C.J., and HAWKINS, J.)

REG. *v.* JUSTICES OF TYNEMOUTH. (*a*)

Summary conviction by justices—Penalty—Imprisonment with hard labour — Alternative — Summary Jurisdiction Act 1879 (42 *&* 43 *Vict. c.* 49), *s.* 5—*Criminal Law Amendment Act* 1885 (48 *&* 49 *Vict. c.* 69), *s.* 13.

Upon the true construction of sect. 5 *of the Summary Jurisdiction Act* 1879, *where an Act upon which a conviction is founded authorises the punishment of imprisonment with hard labour for an offence, the justices have jurisdiction to order a prisoner summarily convicted of such offence to pay a penalty, or in the alternative to undergo a term of imprisonment with hard labour.*

THIS was a motion *ex parte* for a rule *nisi* for a *certiorari* to bring up the case to the Queen's Bench Division of the High Court, in order that a conviction by justices, whereby the prisoner had been ordered to pay a penalty or in the alternative to undergo a term of fourteen days' imprisonment with hard labour, might be quashed. The prisoner had been convicted under sect. 13 of the Criminal Law Amendment Act 1885 (48 & 49 Vict. c. 69) of being the lessor or landlord of premises let with the knowledge that such premises or some part thereof were being used as a brothel. The ground of this application was that, under the Criminal Law Amendment Act 1885, justices have no power to order imprisonment with hard labour as an alternative to the payment of a penalty.

J. Lawson Walton for the appellant.—By sect. 13 of the Criminal Law Amendment Act 1885, it is enacted that "Any person who being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is wilfully a party to the continued use of such premises or any part thereof as a brothel, shall, on summary conviction in manner provided by the Summary Jurisdiction Acts, be liable to a penalty not exceeding 20*l.*, or, in the discretion of the court, to imprisonment for any term not exceeding three months, with or without hard labour." By sect. 5 of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) it is enacted that "The period of imprisonment imposed by a court of summary jurisdiction under this Act, or under any other Act, whether past or future, in respect of the nonpayment of any sum of money adjudged to be paid by a conviction, or in respect of the default of a sufficient distress to satisfy any such sum, shall . . . . . be without hard labour, except where hard labour is authorised by the Act on which the conviction is founded, in which case the imprisonment may, if the court thinks the justice of the case requires it, be with hard labour, so that the term of hard labour awarded do not exceed the term authorised by the said Act." It is submitted that justices have no power under these sections to impose a fine with the alternative punishment of imprisonment with hard labour. Such alternative punishment cannot be imposed unless the statute on which the conviction is founded authorises imprisonment with hard labour to be given as an alternative to the payment of a fine. Such alternative is not authorised by the Criminal Law Amendment Act 1885, upon which this conviction is founded; but we do find it authorised by many Acts of Parliament—*e.g.*, by sect. 52 of the Malicious Injuries to Property Act 1861 (24 & 25 Vict. c. 97). It is the duty of the justices to determine whether the case is one for fine or for imprisonment. If it is a case for a fine, and the fine is not paid, and there is not sufficient distress to satisfy the sum imposed, then the justices have jurisdiction to order the prisoner to undergo a term of imprisonment without hard labour, unless the statute upon which the conviction is founded expressly authorises (as in the case of the Malicious Injuries to Property Act 1861) imprisonment with hard labour in default of payment of the fine. Under the Criminal Law Amendment Act 1885, if the case is one for imprisonment, the imprisonment may be with or without hard labour; but, if a fine is imposed, in default of payment, imprisonment without hard labour is the only alternative. The express authorisation which is necessary to give the justices jurisdiction to make the order that has been made in this case has been excluded from the Criminal Law Amendment Act 1885, and therefore it is submitted that this conviction ought to be quashed.

Lord COLERIDGE, C.J.—I am of opinion that this rule must be refused. It is clear that the magistrates have acted within their jurisdiction, and that they had power to make this order. Under the 13th section of the Criminal Law Amendment Act 1885, the justices might either have fined the prisoner or sentenced him to imprisonment with or without hard labour. Sect. 5 of the Summary Jurisdiction Act 1879 says that the imprisonment shall be without hard labour, except where hard labour is authorised by the Act on which the conviction is founded, in which case the imprisonment may, if the court thinks the justice of the case requires it, be with hard labour. That means that the imprisonment is to be without hard labour as a general rule, and there shall only be imprisonment with hard labour where, under the statute, the justices are authorised to impose hard labour for the offence. They must not inflict hard labour to enforce a penalty unless they could have inflicted hard labour without giving the option of paying a penalty. That is the meaning of the provision in the Summary Jurisdiction Act. Here we have such a case; the justices might, in the first instance, under the provisions of sect. 13 of the Criminal Law Amendment Act 1885, have inflicted a fine, or they might have sentenced the prisoner to imprisonment with or without hard labour. In my judgment, the justices are authorised to impose the alternative punishment of hard labour, because imprisonment with hard labour is authorised by the Act under which the prisoner has been convicted, therefore the same kind of punishment has been given as might have been given in the first instance. For

(*a*) Reported by F. A. CRAILSHEIM, Esq., Barrister-at-Law.

these reasons I think that this rule must be refused.

HAWKINS, J.—I am of the same opinion. The true construction of sect. 5 of the Summary Jurisdiction Act 1879 is, that the imprisonment is to be without hard labour unless the Act creating the offence authorises the imposition of imprisonment with hard labour for that offence.

Rule refused.

Solicitor for the applicant, *T. Cray*, for *Dix* and *Warlow*, Newcastle-on-Tyne.

Monday, March 15, 1886.

(Before MATHEW and SMITH, JJ.)

DAVEY (app.) *v.* THOMPSON (resp.). (*a*)

*Inland Revenue—Excise licence—Carriage lent by coach-builder to his customer during repair of another carriage—*32 *&* 33 *Vict. c.* 14, *ss.* 18 *and* 19—38 *&* 39 *Vict. c.* 23, *s.* 11.

Where the owner of a carriage, which has accidentally become disabled during the year for which an excise licence has been duly taken out, is accommodated by his coach-builder, during the repair of such carriage, with the use of another carriage without any payment, the coach-builder is not required to take out a licence in respect of such carriage so lent.

THIS was a case stated by one of the magistrates of the police-courts of the Metropolis, sitting at the Police-court, Wandsworth, in the county of Surrey, within the Metropolitan Police District, under the statutes 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, on the application in writing of Alfred Davey, an officer of Inland Revenue (the appellant), who was dissatisfied with the determination of the magistrate upon the question of law which arose as stated in the following case:—

1. On the 29th Sept. 1885 an information was exhibited by the appellant against George Samuel Thompson (hereinafter called the respondent), alleging that the said respondent did, on the 7th May 1885, at the parish of Clapham, in the county of Surrey, within the metropolitan police district, keep a certain carriage for the keeping of which a licence was and is required by the statute in that behalf, without having a proper licence under the said statute, contrary to the form of the statute in that case made and provided, and the respondent having been summoned to appear at the court of summary jurisdiction sitting at the Wandsworth Police-court, in the said county, on the 13th Oct. last appeared before the magistrate and pleaded not guilty to the said information.

2. Upon the hearing of the said information it was proved or admitted that on the 7th May 1885 the wife of Mr. Edward Hammond Thompson was seen by a revenue officer driving a phaeton to her residence at Clapham Common. The phaeton was a four-wheeled carriage of the weight of four hundredweight and upwards, and the annual duty to be paid upon the licence in respect of the said phaeton would be 2*l.* 2*s.* Mr. Edward Hammond Thompson did not hold any excise licence for a carriage at 2*l.* 2*s.*, but was the holder of only one excise licence for a carriage at 15*s.* The respondent is a coach-builder, residing in the parish of Stoke Newington, Middlesex, and is the owner and proprietor of the said phaeton. The respondent had contracted with the said Edward Hammond Thompson to repair the latter's carriage, and had allowed him to have the said phaeton for his use without any payment, while the said carriage was being repaired by the respondent. On the said 7th May the respondent was executing the repairs which he would and did execute in very much less than a year. The respondent had not any excise licence to keep a carriage.

3. It was contended on behalf of the appellant that, under 32 & 33 Vict. c. 14, ss. 18, 19, 27, and 38 & 39 Vict. c. 23, s. 11, the respondent was not the person liable to the penalty.

4. The magistrate dismissed the said information upon the ground that, in his opinion, the respondent was not a person liable to the penalty sought to be recovered, as he was not the person who was keeping the carriage on the said 7th May 1885, within the meaning of and contrary to 32 & 33 Vict. c. 14, s. 27.

5. The question of law for the opinion of the court is whether, upon the construction of the aforesaid enactments, the respondent was keeping the phaeton without having a proper licence under the said Acts, so as to be liable to forfeit the penalty under the said sect. 27 of 32 & 33 Vict. c. 14.

Danckwerts for the appellant.—The question in this case turns upon the construction of three Acts of Parliament, 48 Geo. 3, c. 55, schedule D., Nos. 2 and 3; 32 & 33 Vict. c. 14, and 38 & 39 c. 23. Sect. 18 of 32 & 33 Vict. c. 14, enacts that, "On and after the first day of January 1870 there shall be granted, charged, levied, and paid, for the use of Her Majesty, her heirs and successors, in and throughout Great Britain, under and subject to the provisions and regulations in this Act contained, the following duties, that is to say: for every male servant, 15*s.*; for every carriage, if such carriage shall have four wheels or more, and shall be of the weight of four hundredweight or upwards, 2*l.* 2*s.*, and if such carriage shall have less than four wheels, or, having four or more wheels, shall be of less weight than four hundredweight, 15*s.* . . . . and such duties respectively shall be paid annually upon licences to be taken out under the provisions of this Act by the person who shall employ the servant, or keep the carriage, or horse or mule, or shall wear or use the armorial bearings, or shall exercise or carry on the trade of a horse-dealer." By sub-sect. 6 of sect. 19, the term "carriage" is defined, and sub-sect. 7 enacts that, "Every person who shall let any carriage for hire shall, for the purposes of this Act, be deemed to be the person keeping such carriage." Sub-sect. 14: "Any person who shall keep any carriage, whether owned or hired by him, shall be deemed to wear and use any armorial bearings painted or marked thereon, or affixed thereto." Sect. 11 of 38 & 39 Vict. c. 23, repeals sub-sect. 7 of sect. 19 of 32 & 33 Vict. c. 14, and provides that, "Every person who shall let any carriage for hire for any period less than one year, shall for the purposes of the said Act be deemed to be the person keeping such carriage, and every person who shall hire any carriage for a year or

(*a*) Reported by F. A. CRAILSHEIM, Esq., Barrister-at-Law.

any longer period shall for the purpose of the said Act be deemed to be the person keeping such carriage." It is submitted that, upon the true construction of these sections, the coach-builder is liable to pay the duty upon a carriage so lent to his customers, and that it makes no difference whether he keeps it for his own use or for the use of his customers.

The Respondent in person.—It is submitted that a coach-builder who accommodates his customer by gratuitously lending him a carriage while his own is under repair is not liable to pay duty in respect of such a carriage. The customer has paid a duty for one carriage, and is therefore entitled to the use of a carriage during the whole year, and he is no more liable to pay a second duty upon a carriage so lent than would be a master who temporarily employs a butler to do the duty of his own man for whom a licence has been taken out, and who, becoming accidentally disabled, is sent to the hospital, but is still retained in his situation. It is submitted that it is no where enacted, or to be inferred from any statute, that a coach-builder, who gratuitously lends a carriage as has been done here, is to be liable to take out a licence in respect of such carriage.

Danckwerts in reply.

MATHEW, J.—We feel in this case that the opinion of the police magistrate is right, and that the appeal therefore must be disallowed. We are dealing with an Act for taxation, and before we can say that the statute imposes the tax, we must clearly find within the provisions of the Act the words which create the liability. Mr. Danckwerts has brought to our attention the repealed Act and the other statutes which are still in force with reference to this particular duty, and we are asked to say that, where a man pays duty for the use of a carriage which, from accident during the year for which the licence lasts, is disabled, and he goes to his coach-builder and obtains the use of another carriage in lieu of the one in respect of which the duty is paid, his coach-builder becomes liable to pay a duty in respect of that carriage. It is said that that must have been the intention of the Legislature, having regard to the language which is used. But we must consider the gross inequality which would immediately follow from any such construction of the Acts. A man who has already paid a licence for the use of his carriage gets no more than that in respect of which he has paid the duty—the use of a carriage for the year—but if an accident happens to his carriage, and he goes to his coach-builder to have it repaired, the coach-builder must tell him that if he lends him another carriage in lieu of the one in respect of which duty has been paid, he must pay the whole of the duty that the coach-builder has to pay, or he must pay the duty so that the coach-builder may lend it. Thus one man who pays a certain duty, if no accident happens, has the use of his carriage for the whole year for that one duty, while another man, who also pays a duty for his carriage, but who, owing to an accident, has to borrow another from his coach-builder, the accommodation being the same, has to pay another additional duty in respect of the borrowed carriage. Before we say that, we must see clearly from the language of the Acts that that was the intention of the Legislature. The learned counsel has failed, as it appears to me, to show that any such obligation is created by the Acts. The Act shows the circumstances under which a person who lends a carriage shall be liable to pay duty, but it confines such obligation to cases where a carriage is lent for hire. That is not the case here; and it appears to me that the illustration given by the respondent in this case is one which the learned counsel was unable to struggle with effectually. A servant is disabled by illness, and his master chooses to retain the man and engages another meanwhile; he merely employs another servant to take the place of the injured man until his recovery. Why should a master in such a case be called upon to pay a second duty? Why should it be made his misfortune that his servant is affected with illness, and unable to serve him? What the duty is paid for is the use and accommodation, and as long as that and that only is received, the duty paid for it should cover it. I see no reason for bringing the coach-builder under this liability. I agree with the respondent that, if such were held to be the law, it would seriously impede and embarrass his business as a coach-builder. It is an invidious distinction which, I think, ought not to be made. I therefore think the magistrate was right.

SMITH, J.—I am also of opinion that the magistrate was right upon the true construction of sect. 18 of 32 & 33 Vict. c. 14. The Act says, "And such duties respectively shall be paid annually upon licences to be taken out under the provisions of this Act by the person who shall employ the servant." "Who shall employ the servant" seems to me to mean who shall be employing the servant throughout the year. I will now take the illustration employed by the respondent. A master pays a 15*s.* duty for a butler; he is disabled by accident; he goes to the hospital, and the master gets another butler in his place. Surely the master is not to pay the duty twice over. The one servant is out of his employ, being in the hospital, and the other is in his employ. It seems to me that the one duty would cover both perfectly well. Now the words "who shall employ" mean who shall employ for himself. The section goes on, "or who shall keep a carriage, or horse, or mule." I think the meaning of "keep" there is keep for use; that is quite clear, because the word "keep" is between the words "employ the servant" and "the carriage, or horse, or mule, or shall wear or use armorial bearings." I think that means keep for use for himself; and, upon the facts of this case, I think that the coach-builder does not keep his carriage for use by himself, but he keeps it for use by others when their carriages are broken and have to be put into dock to be repaired. I think the magistrate was quite right in holding that it was not shown that the present respondent was taxable.

Appeal dismissed.

Solicitor for the appellant, *The Solicitor to the Inland Revenue.*

Friday, April 9, 1886.

(Before DENMAN and DAY, JJ.)

CORPORATION OF BLACKBURN *v.* MICKLETHWAIT. (*a*)

Blackburn Improvement Act 1882 (45 *&* 46 *Vict. c. ccxliii.*), *ss.* 1, 245, 246, 247—*Public Health Act* 1875 (38 *&* 39 *Vict. c.* 55)—*Expenses of repairing streets—Liability of mortgagee in possession—Right to sue—Concurrent remedies.*

In 1879 *the owner of premises abutting on H.-street and E.-street, Blackburn, mortgaged them to the defendant. In* 1880 *the plaintiffs, the Corporation of Blackburn, paved H.-street. In* 1881 *the mortgagor, in accordance with the provisions of the Blackburn Improvement Act* 1870, *executed a charge on the premises in favour of the Corporation, for the payment by instalments of his apportionment of the expenses thereof. In* 1882, *and prior to the commencement of the operation of the Blackburn Improvement Act* 1882, *the Corporation paved E.-street, and in* 1883 *the mortgagor further charged the premises, in accordance with the provisions of the Blackburn Improvement Act* 1882, *with the payment by instalments of the expenses thereof. The mortgagor made default in payment of the instalments. On the death of the mortgagor in* 1883 *the defendant took possession of the premises under his mortgage. In an action by the Corporation against the mortgagee to recover the unpaid instalments under sect.* 247 *of the Blackburn Improvement Act* 1882, *which entitles the Corporation to institute an action at law against "successive owners" of premises, for the recovery of the expenses of paving streets abutting thereon:*

Held, that the defendant being mortgagee in possession, was a "successive owner" within the meaning of sect. 247; *and that the execution of a charge in favour of the Corporation did not preclude them from the remedy of action at law to recover the expenses; and that the Act of* 1882 *was applicable to the recovery of expenses incurred prior to the commencement of the operation of that Act.*

THIS was an action instituted in the Blackburn County Court by the mayor, aldermen, and burgesses of the borough of Blackburn against the Rev. Wm. Micklethwait, to recover the sum of 34*l.* 15*s.* 1*d.* The defendant was mortgagee in possession of a house in Blackburn abutting on Hall-street and Eccles-street, and the plaintiffs sought to make him liable in respect of certain improvements executed in the said streets. At the trial before the County Court judge a written statement of facts was agreed upon between the parties, and was as follows:—

Richard Pickup, late of Eccles-street, Blackburn, carried on the business of a plasterer, and was a prosperous tradesman (but the plaintiffs submit that this fact is wholly irrelevant to the issue). In the year 1879 he purchased on chief rent a plot of building land in Hall-street and Eccles-street, Blackburn, and built thereon a dwelling-house and workshop (conveyance produced), and on the 3rd April 1879 he borrowed 140*l.* from the defendant, the Rev. William Micklethwait, and on the same day executed a legal mortgage of such plot of building land, dwelling-house, and workshop for securing 140*l.* and interest (mortgage produced), and during his (the mortgagor's) lifetime, the interest was always paid on the half-yearly days fixed by the mortgage deed. He occupied the said dwelling-house and workshop from the date of erection up to the date of his death. On the 20th Feb. 1880 the Blackburn borough surveyor served the said Richard Pickup with notice under the provisions of the Blackburn Improvement Act 1870 to pave Hall-street aforesaid. R. Pickup failed to do the work required, and the plaintiff did the work in accordance with the said notice. The work was commenced on the 18th Aug. 1880, and finished Nov. 2, 1880, and notice of the apportionment was duly served on the said Richard Pickup. On the 19th March 1881 Richard Pickup executed a mortgage agreement or charge agreeing to pay the plaintiffs the apportionment, 30*l.* 0*s.* 7*d.*, with interest at 5 per cent. from 22nd Jan. 1881 by seven annual instalments, the first of 4*l.* 10*s.* 7*d.*, payable with interest on 22nd Jan. 1882, and so on; and the said Richard Pickup charged the premises with the payment of the said instalments. No inquiry as to any other charge on the premises was made by the plaintiffs; but they submit that this fact is wholly irrelevant to the issue. No notice of this charge was given to the defendant. The first and second instalments, which became due on 22nd Jan. 1882 and 22nd Jan. 1883 were duly paid by the said Richard Pickup to the plaintiff on the 24th Jan. 1882, and the 29th Jan. 1883 respectively. The said Richard Pickup died on the 26th Dec. 1883, and Mrs. Pickup, his widow, paid 4*l.* 5*s.* on the 14th Feb. 1884 to the plaintiffs, which made up the cash paid on account of the paving in Hall-street to 13*l.* 0*s.* 7*d.*, as stated in the plaintiff's particulars. There is now owing to the plaintiffs, in respect of the paving Hall-street, the sum of 18*l.* 18*s.* 5*d.* claimed in the plaintiffs' particulars of claim herein, but the defendant repudiates all liability. On the 6th Jan. 1882, notice was served on Richard Pickup, under the provisions of the Blackburn Improvement Act 1870, to pave Eccles-street aforesaid. The said Richard Pickup neglected to do the work, and the plaintiffs, in accordance with the said notice, paved Eccles-street, the work being commenced on the 20th Feb. 1882 and finished on the 18th June 1882. Notice of the apportionment was duly served on the said Richard Pickup, and on the 23rd Jan. 1883 he signed a mortgage agreement or charge in respect of the said paving account (agreement produced). No inquiry was made by the plaintiffs as to any other charge, but the plaintiffs submit that this fact is wholly irrelevant to the issue. No notice was given to the defendant thereof. No payment was made by the said Richard Pickup towards the paving account of Eccles-street, but his widow paid a sum of 4*l.* 1*s.* on the 17th Dec. 1883. There is now due to the plaintiffs in respect of the said paving of Eccles-street the sum of 16*l.* 6*s.* 8*d.* as claimed in the particulars of claim hereof, but the defendant repudiates all liability. No payment has been made by defendant in respect of the plaintiffs' claim. The said Richard Pickup on his death, left a will which was not proved. His estate consisted of valuable household furniture and stock-in-trade, and the equity of the premises in Hall-street and Eccles-street, and a house in Bridge-street, Galligreaves, Blackburn, and trade debts owing to him, and small sums due on life insurance policies. No legal proceedings of any

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

kind have been taken by the plaintiffs against Richard Pickup or his representatives for the recovery of the costs incurred by plaintiffs in paving the said streets, but the plaintiffs submit that these facts are wholly irrelevant to the issue. In April 1884, Mrs. Pickup the widow paid the half-year's interest due to the defendant, under his said mortgage, but default was made in payment of the half-year's interest due on the 3rd Oct. 1884. The defendant on the 3rd Oct. became mortgagee in possession of the said premises in Hall-street and Eccles-street, and has since been and is now in receipt of the rents thereof. The defendant had no notice of the paving of Hall-street and Eccles-street, nor of the mortgage agreements, nor did the defendant personally know anything of the claim of the plaintiffs until the issue of the summons, though correspondence passed between the plaintiffs and the defendant's solicitor upon the claim. The present market value of the property is not more than 140*l.*

The County Court judge gave judgment for the amount claimed, and costs. The defendant thereupon obtained a rule *nisi* to set aside the judgment and to enter judgment for the defendant.

The following Act of Parliament was referred to, and is material to the decision.

Blackburn Improvement Act 1882 (45 & 46 Vict. c. ccxliii.):

Sect. 1. The local Acts, except to the extent mentioned and set forth in the second schedule to this Act, are hereby repealed. . . . Notwithstanding the partial repeal of the local Acts as aforesaid:

(1.) All acts, works, matters, and things before the commencement of this Act done or commenced under the powers and authorities, or by operation of the local Acts, or any of them, and which were at the commencement of this Act good, valid, and available, or in progress . . . shall be, and continue, as good, valid, and available for all purposes, and for and against all parties, and may be commenced, continued, and completed as if this Act had not been passed.

(2.) All actions, suits, prosecutions, arbitrations, or other proceedings by, with, or against the corporation, by reason of any matter, or thing done before the commencement of this Act, in execution of, or in relation to the local Acts, or any of them, may be continued, commenced, or prosecuted by, or against the corporation, as if this Act had not been passed.

Sect. 245. Where the corporation have incurred expenses, for the repayment whereof the owner of the lands, houses, or other property for, or in respect of which the same are incurred, is made liable either by application of, or agreement with, the owner, or by this Act, or the local Acts, or any of them, the same may be recovered from the person who is owner of such lands, houses, or other property, when the works are completed for which such expenses have been incurred in the manner provided by this Act, or the local Acts, or any of them, and such expenses may, by resolution of the council, be declared and thereupon shall be a charge on the lands, houses, or other property in respect of which they were incurred, from the time of the commencement of the works in respect of which such expenses are incurred, and shall bear interest at the rate of five pounds per centum per annum, till payment thereof, and in all summary proceedings by the corporation for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken, shall be reckoned from the date of the service of notice of demand.

Sect. 247. Successive owners of the lands, houses, or other property for, or in respect of which any such expenses as are referred to in the section of this Act of which the marginal note is "Expenses due from owners to be a charge on premises" (sect. 245), have been incurred, shall be liable to the corporation for the payment of the same, or such part thereof, as may for the time being remain unpaid, until the same with interest thereon, as hereinafter mentioned, shall have been fully paid and satisfied, and such expenses or such part thereof as may, for the time being, remain unpaid, shall constitute a debt due from each successive owner to the corporation recoverable from him in a summary manner within six calendar months of his succession, and after that period may be recovered by the corporation from the owner for the time being of the lands, houses, or other property by action at law in any court of competent jurisdiction to entertain an action for recovery of the amount of such debt: Provided that no debt shall be recovered under the provisions of this section after the expiration of six years from the completion of the works, in respect of which such debt is due, or in the case of instalments, after the expiration of three years from the time when any instalment became due.

A. Charles, Q.C. (with him *W. Compton-Smith*, jun.) showed cause against the rule.—The question is whether the plaintiffs are entitled to maintain an action to recover the amount claimed under sect. 247 of the Blackburn Improvement Act 1882. The item of 18*l.* 8*s.* 5*d.* in respect of Hall-street being due under a charge prior to the Act of 1882 is governed by sect. 130 of the Blackburn Improvement Act 1870, and therefore has priority over the defendant's mortgage. The other item of 16*l.* 6*s.* 8*d.* in respect of Eccles-street is due under a charge made under the Act of 1882, and therefore by sect. 246 of that Act is postponed to the defendant's mortgage. The plaintiffs, however, rely upon the provisions of sect. 247 of the Act of 1882. By this section "successive owners" are to be liable in actions at law for the expenses incurred by the corporation. The defendant being a mortgagee in possession is a "successive owner" within the meaning of the Act, and is therefore liable. By sect. 3 the word "owner" has the same meaning as that which it has in the Public Health Act 1875, which would clearly cover a mortgagee in possession. On reference to sect. 237 it will be seen that a mortgagee in possession may add to the principal debt any money paid by him in respect of charges and expenses recoverable by the corporation and from the mortgagor. This would seem to show that the Legislature contemplated mortgagees in possession making payments in respect of improvements as "owners" under sect. 247. Assuming the defendant to be a "successive owner" the next question is whether the plaintiffs' only rights are under the charging agreements. It is submitted that this is not so, and that the plaintiffs were meant to have two remedies, the one under sects. 245 and 246 upon the charging agreement, the other by action at law under sect. 247. The remedies are concurrent and not alternative:

Tottenham Local Board of Health v. *Rowell*, 15 Ch. Div. 378.

Although the expenses were incurred prior to the Act of 1882, yet as sect. 247 refers to such expenses as are within sect. 245, and as sect. 245 refers to expenses for or in respect of which the owner is liable either under the Act of 1882 or the local Acts, sect. 247 is retrospective and covers the present case.

Neville for the defendant.—The words "successive owners" were not meant to cover the case of a prior mortgagee. The words have reference to a devolution of estate, and refer to succession in point of title and not of time. As to the right of the corporation to sue, it is submitted that it was never meant to give them the double remedy of charge and action at law. The taking of the

charge therefore precludes them from the right of action given under sect. 247. Moreover, this Act is not retrospective, and as all these expenses were incurred prior to the operation of the Act, the plaintiffs cannot avail themselves of the remedies given by it. There are no words making it retrospective, and in the absence of express words to that effect the court should not construe the Act so as to give it a retrospective operation:

Hickson v. *Darlow*, 48 L. T. Rep. N. S. 449; 23 Ch. Div. 692.

Inasmuch as by sect. 1 the rights and remedies in respect of matters done under the previous local acts are expressly kept alive, the inference is that the Legislature never meant to make the Act of 1882 retrospective.

Charles, Q.C. in reply.

DENMAN, J.—In this case, although I have some doubts on the whole, I have come to the conclusion that the County Court judge was right in his decision. There have been two points taken before us, the second of which is well worthy of consideration, and on which I am not quite clear that the judgment should be as I am going to pronounce it. The first point taken is that a mortgagee in possession is not a "successive owner" within the meaning of sect. 247 of the Blackburn Improvement Act 1882. I, however, think that the point has not been established, and that it must fail. I think that the words "successive owners of the lands, houses, or other property for or in respect of which any such expenses as are referred to in the section of this Act of which the marginal note is 'expenses due from owners to be a charge on premises,' have been incurred," do include such a case as that of a mortgagee in possession. If they did not, one would have to draw the line so as to exclude a great many classes of persons who were clearly meant to come within the scope of the Act, such as vendor and purchaser, and the like. An owner has to pay expenses which the public body have been empowered to incur, and a purchaser can make his own bargain, as to who is to bear these expenses, himself or the vendor. It would be idle to suppose that the Legislature meant to have left out that case. Yet, if Mr. Neville's argument is correct, they have done so. It seems to me that the Legislature meant that on the mortgagor being out of possession, and ceasing to be owner, the mortgagee in possession becomes a successive owner within the meaning of the section. That disposes of the first point. The second point is more difficult. It is clear law, as was stated, in the cited case of *Hickson* v. *Darlow* (48 L. T. Rep. N. S. 449; 23 Ch. Div. 692), that Acts of Parliament are not to be construed so as to be retrospective unless it is expressly so stated. But when one looks at the words of this Act, and considers the subject-matter of the enactment, I think one cannot construe them reasonably so as to carry out the obvious intention of the Act without putting in one sense a retrospective meaning on the words. The words are these: [The learned Judge read sect. 247.] In one sense, no doubt, the words are prospective; that is, they cannot apply to past successive owners, and must apply to persons who become successive owners after the passing of the Act. But they are to be successive owners of lands, houses, or other property in respect of which expenses "have been incurred." That presupposes a retrospective action in respect of expenses which have been incurred prior to that time. The question is, what are those expenses? To ascertain that we have to look at sect. 245, which is applicable to expenses in respect of which the owner is liable, "either by application of or agreement with the owner, or by this Act or the local Acts or any of them." The local Acts, to a great extent, ceased to be in force when this Act came into operation, and therefore the expenses there referred to are expenses as to which the operation of this Act is to be retrospective. The argument of the defendant, on this point, is a very good one, yet the words in the section seem to me to be in favour of the plaintiffs. This, in my view, is the answer to the proposition that statutes are not to be construed retrospectively unless so expressly stated. I think, upon the whole, that the true construction is in favour of the plaintiffs, and that the learned County Court judge was right.

DAY, J. concurred.

Solicitor for the plaintiffs, *The Town Clerk of Blackburn.*

Solicitors for the defendant, *Marriott Brothers*, Blackburn.

CROWN CASES RESERVED.

Saturday, Feb. 27, 1886.

(Before Lord COLERIDGE, C.J., MANISTY, HAWKINS, DAY, and GRANTHAM, JJ.)

REG. *v.* PETERS. *(a)*

Bankruptcy Act 1883—*Undischarged bankrupt obtaining credit—Receipt of goods without payment—Absence of stipulation for credit—46 & 47 Vict. c.* 52, *s.* 31.

Where an undischarged bankrupt obtains goods of the value of 20*l. and upwards, without paying for them at the time he obtains them, and without informing the person from whom such goods are obtained that he is an undischarged bankrupt, he is guilty of a misdemeanour under sect.* 31 *of the Bankruptcy Act* 1883, *notwithstanding that the contract may be silent upon the question of credit.*

So held by the majority of the court, Manisty, J. dissentiente.

Held also, by the whole court, that a person may be indicted in England for having, whilst resident therein, obtained credit within the meaning of sect. 31 *of the Bankruptcy Act* 1883, *from a person resident in Ireland at the time such credit was obtained.*

THIS was a case stated by the Recorder of the city and county of Newcastle-upon-Tyne for the opinion of the court for the consideration of Crown Cases Reserved, from which it appeared that the prisoner was tried at the Epiphany Quarter Sessions for that city and county on the 12th Jan. 1886, on an indictment which charged that he, being an undischarged bankrupt who had been adjudged bankrupt pursuant to the Bankruptcy Act 1883, unlawfully and with intent to defraud did obtain credit to the extent of twenty pounds and upwards from one William Carson, of Dreen, in the county of Antrim, in that

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

part of the United Kingdom called Ireland, who at the time was carrying on business as a farmer at such place, without informing the said William Carson that he, the said John Peters, was an undischarged bankrupt when he so obtained credit or previously thereto contrary to sect. 31 of the Bankruptcy Act.

The prisoner was adjudicated a bankrupt on the 25th Feb. 1884, and remained an undischarged bankrupt. On the 27th Aug. 1885, the prisoner wrote from Newcastle-on-Tyne to William Carson, who resided in the county of Antrim in Ireland, a letter, in which he expressed a wish to be informed the lowest price Carson would take for a black cob he had to sell, the cob to be put on board the steamer at Larne. Inclosed in the letter was a card on which the prisoner represented himself as a hay and corn merchant of Ord-street, Newcastle-upon-Tyne, wholesale and retail.

In answer to the prisoner's letter, Carson, on the 1st Sept. 1885, wrote that he would take 22*l.* for the cob, such price to be free of expenses from Ireland, and added, "if you think of him I will see him on the boat safely at Larne, and will have everything done for you as cheaply as I can."

The prisoner, on receiving the letter of the 1st Sept. despatched the following telegram from Newcastle:

From J. Peters, Ord-street, and 8, Stanton-street, Newcastle, to W. Carson, Dreen Cally Backey, Co. Antrim.—Your letter received; please send the horse to catch the steamer at Larne to morrow afternoon by the narrow gauge, Ballymena.

On receipt of such telegram, and on the 3rd Sept. 1885, the horse was put on board a steamer at Larne, in Ireland, as directed by the prisoner, who paid the carriage to a railway company in Newcastle, on the 4th day of Sept., on which day the horse duly arrived at Newcastle, and was delivered by them to the prisoner, who immediately afterwards sold the horse for his own benefit, and the price thereof had never been paid by the prisoner to Carson.

The prisoner did not at any time disclose the fact that he was an undischarged bankrupt.

In consequence of his not having received payment for the horse, on the 13th Oct. Carson came to England, and went to prisoner's private address in Stanton-street, Newcastle, saw the prisoner, and demanded payment, but was refused payment, no reason or excuse being alleged for nonpayment.

Upon the above facts it was contended, on behalf of the prisoner, that there was no evidence to go to the jury that he had obtained credit within the meaning of sect. 31 of the Bankruptcy Act 1883, and that if he had obtained credit, such credit was not obtained within the city of Newcastle, but outside the jurisdiction of the court, viz., in Ireland, to which the Act did not apply.

The Recorder overruled the objections, and held that there was a case for the jury, who found the prisoner guilty.

The question reserved by the case was whether there was evidence to go to the jury of an offence committed by the prisoner under the 31st section of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52) within the jurisdiction of the learned recorder.

Sect. 31 of that Act enacts as follows:

Where an undischarged bankrupt who has been adjudged bankrupt under this Act obtains credit to the extent of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanour, and may be dealt with and punished as if he had been guilty of a misdemeanour under the Debtor's Act 1869, and the provisions of that Act shall apply to proceedings under this section.

J. L. Walton, for the prisoner, contended that in order that there should be an obtaining credit it was necessary that there should be a right to defer payment obtained by the terms of the contract, and that where such right was absent the purchaser was merely not called upon to pay owing to the kindness of the vendor. From the definition of credit given by Locke cited in Johnson's Dictionary, it was clear that there must be a time limited during which credit should be allowed, whereas here there was no time limited; the transaction, therefore, was, commercially speaking, a cash transaction. [Hawkins, J.—The credit is given for an unascertained period is it not?] No; a purchaser may enjoy credit without credit in fact having been given him, and unless a purchaser makes it a condition that he is allowed credit he does not obtain credit within this section. If the contention of the other side was correct, the offence was complete when the horse was placed in the steamer at Larne, and the prisoner liable to be convicted, although he was able and willing to pay for the horse immediately he received it in Newcastle. Assuming that the prisoner had obtained credit, still there was no jurisdiction in this country to try the offence, for the Bankruptcy Act 1883 does not extend to Ireland, and the credit was obtained in Ireland immediately the horse was delivered to the prisoner's agents, the carriers: (*Reg.* v. *Jones*, 1 Den. C. C. 551; Russell on Crimes, 5th sect., vol. 2, p. 583.)

Joel, for the prosecution, was only required to argue upon the first point raised for the defence, and contended that the contract was complete immediately the prisoner despatched the telegram accepting the vendor's terms; at that moment the parties were *ad idem*, and the property passed. There was, therefore, nothing left to the vendor but the right to stoppage *in transitu*; the prisoner necessarily enjoyed credit, and, whether it was stipulated for or not, if he actually enjoyed it he obtained credit within the meaning of the section.

Walton in reply.

Lord Coleridge, C.J.—We are all of opinion that as regards the second point it must be decided in favour of the conviction. The question is, where the indictment should have been laid. It charges the prisoner that he being an undischarged bankrupt obtained credit to the extent of 20*l.* and upwards from a person in Ireland, and we are all of opinion that the prisoner obtained credit (if at all) in Newcastle. It appears that the prisoner lived in Newcastle; that he wrote to Carson from that city and received the answers to his letters in that city; and further, that he ordered the horse to be sent to Newcastle, and received it there. No question is raised by the case as to whether, if the offence was committed in Ireland, the prisoner could have been indicted in that country, and it is therefore unnecessary to decide that point, at the same time we do not say that an indictment would not have lain in Ireland

under such circumstances. But the prisoner having, in our opinion, obtained credit in Newcastle, we are of opinion that so far the conviction is right. The other question is perhaps the more important one, and turns upon the following facts: [States the facts.] Now, when the contract contained in the correspondence was made the prisoner was an undischarged bankrupt, and it is for us to decide whether under these circumstances he obtained credit in respect of this horse. On behalf of the prisoner it is said that, there being no stipulation with regard to the time of payment, there was no obtaining credit; that in the absence of such a stipulation the contract was necessarily for immediate payment; that a cash transaction could not be an obtaining credit within sect. 31 of the Bankruptcy Act 1883, merely because, as a matter of fact, no money was paid, and that it could not be intended that a person who got an article without expressly stipulating for credit was to be said to have obtained credit within the meaning of that section. In support of this contention sect. 11 of the Debtors Act 1869 was cited, which contains the following words: "obtains any property on credit, and has not paid for the same," and it was said that the section under consideration was intended to prevent the obtaining a regular mercantile credit, and not merely an isolated instance of obtaining goods without payment. Against that contention are the words of the section themselves, however, and we must bear in mind that it is very undesirable to take words in an Act of Parliament and construe them in other than their ordinary sense, unless they are clearly intended to be so construed. Now, the words of the section are "obtains credit," and the question is, did the prisoner obtain credit? It is said that because he did not stipulate for it he did not obtain it, but the section does not say that he must stipulate for credit, nor does it require a special contract that credit is to be given; and where, as here, there has been a substantial time when the goods have been unpaid for I think that credit has been obtained. I am quite aware that meanings in dictionaries must not be taken as authoritative exponents of words in Acts of Parliament, but it is a well-known rule that such words should be read as used in their ordinary sense, unless the context shows otherwise, and we may therefore look to dictionaries in order to ascertain what is the ordinary meaning of words. Now, I find in Johnson's Dictionary that credit is the correlative of debt, and here a debt was clearly created by the prisoner obtaining the horse without paying for it, and therefore the prosecutor Carson gave credit to the prisoner. Again, credit is defined by Webster to be "trust, the transfer of goods in confidence of future payment," which definition seems peculiarly applicable to the present case, where the horse was delivered by Carson in reliance upon the probity of the prisoner. This section is no doubt a strong interference with commercial transactions, but it is only the transactions with undischarged bankrupts which are affected, and they are interfered with whether they are small or large transactions. That the Act does affect large transactions as well as small should not, in my opinion, affect our decision; and if we find that the Act can be fairly said to interfere with small transactions, it may also be fairly said that it interferes with large ones. Did the Act prevent an undischarged bankrupt from obtaining the necessaries of life without stating his position it would be an intolerable state of affairs, but that is not the fact, for it only makes the obtaining credit under such circumstances to the extent of 20*l.* and upwards an offence. Had the prisoner here stated his position it is clear he would not have obtained the horse, and he therefore came not only within the plain words of sect. 31 but also within the mischief which that section was intended to meet. It seems to me that the fair meaning of the words "obtains credit" is where a person obtains goods without payment and without stating that he is an undischarged bankrupt. My brothers Hawkins, Day, and Grantham concur with me in this opinion, and we are therefore of opinion that this conviction should be affirmed.

MANISTY, J.—It is with great regret that I am obliged to differ from the judgment of the rest of the court; and I do so first, upon the ground that in my opinion the prisoner did not in this case obtain credit. Credit was never given, nor was the prisoner at any moment entitled to it. Upon the delivery of the horse on the steamer at Larne, there became a debt due, for which the prisoner could have been sued at any moment. I quite agree that the words of an Act of Parliament should be construed in their ordinary sense, except when it is clear that a limited and special meaning is intended to be attached to them. But in this case it appears to me that the ordinary sense of the words in this section is not that which has been attached to them. In my opinion they mean a credit transaction, as distinct from a cash transaction; and this is shown by comparing them with the words of sect. 11 of the Debtors Act 1869. In my opinion the buying of goods with a stipulation for credit is what is intended to be prevented, and it is not intended to affect a cash transaction. Otherwise, the result would be that the prisoner would have been guilty of a misdemeanour, even supposing that he had paid for the horse immediately upon its arrival in Newcastle. That is a result which I do not think the Legislature could have contemplated. Had the words "unless the jury is satisfied that he had no intent to defraud," which are used in sect. 11 of the Debtors Act 1869, been inserted, the onus would have been upon the prisoner of disproving any fraudulent intention. But I cannot think that it was ever intended to make it a misdemeanour for a man to order a horse for 22*l.* without disclosing the fact of his being an undischarged bankrupt, if he subsequently paid for the horse; or even that he should be guilty of an offence if, at the time of ordering the goods, he is able to pay for them, and honestly intends to do so. In construing the section, I think we ought to take this result into consideration; and I am therefore of opinion that the section is only intended to meet the case where a credit transaction is entered into by an undischarged bankrupt without disclosing the fact of his being an undischarged bankrupt. In my opinion this conviction should be quashed.

Conviction affirmed.

Solicitor for the prosecution, *The Solicitor to the Board of Trade.*

Solicitor for the prisoner, *T. Cray*, for *Dix* and *Warlow*, Newcastle-upon-Tyne.

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 21, 23, *and Dec.* 18, 1885.

(Before Lord ESHER, M.R., COTTON and BOWEN, L.JJ.)

THE VESTRY OF ST. JOHN, HAMPSTEAD, *v.* COTTON. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Metropolis—Management Acts—"Street"—"New street"—Sewer—Expense of construction—18 *&* 19 *Vict. c.* 120, *s.* 250—25 *&* 26 *Vict. c.* 102, *ss.* 52, 53, 112.

Sect. 53 *of the Metropolis Management Amendment Act* 1862 (25 *&* 26 *Vict. c.* 102), *dealing with the expense of constructing sewers in streets where previously there had been no sewer, and containing a proviso that no property in respect of which sewers rates have been levied for five years prior to the* 1*st Jan.* 1856 *shall be charged, applies to new streets.*

Defendant was the owner of property in respect of which sewers rates had been levied for five years prior to the 1*st Jan.* 1856, *and which abutted on a road in which there was no sewer. In* 1872 *the road ceased to be a turnpike road. Afterwards the vestry constructed a sewer in the road, and claimed from defendant an apportioned part of the expense.*

Held, that when the road ceased to be a turnpike road it became a "street" within the meaning of sect. 250 *of the Metropolis Management Act* 1855, *and therefore, having been formed after the* 7*th Aug.* 1862, *was a "new street" within the meaning of sect.* 112 *of the Act of* 1862; *that sect.* 52 *of that Act did not apply, and defendant was exempted from all liability by the proviso in sect.* 53.

Judgment of Pollock, B. and Manisty, J. reversed.

SPECIAL CASE stated in an action brought to recover the portion alleged to be payable by the defendant of the expense of constructing a sewer.

1. The defendant is owner within the meaning of the Act 25 & 26 Vict. c. 102 (subject to the questions arising on this special case) of certain messuages or dwelling-houses, lands, and hereditaments mentioned in the apportionment hereinafter referred to as follows:

	Feet of frontage. ft.	in.	Amount apportioned. £	s.	d.
Dent de Lion Road	40	0	39	6	3
Kingsgate Lodge	190	6	187	6	6
Private road to Kingsgate Lodge	13	6	13	5	6
Land extending southward from the boundary of the parish of Hendon	1953	0	1920	9	0

The messuages, lands, and hereditaments abut on the east side of Edgware-road, in the parish of St. John, Hampstead. The boundary between that parish and the parish of Willesden runs down the centre of the Edgware-road for a considerable distance, including that part of the road whereon the land and hereditaments of the defendant abut, and where the sewer hereinafter described was constructed.

2. Edgware-road was in existence during the reign of Queen Elizabeth, and in her reign estates were settled by one John Lyon, the founder of Harrow School, for the maintenance of the road as a roadway for traffic from the town of Edgware to London.

3. Subsequently, in the year 1610, Edward Harvist gave certain lands to trustees to employ the rents and profits in repairing the Edgware-road. By the Metropolis Roads Act 1826 the said road and other roads in the neighbourhood of the metropolis north of the river Thames were placed under the care of certain commissioners appointed under that Act, and under that Act and the Metropolis Road Act 1829 the rents and profits of the lands given by Lyon and Harvist as aforesaid became payable to those commissioners, and from the time of the passing of those Acts tolls were collected on the road by the commissioners. Subsequently, by the Metropolis, Kilburn, and Harrow Roads Act 1872 (35 & 36 Vict. c. xlix.), the income from the above-named estates was divided in certain proportions amongst the parishes in which the Edgware-road was situated, and the vestry have, since the year 1872, received and do now receive their proportion thereof. By the last-mentioned Act the Edgware-road ceased to be a turnpike road, and was made a public or common highway. The road was to be maintained and repaired by the parishes in which it is situated, in accordance with schedule C. to the above Act. In pursuance of resolutions passed by the plaintiffs, a brick sewer, with all necessary gullies and side entrances, was constructed by them in that portion of the Edgeware-road which is situate within the parish of St. John, Hampstead, and abuts on the defendant's lands. The construction of the sewer was completed in 1883, previously to which there had been no sewer in this part of the Edgware-road. The sewer was constructed for the purpose of draining houses and other erections within the plaintiff parish then erected, or thereafter to be erected, on the aforesaid lands of the defendant and other lands abutting on the east side of Edgeware-road aforesaid. The house and premises known as Kingsgate Lodge were erected about the year 1838 by a predecessor in title of the defendant. There are no houses at present erected fronting on to the Edgware-road, or draining into the sewer on the pieces of land hereinbefore mentioned to have a frontage thereto of 1953 feet, and these pieces of land remain fenced off from the Edgware-road by a hedge and ditch which have existed for very many years. The last-mentioned pieces of land contain together about thirty-four acres, and are bounded towards the east by the main line of the Midland Railway Company, and may, and probably will, within a few years be laid out and become available as a building site, and the plaintiffs, in view of such contingency, but not at the request of the defendant, constructed the sewer of a larger size than would have been necessary for the drainage of existing buildings.

4. The Dent de Lion-road was made some years since by the defendant or his predecessor in title, in order to the development of his estate as a building estate, and the erection of houses and other buildings on the same. The road is at right angles to the Edgware-road, and leads therefrom to another road called the Fordwych-road, also

(*a*) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

made by the defendant or his predecessor in title, and intersecting the estate in a direction more or less parallel to the Edgware-road. The Fordwych-road terminates at the north end in an old highway called Mill-lane, and at the south end in Maygrove-road, both leading out of the Edgware-road. Two stables have been erected on the side of the Dent de Lion-road, but no other building has yet been erected thereon, and a great number of houses have been erected on the side of Fordwych-road, to which the Dent de Lion-road forms, or, when open, will form, one of the principal means of access from the Edgware-road. The Fordwych and Maygrove roads are all open roads, and no rent or other payment is made to the defendant or any other person for the use thereof, or of the Dent de Lion-road. Maygrove-road and a part of Fordwych-road are, and have been since they were constructed, in fact, public highways so far as the defendant and his predecessor in title by any act of theirs could dedicate them to the public, and were constructed before the sewer was constructed. Dent de Lion-road was also made before the construction of the sewer, and was then and has ever since remained open and dedicated to the public in like manner as aforesaid, except that a temporary and movable barrier has been recently erected across the same at a point about twenty yards from the Edgware-road by an adjoining owner, and with the tacit assent of the defendant, in order to prevent trespass by gipsies and others on the open land. The Dent de Lion-road was approved and allowed by the Metropolitan Board of Works to be formed and laid out as a new road on the 15th Dec. 1882. Dent de Lion-road has never been, and only a small part of Fordwych-road has been taken to or repaired by the plaintiffs, or by any road authority, as a public highway.

5. Sewers rates were levied for five years prior to the 1st Jan. 1856, in respect of the whole of the property, of which the defendant is such owner as aforesaid.

6. The total cost of the said brick sewer was ascertained and fixed at the sum of 5329*l.* 3*s.* 6*d.*, and the plaintiffs have resolved that the vestry should and would bear one-third part share, and they have paid the same out of rates levied by them according to law.

7. The plaintiffs have further resolved that the remaining two-third parts should be borne and paid by the landowners in the parish of St. John, Hampstead, in proportion to their frontage on the sewer, to be paid by them in one sum.

8. The amount payable by the defendant in proportion to his frontage, if he is liable in respect of the whole thereof, is 2162*l.* 0*s.* 5*d.*

The question for the opinion of the court was, whether the sum of 2162*l.* 0*s.* 5*d.*, or some part thereof, was due and payable by the defendant to the plaintiffs.

The case was heard on the 21st May 1885, before Pollock, B. and Manisty, J., who held, on the authority of *Plumstead Board of Works* v. *British Land Company* (32 L. T. Rep. N. S. 94; L. Rep. 10 Q. B. 203), that, as to the sum of 39*l.* 6*s.* 3*d.* charged in respect of the forty feet frontage to the Dent de Lion-road, the defendant was not liable; but, with regard to the remainder of the plaintiff's claim, that the case was governed by *Sawyer* v. *Vestry of Paddington* (33 L. T. Rep. N. S. 662; L. Rep. 6 Q. B. 164), and gave judgment for the plaintiffs.

The defendant appealed.

The following are the statutory provisions on which the decision of the Court of Appeal turned:—

By the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), s. 2, where any sewer is constructed for the drainage of any "new street," the expense of constructing the sewer is to be defrayed by the owners of the street and of the land bounding or abutting on such street.

By sect. 53, where a sewer is constructed in a street in which previously there had been no sewer or only an open sewer, but where sewers rates have been levied previously, the expense is to be defrayed in part only by the owners of the houses situate in and of the land bounding and abutting on such street:

> Provided that no street or property in respect of which sewers rates have been levied for five years prior to the 1st day of January 1856 shall be subject to be charged under the provision contained in this section.

By sect. 112:

> The word "street" shall be deemed to apply to and include the subject-matters specified in sect. 250 of the Metropolis Management Act 1855. . . . The expression "new street" shall apply to and include all streets hereafter to be formed or laid out (*i.e.*, after the 7th Aug. 1862).

By the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 250:

> The word "street" shall apply to and include any highway, except the carriage way of any turnpike road.

Nov. 21 *and* 23.—*Lumley Smith*, Q.C. and *J. G. Wood*, for the defendant, in support of the appeal.—The defendant is not liable to any part of these expenses. In the first place, the Edgware-road at the place in question is not a "street" within the meaning of the statutes. If this view is not correct, it is a "new street," and the defendant is exempted by the proviso in sect. 53 of the Act of 1862, because sewers rates had been levied for five years prior to the 1st Jan. 1856. The word "street" in sect. 53 is large enough to include new streets, and there is nothing to limit it to old streets. This is the correct construction, and was adopted by the Court of Exchequer in *Vestry of St. Giles, Camberwell*, v. *Weller* (L. Rep. 6 Q. B. 168, note), and by the Court of Appeal from inferior courts in *Sheffield* v. *Fulham Vestry* (1 Ex. Div. 395).

Philbrick, Q.C. (*W. English Harrison* with him) for the plaintiffs.—The road became a "street" in 1872, when it ceased to be a turnpike road, and therefore is a "new street" by sect. 112 of the Act of 1862:

> *Robinson* v. *Local Board of Barton Eccles*, 46 L. T. Rep. N. S. 193; 47 L. T. Rep. N. S. 286; 50 L. T. Rep. N. S. 57; 21 Ch. Div. 621; 8 App. Cas. 798.

The defendant is liable under sect. 52, which expressly applies to "new streets." Sect. 53 uses the word "street," and must be taken to apply to something different from sect. 52; it therefore does not include new streets. This was decided by the Court of Queen's Bench in *Sawyer* v. *Vestry of Paddington* (23 L. T. Rep. N. S. 662; L. Rep. 6 Q. B. 164).

Lumley Smith, Q.C. replied.

Cur. adv. vult.

Dec. 18.—The following judgments were delivered:—

Lord ESHER, M.R.—The defendant, who is appealing from a judgment by which he has been held liable to pay for part of the cost of a sewer, is the owner of land bordering on the Edgware-road. That road was formerly a turnpike road, but when the turnpike was abolished it became a mere highway. The defendant, therefore, is the owner of land bordering on a highway. The sewer in question is intended to be used for the draining of the houses which will be built in the neighbourhood, and it drains the houses now existing. The defendant owns a long strip of land by the side of the highway, which is not built on, and that part of the highway would hardly be called a street in the ordinary sense. The order for payment of the cost of the sewer was made under sect. 52 of 25 & 26 Vict. c. 102. It is argued for the defendant that the road is not a "street," and that if it is a "street" it is a "new street," because the turnpike has been taken away since 1862, and that the last clause of sect. 53 exempts him from liability. The question what is a "street" depends on sect. 112 of the same Act, and sect. 250 of the Act of 1855 (18 & 19 Vict. c. 120). Reading the definition contained in those sections, it seems to me that this road is a highway, and therefore the moment it ceased to be a turnpike road it became a "street." The road also seems to me to be a "new street" within the meaning of sect. 112, because the turnpike has been abolished since 1862, and I think also that it was a street in which there had previously been only an open sewer, or, if this was not so, there was no sewer. The question therefore turns on sect. 53, and it comes to this, whether we ought to follow the decision of the Court of Queen's Bench in one case, or the decisions of the Court of Exchequer and the Court of Appeal from iuferior courts in two cases as to the meaning of sect. 53. What we have to determine is, whether that section includes and applies to "new streets" as well as other streets. I think we ought to read the language of the statute in its natural sense unless there is something to show that it ought to be read in some different sense. The word "street" would *primâ facie* include all streets whether old or new, and the words of sect. 53 are, "Where any sewer shall be constructed . . . . in a street." I find nothing to justify us in reading the language otherwise than according to its ordinary meaning, or inserting the word "old" before the word "street." If this is so, it becomes immaterial to consider whether the Edgware-road is an old or new street, for the provisions of sect. 53 apply equally to both kinds of streets. We have to choose between the decision of Bramwell, B. and Denman, J. in *Sheffield* v. *The Fulham Board* (1 Ex. Div. 395), and that of Blackburn and Lush, JJ. in *Sawyer* v. *The Vestry of Paddington* (23 L. T. Rep. N. S. 662; L. Rep. 6 Q. B. 164), and for the reasons I have given I agree with *Sheffield* v. *The Fulham Board*, and dissent from the view adopted by the Court of Queen's Bench. It follows that the defendant in the present case is not liable, and the judgment of the Divisional Court, so far as it is in favour of the plaintiffs, must be reversed.

COTTON, L.J.—I am of the same opinion. There are two points: first, whether this road is or is not a "street" within the meaning of the statutes; and, if it is, secondly, whether it comes under sect. 52 or sect. 53 of the Act of 1862. I agree with the Master of the Rolls that the road is not what is called a street in ordinary language, but that when the turnpike was taken away it came within the definition in sect. 250 of the Act of 1855, and so became a "street" within the meaning of the statutes. Then we find that there are conflicting decisions as to the construction of sect. 53, and we must adopt the view which we think correct. If sect. 53 only applies to an old street, then sect. 52 will apply to the road in question, which is a "new street." In support of this view it is urged that, because sect. 52 applies expressly to "new streets," it must have been intended that sect. 53 should apply to something different, and therefore the latter section applies only to old streets. But, if sect. 53 is construed according to the ordinary meaning of the language used, it will apply both to old and new streets—not to all old or all new streets, but only to such streets as are specified in the section. I think it is a reasonable construction to hold that sect. 52 applies to "new streets" generally, except such "new streets" as come within the terms of sect. 53. I am, therefore, of opinion that sect. 53 does apply to the present case, and, as it is stated in paragraph 5 of the special case that sewers rates were levied for five years prior to the 1st Jan. 1856, the proviso at the end of the section exempts the defendant from liability, and this appeal ought to be allowed.

BOWEN, L.J.—I am of the same opinion. This is not a street in the popular sense of the term but the Legislature has included under the definition of "street" not only that which is a street in the popular sense, but also those roads which have become streets by virtue of the statutes, and this highway became a "street" when the turnpike was taken away. Then we have to decide whether this "street" falls under sect. 53 of the Act of 1862 or not. According to the plain meaning of the words, if we read in nothing that is not in the section, it would be included; and I think we ought never to read in words that do not occur in a statute unless driven by necessity, which is not the case here. I therefore prefer the decisions of the Court of Exchequer and of the Court of Appeal from inferior courts to the decision of the Court of Queen's Bench; and I agree with the Master of the Rolls and Cotton, L.J., that the defendant is not liable, and is entitled to judgment.

Appeal allowed.

Solicitor for the plaintiffs, *W. Gribble.*

Solicitors for the defendant, *A. F.* and *R. W. Tweedie.*

Wednesday, March 24, 1886.

(Before Lord ESHER, M.R., and LINDLEY and LOPES, L.JJ.)

THE MIDLAND RAILWAY COMPANY (apps.) *v.* WATTON (resp.).(*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Local government—Street—Private road—Turnpike road—Apportionment by surveyor, dispute as to—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 4, 150, 179, 257, 268.

The appellants, being frontagers upon a road, were summoned by the urban authority for the nonpayment of the proportion of the expenses of levelling, paving, &c., the road, apportioned by the surveyor of the local board as payable by them. There were on one side of the road buildings and lines of rails, and on the other side continuous rows of houses and shops, the only access to which was over the road. The proprietors of the road had erected gates or bars at several places along the road, at which they took tolls for vehicles, horses, and cattle passing along the same. Such tolls were not taken by virtue of any Act of Parliament. The proprietors had executed whatever repairs had been done to the road for thirty years.

Held, that the road in question was a street within the meaning of sect. 150 *of the Public Health Act* 1875.

Held further, that if the appellants disputed the amount of frontage upon which they were liable to contribute, their proper and only course would have been, within three months of service of the notice, to have disputed the apportionment, and either to have gone to arbitration or to have appealed to the Local Government Board, under sect. 179 *or sect.* 268 *of the Public Health Act* 1875, *and therefore evidence to show that the apportionment was incorrect was rightly rejected.*

Judgment of Mathew and Smith, JJ. affirmed.

THIS was a special case stated by the police magistrate for the district of West Ham, in Essex, sitting at the West Ham Police-court, under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49.

1. The appellants were summoned by the respondent, who was a collector of the West Ham Local Board, duly authorised in that behalf, for nonpayment of the sum of 1386*l.* 14*s.* 10*d.*, the particulars of the respondent's claim being as follows: North Woolwich-road, being a street within the urban district of West Ham, in the county of Essex, not having been levelled, paved, metalled, flagged, channelled, and made good to the satisfaction of the West Ham Local Board, being the urban authority for the said district, and the said local board having by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such part of the said street so required to be levelled, paved, metalled, flagged, channelled, and made good, required them to level, pave, metal, flag, channel, and make good the same, within the time specified in such notice; and such notice not having been complied with, the said local board directed their surveyor to apportion the estimated expenses of so levelling, paving, metalling, flagging, channelling, and making good such street, among the said owners or occupiers of premises so fronting the same, and the said surveyor did settle the proportion of such aforesaid expenses payable by the said appellants as being owners of premises fronting, adjoining, or abutting upon the before-mentioned street in default as aforesaid, according to the frontage of their said premises, at the sum of 1386*l.* 14*s.* 10*d.*, and on the 1st Feb. 1885 a notice was served upon the appellants demanding payment of the said sum of 1386*l.* 14*s.* 10*d.* which the appellants had neglected to pay.

2. At the hearing of the said summons the said magistrate made the order for payment asked for, dated the 8th Aug. 1885, and the appellants having duly asked him to state a case for the opinion of the Queen's Bench Division he refused so to do, and on the same day he gave a certificate as required by the statute 42 & 43 Vict. c. 49, and 20 & 21 Vict. c. 43, that the application of the appellants was merely frivolous. The Queen's Bench Division having made an order that he should, upon two of the questions raised by the appellants, namely, those hereinafter submitted, state a case for the opinion of the said court, he thereupon stated the same.

3. The proceedings taken against the appellants were under the provisions of the Public Health Act 1875, and of the 30th section of the Local Board of Health for West Ham in Essex Extension of Powers Act 1867, a copy of which section of the last-mentioned Act is as follows:

> When the said board shall, under the provisions of the 69th section of the Public Health Act 1848, have given notice in writing to the owners or occupiers of the premises fronting, adjoining, or abutting on any street, or any part thereof, requiring them to sewer, level, pave, flag, or channel such street, or any part thereof, and such notices, or any of them, have not been complied with, it shall be lawful for the board to direct their surveyor to apportion the estimated expenses of sewering, levelling, paving, flagging, or channelling such street, or the part or parts thereof requiring to be so sewered, levelled, paved, flagged, or channelled, including the cost of paving the point at the intersection of streets, and all other incidental costs and charges, among the said owners or occupiers of the premises so fronting, adjoining, or abutting on the said street, or such parts thereof so requiring to be sewered, or otherwise made good as aforesaid, and such expenses so apportioned may be recoverable either before the work shall be commenced, during its progress, or after its completion, and the same may be recoverable from the present or any future owner, either by action at law or in a summary manner before a justice or justices of the peace at the option of the said board.

All the proceedings with regard to notice to repair and notice of the apportionment and demand of payment were duly taken, and the date of the said notice of apportionment and demand was the 14th Feb. 1885.

4. The North Woolwich-road is a road which runs in a south-easterly direction from the Barking-road, in the said district, to North Woolwich beyond the said district, and so far as relates to these proceedings, ends at the boundary of the said district. There are on the southern side, for so much as is in the said district, buildings and lines of rails. On the opposite side of the road there are in many places continuous rows of houses and shops, the only access to which, except in places where there is a dedicated footpath, is over the said road, and these roads are intersected by streets at right angles to the said road. The said road leads from and through

(*a*) Reported by F. A. CRAILSHEIM and P. B. HUTCHINS, Esqrs., Barristers-at-Law.

a populous part of the district of West Ham to the docks and warehouses of the London and St. Katherine Docks Company.

5. The appellants are the owners of land and premises fronting, adjoining, or abutting on the said road.

6. It was proved and found that an association of gentlemen, called the North Woolwich Land Company, who were the proprietors of the road in question, had erected gates or bars at several places along the said road at which they demand and take sums of money, fixed from time to time by the said company, from persons using the carriage way for vehicles, horses, and cattle. It did not appear that the North Woolwich Land Company ever exercised any choice or restriction in the kind of traffic passing along the road, or that they ever refused permission to anyone to pass, so long as such sums of money were paid. There was evidence that omnibuses were accustomed to pass along the road. Foot-passengers are not charged, but use the footway without interference. The said North Woolwich Land Company have from time to time executed whatever repairs were done to the road, and have taken the sums of money aforesaid for a period of about thirty years. It was also proved that some owners of frontage of land pay equally with the public, but other such owners do not, and that the gates were existing and the moneys taken at the time of the proceedings. It was proved that such moneys were not taken by virtue of any Act of Parliament, but no evidence was given as to the authority of the said North Woolwich Land Company to erect these gates or to take the moneys, nor of there being any obligation on them to repair the road. The road was made about thirty years ago.

7. The appellants contended that the road was not a street within the meaning of the Public Health Act 1875, sect. 150, and the above-mentioned Local Board of Health for West Ham in Essex Extension of Powers Act 1867, sect. 30, and that the word street in these sections was not applicable to a private road over which the owners of frontage land had no right of user, and which neither they nor the local board had any legal right to enter upon, or to do thereon the work for which the money was demanded, and where the repairs, if executed, would not be for the benefit either of these owners or of the general public, but would only relieve the North Woolwich Land Company of the expense of repairing their private road.

8. The magistrate found as a fact that the North Woolwich-road was a street, and was not a highway repairable by the inhabitants at large. He also found as a fact that the road was not a turnpike road.

9. A further objection was taken on the part of the appellants which affected them only, and not the other landowners. They contended that the amount apportioned by the surveyor to be paid by them could not be recovered, because (as they said) they had been assessed in respect of a large frontage, part of which was separated from the said road by the Great Eastern Railway in one place, and part in another place by the embankment that raised the road and the railway to the level necessary for passing over a swing bridge, and they put in a letter which was as follows:

Derby, March 27, 1885.—Dear Sir,—Referring to the notices dated the 4th Dec. 1884 and the 16th Dec. 1884, relative to the repairs of the North Woolwich-road, I beg to inform you that this company objects to pay any portion of the cost of the road which is cut off from their property by the docks branch of the Great Eastern Railway.—Yours truly (Signed) J. T. GRATTON. F. E. Hilleary, Esq., 5, Fenchurch-buildings, London, E.C.

The notices referred to in this letter were notices to make good the road in front of the appellants' premises. The letter contains no reference to any apportionment of expenses.

10. The magistrate held that this letter, though written within three months of the date of the apportionment, was not a dispute of the apportionment within the meaning of the 257th section of the Public Health Act 1875, and that the appellants had not taken the necessary steps to contest the apportionment either by proceeding under the 179th section, which refers to arbitration, or by appealing to the Local Government Board under the 268th section, and that the mere writing of this letter was not sufficient. He therefore found that they were concluded by the apportionment, and he declined to hear any evidence in contradiction of the apportionment, nor would he allow the appellants to give evidence, though tendered by them, as to the nature and position of their property, or of the line of the Great Eastern Railway Company, or of the embankment before referred to, or to prove that part of their property was not fronting the said road, or in any other way to show that they had been, in respect of such part of their property assessed as owners of land fronting the said road, whereas (as they said) they were not so within the meaning of the above-mentioned Acts.

It was not disputed that the appellants were the owners of some land fronting the road, and the magistrate considered that the evidence offered merely tended to show that the surveyor had not correctly apportioned the expenses of making good the road, and that this was a matter which he had no jurisdiction to inquire into.

11. The questions for the court are: (1) Was there evidence for the magistrate finding as he did, that the North Woolwich-road was a street? (2) Was he right in holding that the surveyor's apportionment was conclusive? and (3) Was he right in rejecting evidence tendered by the appellants as set forth in paragraph 10?

March 5.—*Castle* (*Jelf*, Q.C. with him) for the appellants. — It is submitted that the North Woolwich-road is not a street, and that therefore the appellants are not within the jurisdiction of the local board. If they are not within the jurisdiction and are mere strangers, then the order of the local board is void:

> *London and North-Western Railway Company* v. *Buckmaster*, 33 L. T. Rep. N. S. 329; L. Rep. 10 Q. B. 444.

A rate is conclusive if there is liability, but the liability may be disputed at any moment. The serious point to be argued in this case is whether the North Woolwich-road is a street or not. The judges have taken many different views, which are quite irreconcilable, as to the question of what is a street. As defined in the interpretation clause (sect. 4) of the Public Health Act 1875, "street includes any highway (not being a turnpike road) and any public bridge (not being a county bridge), and any road, lane, foot-

way, square, court, alley, or passage, whether a thoroughfare or not." The interpretation put by the House of Lords upon that definition is, that it must be taken in the natural and popular sense of the word street:

Robinson v. *The Local Board of Barton-Eccles*, 50 L. T. Rep. N. S. 57; 8 App. Cas. 798;
Pound v. *Plumstead Board of Works*, 25 L. T. Rep. N. S. 461; L. Rep. 7 Q. B. 183, 194;
Baker v. *The Mayor of Portsmouth*, 37 L. T. Rep. N. S. 822; 3 Ex. Div. 157.

The ordinary popular sense of the word "street" is a place laid out by the building owner as a means of access to his property:

Hall v. *The Corporation of Bootle*, 44 L. T. Rep. N. S. 878.

It is submitted that the road in question is not a street, because it is not an access to the houses laid out by the building owner. Moreover, there has been no dedication of this thoroughfare. If, as in this case, a road is barred off at both ends by gates, and people and the owners of the houses have not a right to go through, then it is not a street. A single gate across a street does not bar out the public, but simply makes two alleys abutting on each other. But here we have the public barred out at both ends, which prevents this being a street. The next point is, that this is a turnpike road, being a road over which gates have been erected, and where tolls are taken:

Northam Bridge and Roads Company v. *London and Southampton Railway Company*, 6 M. & W. 428.

The distinctive mark of a turnpike road is the right (not necessarily parliamentary) to turn back anyone who does not pay the tolls. The Act of 4 Geo. 4, c. 95, s. 90, expressly recognises that such roads are turnpike roads. It is also contended that this road never came under the urban authority at all. Sect. 149 of the Public Health Act 1875 says that "all streets being, or which at any time become, highways repairable by the inhabitants at large within any urban district, shall vest in and be under the control of the urban authority;" but there is no section vesting this property in the urban authority. It is therefore submitted that the appellants are not frontagers within the meaning of the Act at all, in respect of two plots of land to which they are assessed; that this is not a street because there is no free access upon it; and that it is a turnpike road. He also cited

Reg. v. *Swindon Local Board*, 40 L. T. Rep. N. S. 424; 4 Q. B. Div. 305.

Wood Hill (*Philbrick*, Q.C. and *Phipson* with him) for the respondent.—This road is a street within sect. 150 of the Public Health Act 1875, though it is not a street within sect. 149, which is a different section, and for a different purpose. The fact that the public may be barred out does not prevent it being a street within sect. 150 of the Act:

Austerberry v. *Corporation of Oldham*, 53 L. T. Rep. N. S. 543; 29 Ch. Div. 750.

There the private owners did exactly what they have done here; they put up toll-bars and exacted tolls. Another authority on the same point is the case of

Taylor v. *Corporation of Oldham*, 35 L. T. Rep. N. S. 696; 4 Ch. Div. 395.

The word "street" in the Public Health Act extends to places which are in all respects private, and over which the public have no right. It has been argued by the other side that, because it had not been dedicated, it was not a street; but the authorities show that dedication is not necessary. There may be a private street; the question whether the public have any rights over it is immaterial:

Vestry of St. Mary, Islington, v. *Barrett*, 30 L. T. Rep. N. S. 11; L. Rep. 9 Q. B. 278.

There need be no dedication whatever to the public, so as to constitute a street within the meaning of the Public Health Act 1875. Again, this is not a turnpike road, because the tolls were not originated by Act of Parliament, nor is it a road vested in trustees by Act of Parliament, whose duty it is to keep it in repair. It is a local Act of Parliament which gives the local board power to do what they have done, and the local board have no power to get the money first; they must do the work and expend the money, and then come upon the frontagers for payment. The appellants have not objected to the apportionment, and the magistrate has nothing to do with the apportionment; no one but the surveyor is the person to make the apportionment. If they object to the apportionment, they are bound to do so within three months, under sect. 257 of the Public Health Act 1875. Then the question of apportionment goes to arbitration, and not before the magistrates at all:

Wake v. *The Mayor of Sheffield*, 50 L. T. Rep. N. S. 76; 12 Q. B. Div. 142.

If the appellants denied that they had any land in the neighbourhood at all, then the case would be one for the magistrate:

Hesketh v. *Local Board of Atherton*, 29 L. T. Rep. N. S. 530; L. Rep. 9 Q. B. 4.

Castle, in reply, cited

West v. *Downman*, 42 L. T. Rep. N. S. 340; 14 Ch. Div. 111.

Mathew, J.—Our judgment must be for the respondent. The first point raised on the special case is, whether the roadway in question is a street within the meaning of the Public Health Act 1875. The question whether it is a street or not is a question of fact to be determined by the magistrate. The magistrate, by the direction of this court, has set out the facts of the case, and has stated to us the grounds upon which he came to the conclusion that this was a street. The case states that: "The North Woolwich-road is a road which runs in a south-easterly direction from the Barking-road to North Woolwich, and so far as relates to these proceedings ends at the boundary of the said district. There are on the southern side, for so much as is in the said district, buildings and lines of rails. On the opposite side of the road there are in many places continuous rows of houses and shops, the only access to which, except in places where there is a dedicated footpath, is over the said road, and these rows are intersected by streets at right angles to the said road. The said road leads from and through a populous part of the district of West Ham to the docks and warehouses of the London and St. Katherine's Dock Company." It also appears that the road is owned by private gentlemen, and that gates and bars have been erected at which have been

demanded sums of money, fixed from time to time by the company, from persons using the carriage way for horses or vehicles, but it does not appear that the North Woolwich Land Company have exercised any choice or restriction in the kind of traffic passing along the road; the foot-passengers are not charged, but are allowed to use the road without interference. Upon these materials the learned magistrate has come to the conclusion that this was a street within the meaning of the Act, and I am clearly of opinion that there are ample grounds to justify this conclusion. A peculiarity about this way, however, is that it is a private way in a certain sense, which it is said prevents its being brought within the operation of the Public Health Act. But it has been held that private roads may become streets, and having become streets, they come under the operation of the Act, and in my opinion such a way as this comes within the interpretation clause contained in sect. 4 of the Act: "A street includes any highway (not being a turnpike road), and any public bridge (not being a county bridge), and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not." Turnpike roads are excepted in that section, and they are extremely rare now, because by statute they are under the jurisdiction of trustees who are bound to repair them, and therefore this is an excellent reason for their exclusion. All we know of this road is, that certain proprietors have chosen to lay it out, and to charge tolls for its use; but it would be incorrect and improper to describe it as a turnpike road of the class exempted by this clause, because there are none of the liabilities of the Turnpike Acts imposed upon the trustees of private roads. So much for the first point. Then it is said that the appellants, though they are frontagers, are not frontagers to the extent to which they have been assessed, and that the magistrate should have held his hand and refused to enforce this order because of their statement, and that he was bound to hear evidence for the purpose of showing whether what they suggested was true or not, and that he should have withheld his jurisdiction in the event of that being established. Under the private Act the expenses of the repair of the road are to be distributed amongst those persons who own property fronting or abutting upon the road, and the extent of their liability is to be ascertained by apportionment, which is the duty of the surveyor. The objection of the company here is, that the apportionment is incorrect, because they are made to bear a part of that which should be cast upon their neighbour. The meaning of that objection most clearly is, that they object to the apportionment. But the Act points out clearly what course should be taken in the event of such objection; they must object to the apportionment, and if they adhere to their objection and insist upon it, they must have recourse to arbitration. If they let the time go by without taking such course, that objection can no longer be maintained. On both points, therefore, it appears to me that the appellants are wrong, and the order of the magistrate must be upheld.

Smith, J.—The first point raised in this case is, whether or not the North Woolwich-road is a street within the meaning of the 150th section of the Public Health Act 1875. There are plenty of facts in the case stated by the magistrate to show that this road is a street within the definition laid down by Lord Selborne in the House of Lords in the case of *Robinson* v. *The Local Board of Barton-Eccles* (50 L. T. Rep. N. S. 57; 8 App. Cas. 798), and Mr. Castle admitted that, if it were not something else, it was a street within the meaning of sect. 150. But it was contended by Mr. Castle that it could not be a street within the meaning of sect. 150, because it was inclosed by some gentlemen some thirty years ago, and because there were gates at each end at which tolls were collected. Speaking for myself I was somewhat taken by that argument; but I am convinced now that I was wrong in allowing myself to be taken in that way, because it seems to me that, when sect. 150 is read carefully, it clearly includes a street either public or private, and although the late Master of the Rolls, Sir George Jessel, decided a case very much like this one, namely, the case of *Taylor* v. *The Corporation of Oldham* (35 L. T. Rep. N. S. 696; 4 Ch. Div. 395), upon the 16th section of this Act, he undoubtedly holds that sect. 150, as well as sect. 16, applies to private as well as public streets, and if it applies to private as well as to public streets, I think it does not make any difference that there are gates at the ends. I am of opinion that *primâ facie* this road comes within sect. 150; but it is said that it is out of it because it is a turnpike road. I cannot accept that argument at all. Sect. 4 of the Public Health Act 1875 says a street shall include any highway, not being a turnpike road. The turnpike there made mention of is a turnpike road well known, formed by Act of Parliament, maintained and regulated by trustees, both as to repair and taking tolls. I am of opinion that there is no ground for saying that this road is a turnpike-road within the meaning of the statute, and it seems to me that the case of *Austerberry* v. *The Corporation of Oldham* (53 L. T. Rep. N. S. 543; 29 Ch. Div. 750) gives us express authority for saying that a road like this is not a turnpike road within the meaning of the Public Health Act 1875. Now we come to the last point. It is said that the Midland Railway Company have been assessed too heavily for the line adjoining and abutting on this road. It is said they have been assessed, we will assume, upon one hundred yards when they ought only to have been assessed upon fifty. The money has been apportioned upon what the surveyor said was their frontage, and they say the assessment is wrong. They ought to have disputed the apportionment and taken the remedy which was open to them, and instead of going before a magistrate, they should have gone to the Local Government Board or to arbitration. But they have done nothing of the sort; they have waited until proceedings were taken, and then they say that the apportionment is wrong. My opinion is that they cannot do that. The case of *Wake* v. *The Mayor of Sheffield* (50 L. T. Rep. N. S. 76; 12 Q. B. Div. 142) shows that the only remedy they have, if they want to dispute their apportionment as being frontagers of some portion of the road, is either by appeal to the Local Government Board or by going to arbitration. I think both points fail, and the appeal should be dismissed.

The Midland Railway Company appealed from this judgment.

March 24.—Jelf, Q.C. and *Castle* for the appellants.—In addition to the authorities referred to in the court below they cited

Lord Pelham v. *Pickersgill*, 1 T. R. 660;
Mayor of Portsmouth v. *Smith*, 10 App. Cas. 364;
Healey v. *Corporation of Batley*, L. Rep. 19 Eq. 375.

Philbrick, Q.C., *Wood Hill*, and *Phipson*, for the respondents, were not called on.

Lord Esher, M.R. — The first question is, whether the North Woolwich-road is a street within the meaning of the Public Health Act. It is necessary to look at the definition given in the statute, and to consider the facts of the case, in order to ascertain whether there was any evidence on which the magistrate could reasonably find that the road in question was a street. The definition given in the Act enlarges the ordinary meaning of the word "street," but in the present case there is no occasion to rely on the enlarging part of the definition, for the question is whether, taking the ordinary meaning of the word, there was evidence on which the magistrate could find that the road was a street. It is a long road with houses and shops at the side of it, and it is used by everybody who chooses to use it. If it is a street in the ordinary sense of the term, then, whether it is private or public property, it is a street within the meaning of the Act. I will assume, for the purpose of this judgment, that it is a private road, but if it is a street within the meaning of the Act it is a street within the meaning of sect. 150, and if that is so the local authority have power to deal with it, and therefore they can order the work to be done and apportion the expenses. Sect. 150 of the Public Health Act does not deal with this particular work, because the expenses had not yet been incurred; but then by sect. 30 of the private Act the local authority had power to estimate the amount of the expenses and treat the case as if the work were already done, and when they did so the owners of the adjacent property were bound to pay a part of the expenses. The appellants here contend that the amount apportioned as their share of the expenses is too much, but, as there was jurisdiction to make the order, their proper remedy was that prescribed by sect. 257 of the Public Health Act. The case comes within the very words of that section, and if the appellants have any ground of complaint they have not given written notice to dispute the apportionment. It is contended that the surveyor has apportioned the amount wrongly, but that is not excess of jurisdiction. Then it is said that the appellants are not adjacent owners, but they own houses along the side of the road, and no doubt either the road was already dedicated, or the local authority will exercise the powers conferred upon them by sect 152 of the Public Health Act. For these reasons I am of opinion that the appeal ought to be dismissed.

Lindley, L.J.—There are three questions to be decided in this case. The first is, whether there is any evidence that the North Woolwich road is a street. Looking at the facts stated in paragraph 6 of the case, I agree with the Master of the Rolls that there is such evidence. Then the second and third questions are, whether the magistrate was right in holding that the surveyor's apportionment was conclusive, and in rejecting the evidence tendered by the appellants. This evidence was tendered to show that the railway company were assessed in respect of land not adjoining the road, and its admissibility would depend on whether the surveyor exceeded his jurisdiction. It is obvious from paragraph 5 of the case that he had jurisdiction to apportion something, and therefore it would only be a mistake in the exercise of his jurisdiction if he fixed too large an amount, and this would not be a ground for holding that the appellants were not liable. This would be so, apart from the decision in *Wake* v. *The Mayor of Sheffield* (*ubi sup.*). The railway company had a method of setting right the mistake, if there was one, by giving notice under sect. 257 to dispute the apportionment, but they have not pursued that remedy. Mr. Jelf argued that the provisions of sect. 257, as to recovery of the expenses, did not apply, because the expenses had not yet been incurred. That, no doubt, is true; but here the expenses are recoverable by virtue of sect. 30 of the local Act.

Lopes, L.J.—The first question is, whether there was any evidence on which the magistrate could reasonably find that the North Woolwich road was a street. The case is stated under 20 & 21 Vict. c. 43, and the decision of the magistrate is only impeachable if it is erroneous in law, but not if there was evidence on which he could find as he has found. As to what is a street, I wish to adopt the language used by Jessel, M.R. in *Taylor* v. *The Corporation of Oldham*, where he said: "The definition of a street is thus laid down in the 'Imperial Dictionary:' 'A street is properly a paved way or road; but in usage, any way or road in a city, having houses on one or both sides.' Now, tried by that test, this is a street—it has houses on both sides of it, and therefore in common parlance it is a street:" (4 Ch. Div. at p. 408.) Now, it is impossible to read paragraphs 4 and 6 of the case without seeing that the North Woolwich-road would come within this definition. Then it was suggested that it was a private road; but there is authority to show that this is immaterial, for in *Taylor* v. *The Corporation of Oldham* (*ubi sup.*) it was held that the provisions of the Public Health Act applied to a street which was a private road. It was suggested in the court below that this road was a turnpike road, and therefore could not be a street; but the decision in *Austerberry* v. *The Corporation of Oldham* (*ubi sup.*) is conclusive against that contention. Another point is, whether the apportionment is conclusive or not. The appellants contend that too much frontage has been included, and that the amount apportioned as their share of the expenses is too large. For the purpose of this argument it must be admitted that the road is a street, and that the appellants are frontagers. The question then turns on sect. 257 of the Public Health Act 1875, and the local board have complied with all the provisions of that section, whereas the appellants have not followed the proper course which the section points out. The case of *Wake* v. *The Mayor of Sheffield* (*ubi sup.*) is a strong authority against the appellants' contention, especially the latter part of the judgment of the Master of the Rolls.

Appeal dismissed.

Solicitors for the appellants, *Beale* and *Co.*
Solicitors for the respondent, *Hillearys* and *Layard.*

Friday, Dec. 4, 1885.

(Before Lord Esher, M.R., Cotton and Bowen, L.JJ.)

Wright v. Ingle. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Metropolis Management Acts—Dissenting chapel—Expenses of paving new street—Liability of trustees of chapel—"House"—"Owner"—"Land"—18 & 19 Vict. c. 120, ss. 105, 250—25 & 26 Vict. c. 102, s. 77.

By the Metropolis Management Act 1855 (18 & 19 *Vict. c.* 120), *s.* 105, *the vestry or district board are empowered to pave new streets, "and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement."*

By sect. 250, *"The word 'owner' shall . . . mean the person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used, whether on his own account, or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent."*

By the Metropolis Management Amendment Act 1862 (25 & 26 *Vict. c.* 102), *s.* 77, *"The owners of the land bounding or abutting on such street shall be liable to contribute to the expenses . . . of paving the same, as well as the owners of houses therein."*

A Wesleyan Methodist chapel was vested for a long term of years in trustees, who, by the terms of the trust deed, were prohibited from letting for a longer period than one year.

Held, that the chapel was a "house" within the meaning of sect. 105 *of the Act of* 1855, *and the trustees were "owners" within the meaning of sect.* 250, *and were therefore liable to contribute to the expense of paving the new street in which the chapel was situated.*

Held, also, that if the chapel had not been within the meaning of the word "house," the trustees would have been liable under sect. 77 *of the Act of* 1862 *as owners of "land."*

Judgment of Lord Coleridge, C.J. and Mathew, J. affirmed.

This was an appeal from the judgment of a divisional court on a case stated by a police magistrate.

The appellants were trustees of a Wesleyan chapel and schools and a piece of land situated within the district of the Lewisham Board of Works, of which the respondent was the secretary.

By a lease dated the 24th March 1870 the property was let to the appellants to hold for a term of ninety years from the 25th Dec. 1867, at a yearly rent of a peppercorn for the first seven years and 1*l.* for the remainder of the term. There was a covenant in the lease that the lessees would not assign, aliene, underlet, or part with the demised premises, or any part thereof, for any longer period than one year without the consent in writing of the lessors.

By a deed-poll dated the 14th July 1870 the appellants declared that they would stand possessed of the demised property upon such and the same trusts as were expressed and declared in and by a certain deed dated the 3rd July 1832, and enrolled in the Court of Chancery on the 25th July 1832, being a deed for the settlement of a piece of land and chapel situate at Shircoat, in the parish of Halifax, for the use of the people called Methodists in the connection established by the late Rev. John Wesley, "and to and for and upon no other use, trust, intent, or purpose whatsoever."

The deed of the 3rd July 1832 contained various recitals showing "the origin and formation of the societies of the people called Methodists," and the constitution of a body called "The Conference." The deed provided that the trustees thereby appointed should hold a piece of land, which was thereby conveyed to them in fee, upon trust, out of moneys then or thereafter to be possessed by them for the purpose, to build on the land a chapel or a place of religious worship, and a dwelling-house, school-room, and other appurtenances and upon further trust from time to time and at all times after the erection thereof to suffer the chapel, with the appurtenances, "to be used, occupied, and enjoyed as and for a place of religious worship by a congregation of Protestants of the said people called Methodists in the connection established by the said John Wesley as aforesaid, and for public and other meetings and services held according to the rules and usage of the said people called Methodists, and do and shall from time to time and at all times hereafter permit and suffer such person and persons as are hereinafter mentioned or designated, and such person and persons only, to preach and expound God's holy word, and to perform the usual acts of religious worship therein; that is to say, such person and persons as shall be from time to time approved, and for that purpose duly appointed, by the said Conference of the said people called Methodists," and also such other person or persons as should be thereunto from time to time duly permitted or appointed in manner therein mentioned. Power was given to the trustees for the time being of the deed, or the major part of them, from time to time and at all times thereafter, to mortgage in fee, or for any term or terms of years, the piece of ground, chapel, and premises, or any part or parts thereof respectively, to any person or persons, for securing such sum or sums of money as might be requisite or necessary for the due execution and accomplishment of the trusts and purposes of the deed or any of them. The trustees were also empowered to let the pews of the chapel and to let the school-room.

The deed also gave power to the trustees, with the consent of the Conference, absolutely to sell and dispose of the piece of ground, chapel, and premises, and to convey the same to the purchaser or purchasers, and it was provided that the premises so sold and conveyed should thenceforth be held and enjoyed by the purchaser or purchasers thereof freed and absolutely discharged from the trusts declared by the deed. In certain specified events power was also given to the trustees, or the major part of them, of their own proper authority, without any consent of the Conference, to sell the piece of land, chapel, and premises, discharged from the trusts. In either case the purchase money was to be applied by the trustees in the manner mentioned in the deed.

The chapel was exempt from poor rate by 3 & 4 Will. 4, c. 30.

The property so held by the appellants stood at

(a) Reported by P. B. Hutchins, Esq., Barrister-at-Law.

the junction of, and abutted on, two roads which were "new streets" within the meaning of the Metropolis Management Acts. The district board resolved that these two new streets should be paved, and they apportioned the expenses to be paid by the owners of the land and houses abutting on the streets. The appellants were charged as owners, and the amount payable by them was assessed at 64*l.* 2*s.* in respect of the chapel, and 40*l.* 14*s.* in respect of the schools and the vacant land.

The trustees declined to pay these sums, and a complaint was preferred at the Greenwich Police-court by the district board. The magistrate held the trustees liable in respect of the schools and vacant land, but not in respect of the chapel, and stated a case for the opinion of the court, the questions being (1) whether the trustees were "owners" of the chapel, schools, and land within the meaning of the Metropolis Management Acts 1855 and 1862; and (2) whether, if they were such owners, they were liable to pay the amount claimed in respect of the chapel.

The Divisional Court (Lord Coleridge, C.J. and Mathew, J.) held that the trustees were liable to pay the whole amount.

The trustees appealed.

The appeal was argued by *H. D. Greene*, Q.C. (*Fraser Macleod* with him) for the appellants; and by *F. Meadows White*, Q.C. and *Crump*, Q.C. for the respondents, the district board. The arguments used are sufficiently stated in the judgments.

The words of the statutes on which the decision turned are set out in the head-note. The following authorities were referred to:

Caiger v. *The Vestry of St. Mary, Islington*, 44 L. T. Rep. N. S. 605; 50 L. J. 59, M. C.;
Higgins v. *Harding*, 27 L. T. Rep. N. S. 488; L. Rep. 8 Q. B. 7;
Angell v. *The Vestry of Paddington*, L. Rep. 3 Q. B. 714;
The Great Eastern Railway Company v. *The Hackney District Board of Works*, 49 L. T. Rep. N. S. 509; 8 App. Cas. 687;
Robson v. *Hyde*, Caldecott, 310;
Bowditch v. *The Wakefield Local Board of Health*, 25 L. T. Rep. N. S. 88; L. Rep. 6 Q. B. 567;
The Plumstead Board of Works v. *The British Land Company*, 32 L. T. Rep. N. S. 94; L. Rep. 10 Q. B. 203;
Pound v. *The Plumstead Board of Works*, 25 L. T. Rep. N. S. 461; L. Rep. 7 Q. B. 183;
The School Board for London v. *The Vestry of St. Mary, Islington*, 33 L. T. Rep. N. S. 504; 1 Q. B. Div. 65;
Dryden v. *The Churchwardens and Overseers of Putney*, 34 L. T. Rep. N. S. 69; 1 Ex. Div. 223.

Lord ESHER, M.R.—The question to be decided is, whether the trustees of a Wesleyan Methodist chapel are bound to pay their proportion of paving expenses incurred in respect of a new street in which their property is situated. This depends on whether they are owners of a house or land so as to be bound to contribute to the paving expenses under the Metropolis Management Acts 1855 and 1862 (18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77). The first point is, whether the property is either a house or land within the meaning of these statutes; and the second is, whether the trustees are such owners within the meaning of the statutes as to be bound to contribute to the paving expenses. The property in question consists of a chapel, a school house, and a small piece of land. As to the school house and the land, I think there can be no doubt that they come within the statutes. The real question in dispute is as to the chapel, and it depends upon the construction of the statutes 18 & 19 Vict. c. 120, s. 105, and s. 250, which defines the word "owner," and 25 & 26 Vict. c. 102, s. 77. The first question, which goes far towards deciding the case, is, whether, taking the two statutes together, the chapel is a house within the meaning of the first, or land within the meaning of the second Act. If it is either, I think it must come within one or other of the statutes. Where a new street is formed, the liability to contribute to the expenses of paving is imposed on property abutting on the street, and it seems to me to be impossible to come to any other conclusion than that the Legislature intended to deal with the frontage of the whole length of the street, and I am of opinion that the two words, "houses" and "land," include the whole of the frontage, and therefore anything fronting the street must be either a house or land; and, whichever it is, it comes within the meaning of the statutes. But it is not satisfactory to stop there, so I will state my view as to what is the division between houses and land. If the question depended upon the earlier statute alone, there might be some doubt as to whether the word "houses" was used in the colloquial sense, or whether it included something more. The second Act, however, shows that the word "houses" is not intended to include all the frontage of the street; but it does not show that the word in the earlier Act does not include something more than what would be described as houses in ordinary language. We must use the second Act in order to interpret the word "houses" in the first Act, and we must consider whether the Legislature meant the word "land" in the second Act to include all uncovered land, and the word "houses" in the first Act to include all else, or whether they intended to use the word "houses" in the colloquial sense, and to make the word "land" include all other property fronting on the street. If it was intended to use the word "houses" in the earlier Act in its colloquial sense, then it must have been intended in the later Act to include everything else fronting on the street under the word "land," as, for instance, a large factory or brewery or warehouse, not used for living in; and by sect. 77 of the Act of 1862 the district board are empowered, if they think it just, to charge a less proportion on land than on houses. But such property as I have mentioned is often far more valuable than houses in the ordinary sense of the word, so I cannot think the Legislature meant that to be the construction. I am therefore of opinion that the second Act shows that in the first Act the meaning of the word "houses" is not confined to the colloquial sense. We have then to consider whether it can include all land on which any building stands. To hold that it can would, in my opinion, be an outrage on the ordinary meaning of language. It can never have been intended to include such structures as a pigsty, or an open shed, or a greenhouse with a glass roof. My conclusion, therefore, is that, although the word is used in something more than its colloquial sense, yet it does not include all land with buildings on it which fronts on the street. I think it is reasonable to say that the word includes all land with any building on it

which is or may be used as a habitation, and it follows that if there were no other difficulty in the case it ought to be taken to include such a building as this chapel. Then the question arises whether there is any exception. It may be true that the Legislature has shown an intention that what would otherwise come within the definition of a house shall not be a house within the meaning of these statutes, if it never can be used as a habitation; that is, if although structurally it might be so used, yet by law it can never be used as a habitation, then it is not a house within the meaning of the statute. I am prepared to adopt that view, looking at the whole of these Acts of Parliament together. Thus a church which has been consecrated by law cannot ever be used as a habitation, and therefore is not a house within the meaning of the Act. That is not a case of a prohibition by statute, but if the prohibition were by statute it would produce the same result, for we cannot assume that a statute will be repealed; so a building under such circumstances would be in the same position as a church is in by the common law, and therefore would not be a house within the meaning of the Act. One reason for adopting this view is afforded by the enactment as to the owners, and it is necessary to consider who the owners are; this depends on sect. 250 of the Act of 1855, by which "the word 'owner' shall . . . . mean the person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent." I observe that this section contains the word "mean," not "include," and the words are not if such lands were capable of being let at a rack rent, but if such lands were let at a rack rent. It is obvious that this language cannot apply to premises which by law cannot be let at a rack rent, and no church could be let at a rack rent, or at any rent at all; therefore there cannot be an owner of a church within the meaning of the Act, and therefore no one can be charged with paving expenses in respect of a church. This shows that a church is not a house or land within the meaning of these Acts of Parliament. If by an Act of Parliament a house or land is placed in the position of a church, there cannot be an owner within the meaning of the Act, it follows that the house or land could not come within these Acts. I have, therefore, come to the conclusion that a church is not a house, and that any other building which is in the same position as a church is not a house, and there can be no "owner" of such land or building within the meaning of sect. 250, and that section applies to land on which there is no structure as much as it applies to houses. We must consider, therefore, whether this chapel is in the same position as a church. Obviously it is not so by the common law or by ecclesiastical law, and it is not so by any Act of Parliament. By the conveyance it is put in this position (at least I will assume this to be the true construction)—that as long as the trusts last the trustees could not let at a rack rent; but that is not the same as saying that they cannot do so because they are prevented by the common law or by a statute. By agreement between the trustees, the *cestuis que trust*, and the grantors, the trust could be put an end to, and the chapel could be used as a habitation; so it certainly is not in the same category as a church. This view is supported by the opinion expressed by Lord Mansfield in *Robson* v. *Hyde* (Cald. 310), where he said, "It is said, indeed, that he is restrained from doing this by covenant, but the restriction by covenant does not vary the nature of the property" (p. 314). The common law and statutes vary the nature of property; but covenants do not, because the trusts can be put an end to by consent. I agree with the view expressed by Lord Mansfield, and I am prepared to hold that this chapel comes within the Acts, and that the trustees are the owners; from which it follows that the decision of the Divisional Court is right, and ought to be affirmed. In deciding the case in this way, I think we do not overrule any of the decisions which have been referred to. The decision in *Angell* v. *The Vestry of Paddington* (L. Rep. 3 Q. B. 714) remains untouched, and so does that in *Bowditch* v. *The Wakefield Local Board of Health* (25 L. T. Rep. N. S. 88; L. Rep. 6 Q. B. 567). *The Great Eastern Railway Company* v. *The Hackney District Board of Works* (49 L. T. Rep. N. S. 509; 8 App. Cas. 687) does not apply. If we were to decide otherwise we should be overruling *Caiger* v. *The Vestry of St. Mary, Islington* (44 L. T. Rep. N. S. 605; 50 L. J. 59, M. C.). We do not touch the decision in the *Plumstead Board of Works* v. *The British Land Company* (32 L. T. Rep. N. S. 94; L. Rep. 10 Q. B. 203).

COTTON, L.J.—There are two questions to be decided in this case, namely, whether the trustees are "owners," and whether the chapel and other property are "houses" or "land" within the meaning of the statutes. The question is, whether sect. 105 of the Act of 1855, or sect. 77 of the Act of 1862, gives power to the district board to charge the appellants with part of the cost of paving a new street. The money charged is not a rate; the paving is for the benefit of the owners, and the charge is not like a rate for general purposes. Houses in sect. 105 of the earlier Act are referred to as "the houses forming such street, and land in sect. 77 of the later Act is referred to as "the land bounding or abutting on such street." In new streets there may be uncovered land abutting on the street, and therefore this latter section was added for the purpose of including property which could not come within the meaning of the word "houses" in the earlier Act. The statutes mean this, that if property fronting on a street does not come within the meaning of the word "houses" it comes within the meaning of the word "land." Land may be covered with buildings which are not houses. I think we could decide the present case by saying that if this property is not houses it is land, and therefore comes within one or other of the two statutes; but I agree with the Master of the Rolls that we should say which it is. I dissent from the view that the meaning of the word house should be limited to the case of a house ordinarily so called; it may be so in some statutes, but not, I think, in these. The question then arises as to what the fair meaning of the word is. I agree with the Master of the Rolls that it would not include all buildings; for instance, it could not include a cart-shed or a cowhouse, and land with such buildings on it fronting on a street would be chargeable as

"land," not as "houses." I am, however, of opinion that these buildings are houses. I think Lord Mansfield's rule, which has been cited by the Master of the Rolls, affords a useful test, and shows that, to exempt a building, the use made of it must not be a temporary use which can be altered by the parties. In the present case I think the school is clearly a house. There is nothing in the terms of the trust to prevent its being used as a house. With the consent of the Conference the trustees may alienate it, and without such consent they can do so in certain specified events. I cannot say that they are not the owners; they would receive the rack rent if it were let at a rack rent. As to the chapel I am of opinion that it does not come within the definition of those buildings which are necessarily excluded from the operation of the statutes. It could be used to live in if certain internal alterations were made, and there is nothing in law to prevent this being done, nor is there anything to that effect in the terms of the trust, because there is power to sell it with the approval of the Conference, and in certain specified events without such approval; if this were done it could be turned into a house. The trustees have also power to mortgage it, and if the mortgagees took possession they could change the mode of using it. I am therefore of opinion that this structure is a house within the meaning of sect. 105 of the Act of 1855, for there is nothing in law to prevent its being applied to the purposes of a house. I am also of opinion that if it were not a house it would be land within the meaning of sect. 77 of the Act of 1862. Then with regard to the cases: *Angell* v. *The Vestry of Paddington* (L. Rep. 3 Q. B. 714) has been supposed to conflict with *Caiger* v. *The Vestry of St. Mary, Islington* (44 L. T. Rep. N. S. 605; 50 L. J. 59, M. C.), but, in my opinion, it does not. The first-mentioned case was that of a church of the Church of England, which was vested in the Church Commissioners, and the decision was based on the grounds that the commissioners were not the owners as defined by the statute, and that, by the common law, a church is not a house. This distinguishes it from the later case to which I have referred, and from the case now before the court. Then the question arises whether these trustees are the owners within the meaning of sect. 250. That question must be decided by referring to the terms of the trust under which the chapel is held. It is said that the owners must be those to whom the rack rent would come if the premises were let at a rack rent; but, if so, I think the trustees in the present case come within the definition. For these reasons I am of opinion that the judgment is correct with regard to all the property in question, and ought to be affirmed.

BOWEN, L.J.—Two questions are raised: first, whether the trustees are "owners" within the meaning of sect. 250 of the Act of 1855; and, secondly, whether the property in question is either "houses" within the meaning of sect. 105 of that Act, or "land" within the meaning of sect. 77 of the Act of 1862. It is necessary to explain the meaning of the word "houses" as used in sect. 250; and I am of opinion that the meaning is to be derived from the Act. We find various popular terms employed in different meanings in the various sections. In sect. 105, the Legislature was dealing with new streets, and had to consider the question how far the expenses of paving should be borne by the buildings fronting such streets. I think it cannot have been meant to confine the word "houses" to cases of mere present user as a house, for this would exclude all unoccupied houses, of which there are naturally many in new streets. It cannot have been intended to consider any temporary or ephemeral use to which a building may be put, for the mode of using a building may be changed, and it was certainly not intended that a building should escape liability because the owner was not using it at a particular time. I think the true view is, that the word applies to any building capable of being used as the dwelling of man. There may be two obstacles in the way of its being so used. In the first place, the incapacity may be physical, as in the case of such structures as the Duke of York's Column, a tombstone, the Albert Memorial, or an open shed. Secondly, there may be a legal incapacity, which may be produced either by the common law or by statute. One instance is a church of the Established Church; by consecration its status is altered, the building is separated from common usage, and is for ever dedicated to sacred service. It is said to be a hardship that any distinction should be drawn between a church and a Dissenting chapel in this respect; but the answer is, that the consecration of the church alters its status in point of law. I read the case of *Angell* v. *The Vestry of Paddington* as deciding that a church is not a house or land within the meaning of the statute. Cockburn, C.J. said so expressly, and Blackburn, J. agreed with that judgment, though he also said that he did not see how the commissioners could be owners. That is also the construction put upon the statutes by Lord Watson in the *Great Eastern Railway Company* v. *The Hackney District Board of Works*. I think the true view to be arrived at, by reading sect. 250 together with sect. 105, is, that if there is any legal incapacity there cannot be an owner or a rack rent. As well as the incapacity at common law, there can also be an incapacity by statute, but it must be such an incapacity as to alter the nature of the property; and where a building is only prevented from being used as a house by a conventional restriction existing only as between the parties, and which they could alter by agreement, there, I think, the status of the building is not altered. I think the case comes within the distinction pointed out by Lord Mansfield in *Robson* v. *Hyde* (Cald. 310). It is true that was a decision on the Rating Acts, but the language and reasoning there used apply to the present case. Lord Mansfield said (at p. 314): "The doubt in this case can only have arisen from the use of the word 'chapel;' but this building is not a chapel in an ecclesiastical sense. It is not a consecrated place—the ecclesiastical law cannot take notice of it. It is a mere private room, let out, it is true, at present for the purposes of religious worship, but which, at his pleasure, the owner may apply to any other use. It is said, indeed, that he is restrained from doing this by covenant; but the restriction by covenant does not vary the nature of the property." It seems to me that this chapel is capable of being used as a house within the meaning of the passage I have read, and a portion —the school—is capable of being so used. That is the real basis of our decision. I agree also

that, if the property is not houses, it is land within the meaning of sect. 77 of the Act of 1862. If this were not so, large buildings —such as factories—which do not come within sect. 105 of the Act of 1855, would be entirely exempt. Unless everything that does not come within that section were included under the term "land" the result would be that houses would be liable to contribute by the Act of 1855, and a field or a piece of waste ground would be liable by the Act of 1862, but a valuable factory would not be liable at all. For these reasons I think it is clear that, if the property were not liable as houses, it would be liable as land, for that term includes all land with buildings upon it which are not houses. Then there remains the question whether the trustees are the "owners" of the property within the meaning of sect. 250 of the Act of 1855, and I am of opinion that they are, for they are the persons who would receive the rack rent if the property were let. It was said by Mr. Greene in his ingenious argument that the chapel could not be let without a breach of covenant; but sect. 250 does not apply only to persons who could let the property at a rack rent, but defines the owner as the person who would receive the rack rent if the property were let. I think the case of *Bowditch* v. *The Wakefield Local Board of Health* (25 L. T. Rep. N. S. 88; L. Rep. 6 Q. B. 257) is a conclusive authority that a person is not less the owner of premises because by the provisions of a deed he is prohibited from letting them. Whether if the premises were prevented from being let at a rack rent by the terms of an Act of Parliament there could be an "owner" within the meaning of sect. 250 I very much doubt. I think that, if the status of the property were altered, there would be no owner; but that is not the case here, and I therefore think that the trustees are the "owners" within the meaning of the Act. For these reasons I am of opinion that the judgment of the Divisional Court is right. I also think that the decision in *Caiger* v. *The Vestry of St. Mary, Islington* (44 L. T. Rep. N. S. 605; 50 L. J. 59, M. C.) is right. Our judgment in the present case does not interfere with *Angell* v. *The Vestry of Paddington* (L. Rep. 3 Q. B. 714), or with *The Great Eastern Railway Company* v. *The Hackney District Board of Works* (49 L. T. Rep. N. S. 509; 8 App. Cas. 687), or with any other case.

Appeal dismissed.

Solicitors for the appellants, *Ingle, Cooper*, and *Holmes*.

Solicitor for the district board, *H. S. Winnett*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

June 30, *July* 1, 6, 7, 8, 14, 15, 20, 21, 22, *and Oct.* 27, 1885.

(Before KAY, J.)

BIDDER *v.* BRIDGES.(a)

Evidence — Commonable rights — Ordnance and other maps—Documents in the British Museum —Cottonian manuscripts—Church-books of a parish.

In an action to establish commonable rights over a piece of land on behalf of all the proprietors and occupiers of lands or tenements in a certain parish, the chief questions raised by the evidence were: (1) *whether the land in question was within the parish; and* (2) *if so, whether the plaintiffs had any right to maintain the action. The Ordnance map, and several other maps, some of which had been kept in the British Museum, were tendered in evidence for the purpose of showing the position of the boundaries of the parish.*

Held, that the maps were not admissible in evidence.

The plaintiffs founded their claim upon an actim of novel dissesisin brought in 23 Hen. 3, the records in which were missing. It was submitted that the proceedings could be proved by (1) *a note-book in the British Museum containing a note of the case, which was submitted as being a copy of the record;* (2) *a document forming part of the Cottonian MSS. in the British Museum, purporting to be a register of a priory interested in the action, containing an account of the action; and* (3) *a note of the action in an entry in the church-book of a parish, the parson of which was a defendant to the action, made 438 years after the date of the action.*

Held, that (1) *and* (2) *were not admissible, but that* (3) *was receivable in evidence quantum valeat, as an entry of an historical fact in which the parish was interested, it being probably taken from the record which might then have been in existence.*

THIS was an action by two persons, who were owners of freehold lands and tenements in the parish or vill of Mitcham, in the county of Surrey, on behalf of themselves and all other the proprietors and occupiers of lands or tenements in that vill or parish, asking for a declaration that a piece of land called Beddington Corner formed part of Mitcham Common, and that the plaintiffs and those on whose behalf they sued were entitled to certain commonable rights over it; and that the defendants might be restrained from trespassing on the land, or erecting any buildings or fences thereon; and from otherwise intermeddling therewith, or interfering with the plaintiffs' enjoyment of their rights over the land. The case only calls for a report upon the question as to whether certain evidence which had been tendered was admissible.

The vill or parish of Mitcham was within several manors, and the lords of several manors claimed rights in the soil of the common. Amongst these last were the manors of Mitcham, Beddington Bandon, and Wallington.

The defence set up (amongst others) was, that the land in question was not part of Mitcham Common, but was part of the manor of Walling-

(a) Reported by A. J. HALL, Esq., Barrister-at-Law.

ton, of which the defendant Bridges was lord, and that all rights of common over it, if any had ever existed, had been extinguished. The other defendants were purchasers of parts of the land in question from Bridges.

The nature of the questions of evidence raised appears from the judgment. It is sufficient to state here that the two principal questions raised by the evidence were: (1) whether the land in dispute was within the vill or parish of Mitcham; and (2) if it was, whether the plaintiffs had any right to maintain this action.

Upon these questions the Ordnance map, tithe maps, and several other maps of the district were tendered in evidence on both sides, some of which had been kept in the British Museum. In some of these maps Beddington Corner was included as part of Mitcham Common, in others it was excluded from it. One question was whether these maps could be admitted as evidence as to the situation of the land. The other questions were whether the proceedings in an action of novel disseisin, brought in 23 Hen. 3, upon which the plaintiffs founded their claim, and the records in which were missing, could be proved by (1) a note-book in the British Museum containing a note of the case, which was submitted as being a copy of the record; (2) a document from the British Museum, forming part of the Cottonian MSS., purporting to be a register of Merton Priory, containing an account of this action; and (3) another note of the same action in an entry in the church-book of the parish of Beddington, in 1678, 438 years after the date of the action.

The Prior of Merton was one of the plaintiffs in this action, and the Parson of Beddington one of the defendants.

The extract from the church-book was as follows:

Henrici 3 Anno 24 Anno Dom. 1240. The 23rd yeare off the Reigne off King Henry the sonne of King John one assyse was maide and brought afore Sir Steven Segrave and other the Kings justices by the Prior of Merton the Prior of Southwarke and the freeholders of Mitcham against Agnes Hustard William Hustard and others of Bedynton Bandon and Wallington which did disease the said Priors and men of Mycham of their common of Mitcham whereupon 12 men were sworne which said that they of Mitcham twenty yeares and more before the assyse brought did common in the said pasture with them of Beddington Bandon and Wallington as in the common pertayning to Mitcham whereupon itt was considered through long continuance of them off Mitcham that they should have againe their possession and the diseasers should pay to the said Priors and men of Mytcham for their damages 40 shillings.

Sir *F. Herschell*, Q.C., *Kekewich*, Q.C., and *P. H. Lawrence* for the plaintiffs.—We are entitled to use the documents which we produce to prove what occurred in the action of novel disseisin in 23 Hen. 3. The documents we produce are copies of copies, but there are no degrees in secondary evidence, and as such they are admissible. They referred to

Swinnerton v. *The Marquis of Stafford*, 3 Taunt. 91.

As to the entry in the church-book of the parish of Beddington, the parson of that parish was a defendant to the action, and the action was one in which the parish was interested; the entry would therefore be admissible:

Armstrong v. *Hewitt*, 4 Price, 216.

The maps would be evidence as to the parish boundaries, as for such a purpose hearsay evidence and evidence of reputation could be given.

Graham Hastings, Q.C., *Kingdon*, and *Dibdin* for the defendant Bridges.—The document in the church chest can only be evidence as to parish matters, not as to a right of common in the neighbourhood. Evidence of reputation and hearsay evidence is admissible to prove the position of parish boundaries:

1 Taylor on Evidence, 8th edit. pp. 541, 542;
Lord Dunraven v. *Llewellyn*, 15 Q. B. 791.

Maps are statements, and can be admitted as such, though not as more than that:

Taylor on Evidence, 8th edit. p. 549.

An Ordnance map, however, is of more value, as it is a sort of public document, and persons are bound, when summoned, to point out boundaries for that purpose:

& 5 Vict. c. 30, ss. 5, 6, 9, 11;
Sturla v. *Frenia*, 43 L. T. Rep. N. S. 299; 5 App. Cas. 623.

[KAY, J. referred to *Wilberforce* v. *Hearfield*, 5 Ch. Div. 709.]

A. Charles, Q.C., *Elton*, Q.C., and *Atherley Jones*, for the other defendants, referred to

Hammond v. *Bradstreet*, 10 Ex. 390.

Kekewich, Q.C., in reply, referred to

Neil v. *The Duke of Devonshire*, 8 App. Cas. 135.

Oct. 26.—KAY, J. delivered a written judgment. He stated the nature of the action, and upon the points dealt with by this report said:—The Ordnance map and several other maps, some of which came from the British Museum, were tendered in evidence on either side. The Ordnance map excludes the land in question from the parish of Mitcham. Many of the other maps included it. In the case of the Ordnance map, it seems an investigation on the question of the disputed parish boundary was made under the provisions of the statute 4 & 5 Vict. c. 30 and subsequent Acts. No public inquiry was held. Certain men were appointed by justices of the peace in the locality to point out the boundaries. Tracings of maps then produced were taken, and a statutory declaration was made by the lord of the manor of Wallington, detailing the acts of ownership which have been proved in this action, or some of them. But the maps which were produced from the British Museum were not then referred to. It was argued that hearsay evidence, and evidence of reputation is admissible to prove the position of parish boundaries (1 Taylor, pp. 541, 542), and that therefore all these maps should be received. As to the greater part of them, I am not informed how, or on what information, the boundary was laid down. None of them probably was made with the same care in this respect as the Ordnance map, and it is obvious that nothing like the amount of evidence on the question was produced for the purpose of that map which has been given before this court. In my opinion these maps are not admissible as evidence in such an action as this; if they were, they amount to no more than a statement of the opinion of the particular map-maker upon such information as he obtained at the time. Upon this part of the case, namely, in what parish the land in question lies, I am bound to say that the plaintiffs have not proved to my satisfaction that this portion of the common is within the vill of

Mitcham, or if it were, that it is not waste of the manor of Wallington. If it be waste of the manor of Wallington, though within the vill of Mitcham, the lord of that manor would have a right to separate it from the rest of Mitcham Common, and so to exclude the plaintiffs and the other commoners claiming in right of Mitcham: (Co. Litt. 122a.) This is sufficient to decide the case against the plaintiffs, but so much evidence was given, and so much argument was used upon the other points raised, that I feel bound to express my opinion upon them. [His Lordship then dealt with the other parts of the case, and upon the further questions of evidence said:] But the main foundation of the plaintiffs' claim is an action which was brought in the year 23 Hen. 3. It appears from certain entries in the Record Office that it was an action of novel disseisin in Surrey, by the Prior of Southwark and the Prior of Merton against Agnes and William Hustard and others. From these entries it also appears that the action was decided against the defendants, and that they, including amongst others Roger the parson of Beddington, were ordered to pay certain sums as damages, which are stated in the Pipe Roll, 25 Hen. 3. The record of the action itself is missing, there being about that time an hiatus in the records preserved. In order to supplement these entries there is tendered in evidence, first, a note-book in the British Museum, containing, amongst other notes of cases, some of which are copied from existing records, a note of this case which the court is asked to receive as a copy of the missing record. There is a strong probability of this being a copy, and an accurate one, because it agrees with the entries which I have referred to as to there having been such an action, and the result of it, but no history of this book is preserved. I am not informed how it came to the British Museum, or that it ever was in such custody as would entitle a court of justice to treat it as an authentic document. Similar remarks apply to another document, also produced from the British Museum. This purports to be a register of Merton Priory containing an account of the same action, and it is among the Cottonian MSS., of which, under certain statutes of 12 & 13 Will. 3, c. 7, 5 Anne, c. 30, and 26 Geo. 2, c. 22, the British Museum now have the custody. It was decided in *Swinnerton* v. *The Marquis of Stafford* that, in an issue under an Inclosure Act as to rights of common, a document from the Cottonian collection purporting to be an original could not be received in evidence, because not produced from the proper custody. It has been argued that this does not apply so strongly to a copy. But I dissent entirely from that argument. The authenticity of a copy is at least as doubtful as of a document which is apparently an original, and the rule of evidence which requires that such a document should come from a proper custody really is founded on this, that such custody is evidence that the document is that which it purports to be. I must therefore reject both these documents. Another note of the same action is found in an entry in the church-book of the parish of Beddington. Now it appears from the Pipe Roll, 25 Hen. 3, as I have pointed out, that Roger, the parson of Beddington, was one of the defendants to the action against whom damages were awarded by the judgment of the court. The action, therefore, was one in which that parish was interested. The entry was made in 1678, 438 years after the action. But it was probably taken from the record which might have been then existing, and as an entry of an historical fact in which the parish was interested, I think it is receivable in evidence *quantum valeat*, and for this the case of *Armstrong* v. *Hewitt* seems to be an authority. [His Lordship came to the conclusion on the evidence that the plaintiffs had not established the rights which they claimed, and he dismissed the action with costs.]

Solicitors for the plaintiffs, *Rooke* and *Sons*.

Solicitors for the defendants, *Bridges, Sawtell, Haywood, Ram*, and *Dibdin*; and *C. A. Russ*.

CROWN CASES RESERVED.

Saturday, Feb. 27, 1886.

(Before Lord COLERIDGE, C.J., MANISTY, HAWKINS, DAY, and GRANTHAM, JJ.)

REG. *v.* FLOWERS. (*a*)

Larceny — Money given by mistake — Innocent receipt—Mutual mistake — Animus furandi on ascertaining mistake—Felonious taking.

Where money or goods have been innocently received, a subsequent fraudulent appropriation will not render the receiver guilty of larceny, the decision in Reg. *v.* Ashwell (53 *L. T. Rep. N. S.* 773) *not being an authority to the contrary.*

CASE reserved for the opinion of this court by the learned Recorder for the borough of Leicester, at the last Epiphany Quarter Sessions for that borough, upon the trial of an indictment which charged one Charles Flowers with having, on the 31st Oct. 1875, while being servant to one Samuel Lennard and another, feloniously stolen, taken, and carried away certain money to the amount of seven shillings and one penny halfpenny the property of the said Samuel Lennard and another, his masters.

It appeared from the case that the prisoner had been for about three months next preceding the 31st Oct. 1885, a clicker in the service of Messrs. Lennard Brothers, a firm of shoe manufacturers in Leicester, in whose establishment the following mode of payment of the wages of their *employés* was adopted, viz.:

The amount of wages due to each workman was calculated from the time book and entered in the wages book. Each amount was then made up and put into a small paper bag, which was then sealed, and the bags so secured were sent to the various rooms in which the men worked. The foreman of each of such rooms then distributed the bags containing the wages among the men under his charge. When a mistake occurred the workman affected thereby took his bag to one Francis Cufflin (the clerk) to have the mistake rectified.

On the 31st Oct. there was due to the prisoner the sum of sixteen shillings and eightpence, and after the workmen had been paid their wages the prisoner came to Cufflin, and said that he was three pence short, and gave him the bag into which his money had been put. The top of the bag had been torn off, and the bag was empty.

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

Another workman named Jinks had also come to Cufflin for a correction in his money, stating that fivepence or sixpence was due to him, and had handed to Cufflin his bag with seven shillings and eleven pence halfpenny in it. Cufflin, thereupon, gave the prisoner by mistake Jinks's bag, and also three pence in copper, into his hand, and the prisoner, having received Jinks's bag, went away immediately, and in the presence of one of his fellow workmen emptied the contents of Jinks's bag into his hand, saying, "The biter has got bit; he has paid me double wages." He then turned to another man and said, "Come on, we'll go and have a drink on it."

At the close of the case for the prosecution, it was submitted on behalf of the prisoner that there was no case to go to the jury, as the evidence failed to show that the prisoner at the time he received the seven shillings and eleven pence halfpenny from Cufflin had the *animus furandi*, or guilty mind, essential to constitute the offence of larceny, and that any subsequent fraudulent appropriation of the money by the prisoner was immaterial in so far as the offence of larceny was concerned.

The learned Recorder, however, held that there was evidence to go to the jury of the prisoner having the *animus furandi* at the time he received from Cufflin the money, and he also ruled, in deference to the opinion of certain of the learned judges in *Reg.* v. *Ashwell* (53 L. T. Rep. N. S. 773; 16 Cox C. C. 1; 16 Q. B. 190; 55 L. J. 65, M. C.), that if the prisoner received the money innocently, but afterwards fraudulently appropriated it to his own use, he was guilty of larceny. Having directed the jury to this effect he put to them the following questions, viz.:

1. Did the prisoner, from the time he received from Cufflin the bag containing the seven shillings and eleven pence halfpenny, know that it did not belong to him? To this the jury answered, No.

2. Did the prisoner, having received the bag and its contents innocently, afterwards fraudulently appropriate them to his own use? And to this the jury answered, Yes.

The learned Recorder thereupon directed a verdict of guilty to be entered on the first count of the indictment, which was that above set out, and reserved the question for the consideration of this court, whether, the jury not having found affirmatively that the prisoner had the *animus furandi* at the time he received the seven shillings and eleven pence halfpenny from Cufflin, he could be rightly convicted of larceny by reason of the subsequent fraudulent appropriation by him of the said money to his own use?

No one appeared on behalf of the prosecution or the prisoner.

Lord COLERIDGE, C.J.—This case might have raised a very subtle and interesting question. The manner in which the learned recorder has stated it, however, raises a question which is distinguishable from that which was raised in the case of *Reg.* v. *Ashwell*. Now, in that case, the judges who decided in favour of the conviction never meant to question that which has been the law from the beginning, and to hold that the appropriation of chattels which had previously been innocently received should amount to the offence of larceny. If that case is referred to, it will be seen that I myself assumed it to be settled law that where there has been a delivery of a chattel from one person to another, subsequent misappropriation of that chattel by the person to whom it has been delivered will not make him guilty of larceny, except by statute. In the present case, however, the learned recorder appears to have directed the jury that, if the prisoner received the 7*s.* 11½*d.* innocently, but afterwards fraudulently appropriated the money to his own use, he was guilty of larceny. But no such rule was intended to be laid down in *Reg.* v. *Ashwell*, and the direction of the learned recorder was not, in my opinion, in accordance with that decision. It is quite possible for the jury to have considered consistently with that direction that a fraudulent appropriation, six months after the receipt of the money, would justify them in finding the prisoner guilty of larceny. The question we are asked is, whether the jury, not having found affirmatively that the prisoner had the *animus furandi* at the time he received the money, he was rightly convicted of larceny by reason of the subsequent fraudulent appropriation. In my opinion he was not. The judgments of those judges who affirmed the conviction in *Reg.* v. *Ashwell*, if carefully read, show that they considered that to justify a conviction for larceny there must be a taking possession simultaneously with the formation of the fraudulent intention to appropriate, and that was not the case here.

MANISTY, J.—I am of the same opinion. The difference of opinion among the judges who decided the case of *Reg.* v. *Ashwell* was in the application to the particular facts in that case of the settled principle of law, that the innocent receipt of a chattel, coupled with the subsequent fraudulent appropriation of that chattel, does not amount to larceny. And while certain of the judges were of opinion that there had been a fraudulent taking and not an innocent receipt, and held that Ashwell had been guilty of larceny, the others, on the contrary, were of opinion that there had been an innocent receipt, and that, therefore, there had been no larceny. I am glad to think that the old rule of law remains unaffected.

HAWKINS, J.—The old rule of law was not questioned by any of the judges in *Reg.* v. *Ashwell*. This case is distinguishable, for here the learned recorder told the jury that if the prisoner received the 7*s.* 11½*d.* innocently, but afterwards fraudulently appropriated that money to his own use, he was guilty of larceny. It appears clear to me that that direction could not be right, and that the learned recorder misapprehended the rule of law.

DAY, J.—I was one of those who dissented from affirming the conviction in *Reg.* v. *Ashwell*, and have only to add that, in my opinion, this conviction cannot be supported.

GRANTHAM, J.—I am of the same opinion.

Conviction quashed.

Saturday, March 27, 1886.

(Before Lord COLERIDGE, C.J., MATHEW, DAY, SMITH, and WILLS, JJ.)

REG. *v.* CRONMIRE. (*a*)

Embezzlement — Fraud by an agent—Money intrusted for specific purpose — Stock-jobbing — Deposit for cover and commission—Conversion of money by stockbroker—24 & 25 Vict. c. 96, s. 75.

On the 2nd Nov. 1885, *W. by letter instructed the prisoner, a stockbroker, to buy for him on the following day certain stock at 90, to hold for a rise, the time to close to be left open, and inclosed a cheque for 21l. 5s. "for cover and commission."*

On the 3rd Nov. the stock specified was at 91¼, and the prisoner paid the cheque into his bank without purchasing, and subsequently spent the money for his own use, the balance standing to his credit at his bankers on the 14th Nov. being only 8l.

Upon a case reserved at the trial of an indictment under 24 & 25 Vict. c. 96, s. 75, which charged the prisoner for that he having been intrusted as a broker and agent with a security for the payment of money, with a direction in writing to apply it for a specific purpose, in violation of good faith, and contrary to the terms of such direction converted to his own use such security.

Held, that the prisoner was merely the agent of W. to hold and apply the money for which the cheque was sent for a specific purpose, and that he was rightly convicted under the circumstances of having converted the cheque to his own use, as charged in the indictment.

CASE reserved by the Common Serjeant for the consideration of this court in a case tried at the Central Criminal Court on the 10th Feb. 1886, the facts stated being the following:—

The defendant was charged under the 75th section of the 24 & 25 Vict. c. 96, for that he having been intrusted as a broker and agent with a security for the payment of money, with a direction in writing to apply it for a specific purpose, in violation of good faith and contrary to the terms of such direction converted to his own use such security.

The second count was similar to the first, except that the defendant was charged with converting to his own use the proceeds of the security.

One Robert Henry Waud had received from the defendant a book entitled "Mr. Herbert Harrison's A B C Guide to the Stock Exchange, exhibiting the certain method of making money and avoiding risk through its agency," in which was the following paragraph under the head of "Cover:"

Cover, which represents the amount of money or approved security deposited by the client in support of the speculation to be undertaken for his account, and is in other words the assurance to the broker that his responsibility ceases, when he has acted to the best of his ability in the client's interest. Without such deposit the broker would be liable to the Stock Exchange for all losses incurred, which would become ruinous when, as in my case, there are very many clients some of whom act entirely upon their own judgment. As I proceed to illustrate my system of conducting the business, it will be readily perceived that under it "many are the gains; the losses few." I buy or sell stocks or shares at a price with an inclusive commission of one-sixteenth and open any stock no matter how speculative on receipt of 1 per cent. cover.

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

On the 22nd Nov. 1885 Waud wrote to the defendant a letter which (so far as it is material) was as follows:

Dear Sir,—If you can buy me to-morrow (Tuesday) North British at 90, buy 2000 to hold for a rise, the time to close to be left open whilst I watch the market. I inclose my cheque for cover and commission 21l. 5s.

This was set out as the direction in writing in the indictment. Waud contended that he had originally written "91," and that it had been altered to "90." The defendant's clerk, who received the letter, swore that he had not altered it. There was "91" on the counterfoil of the cheque. On the 3rd Nov., the day on which the purchase was to be made, the price of North British was 91¼, therefore it was impossible that the order could be executed whether the figures were 90 or 91. On the 5th Nov. the price was 90¾ to 91, but the order was for the 3rd. Waud received no communication whatever in reply to his letter, and accordingly, on the 11th Nov., he sent a telegram to the defendant, which (so far as is material) ran as follows:

Have you bought British 91? Shall wait Bridgwater for reply. Post office half hour.

His telegram appears to have been received in London at 11.43 a.m. At 12.27 noon the defendant sent a telegram to Waud, which (so far as is material) was as follows:

Open British 90 2¼. Send further cheque Avoid risk. Reply Harrison.

The telegram was followed on the same day by a sold note to the following effect:

18, Telegraph-street,
London, 11th Nov. 1885.

Amount.	Stock	Price.		Cost.
				£ s. d.
16,000	Stock—92 is 14,720 British	92¼	14,800	14,874

For the 30th Nov. discount subject

Stp. 1d. K

2% margin. Rules at back hereof.

Harrison, Stockbroker.

Waud had given no directions to the defendant to open British at 92⅛, and he went to the defendant's office and saw the defendant's clerk, and repudiated the purchase of British at 92¼, and it was ultimately withdrawn. Waud's cheque for 21l. 5s., which was drawn on the London and Provincial Bank, South Kensington Branch, payable to the order of Herbert Harrison, was indorsed "Herbert Harrison," and paid into the defendant's bank, and on the 3rd Nov. a receipt was sent from the defendant's office to Waud for the amount of the cheque.

There were several dealings in reference to stocks between Waud and the defendant, but the defendant never refunded the 21l. 5s. sent him by Waud "for cover and commission."

The defendant, having absconded, was arrested on the 28th Dec. at Madrid.

It was proved that on the 14th Dec. 1885 the whole amount standing to his credit at his bank was 8l. At the trial it was contended on behalf of the defendant that there was no case to go to the jury, but the Common Serjeant left the case to the jury after consulting Denman, J., and they found a verdict of guilty.

The first question raised for the decision of this court was, whether the letter of the 2nd Nov. was a sufficient direction in writing to satisfy the

terms of the 75th section of 25 Vict. c. 96; and in the event of the court being of opinion that the letter was such a sufficient direction in writing, the further question was raised: "Did the defendant convert the cheque for 21*l.* 5*s.*, or its proceeds, to his own use, contrary to the terms of such direction within the meaning of the Act."

By 24 & 25 Vict. c. 96, s. 75, it is enacted that:

Whosoever, having been intrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney, or other agent with any money or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security, or any part thereof respectively, or the proceeds, or any part of the proceeds of such security, for any purpose, or to any person specified in such directions, shall, in violation of good faith, and contrary to the terms of such direction, in anywise convert to his own use or benefit, or the use or benefit of any person, other than the person by whom he shall have been so intrusted, such money, security, or proceeds, or any part thereof respectively . . . . shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any time not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour.

Kemp, Q.C. (with him *C. W. Matthews*) for the defendant.—The prosecution rely upon the decision in *Reg.* v. *Christian* (L. Rep. 2 C. C. 94; 12 Cox C. C. 502). Now, in that case, Blackburn, J., in his judgment, said: "Before turning to the words of the statute, look at the facts. The prisoner being an agent within the meaning of the statute (for as to that, no question is reserved), consents to act on the terms contained in his first letter of the 12th Nov. He accordingly receives instructions to buy, and various securities are bought. It seems immaterial to consider whether any privity of contract was established between the prosecutrix and the sellers. There is, at any rate, no doubt that the prisoner must have made himself personally liable to them. And therefore he would have a right, after paying for shares, if he did pay, to refuse to hand them over till he was repaid. He would also have a right to require cash beforehand so as to keep him out of advances. In this state of things he writes his letter of the 27th Nov., and the prosecutrix her answer of the same date. Now, looking at the facts, and noting down what seems to have been her meaning as to the cheque, I have no doubt as to what it must be. 'Inasmuch as there is a sum of 336*l.* which I have to pay to get the Japanese bonds, get the proceeds of the cheque in the way most convenient to yourself and pay for the bonds.'" Here the defendant had not to pay for anything, he was to take the cheque for cover and commission, and therefore had a right to pay it into his bank. The moment it was paid into his account at his bankers he had a right to use it, subject merely to his repaying the amount in a certain event. In order to be within the decision cited, the direction requires such words as "I send you cheque to pay deposit on bonds." As it is, the only remedy the prosecutor has is to sue for his money. In *Reg.* v. *Golde* (2 Moo. & Rob. 425), which was a decision upon 7 & 8 Vict. c. 29, s. 49, a statute containing words practically the same as the words in the statute in question, the court held that it was essential the indictment should allege a written direction as to the application of the proceeds. Now, although there was a direction in writing here, the defendant had done nothing contrary to that direction. He was directed to hold the money as cover and commission. [WILLS, J.—The fact is, however, that he did not hold it as cover and commission, he spent it.] He spent moneys, certainly, but as the cheque was crossed, it was practically necessary he should pay it into his bank, and if he spent that particular amount he did so at the peril of having to repay it out of other moneys. Had he repaid it out of other moneys, no proceedings could have been instituted. He was instructed to make a particular contract, which he need not have made until after he had paid the money into his bank. [DAY, J.—If he did not make the particular contract, was not he bound to return the cheque?] No; he had the right to pay the cheque into his bank as soon as he received it. He was directed to keep the cheque and to have the use of it. [Lord COLERIDGE, C.J.—He was to use it in a particular way, in which, as it turned out, he could not use it.] He was not to pay away this particular money. [MATHEW, J.—Your difficulty is that it was a case of an agent, and not the case of two contracting parties.] I must admit he was an agent. [Lord COLERIDGE, C.J.—Then where was his authority to spend this money?] He was, no doubt, bound to return the money at some time or another, but in the meantime, I submit, he had a right to deal with it as if it were his own.

Mead and *Richards*, for the prosecution, were not called on.

Lord COLERIDGE, C.J.—This case has been very ingeniously argued, but when we come to look at the facts, and at the words of the letter, there is, in my opinion, no difficulty in arriving at what our judgment should be. Here is a man who, it must be admitted, was in the position of an agent, he received money which he was to apply in a particular way, and which he had no right to spend in any other way. He did, however, spend it in a way other than that in which he was directed to apply it, and he is, therefore, in my opinion, within the words of this statute, and the questions we are asked in this case must be answered in the affirmative, and the conviction affirmed.

MATHEW, DAY, SMITH, and WILLS, JJ. concurred.

Conviction affirmed.

Solicitors for the prosecution, *Edward Beall, and Co.*

Solicitor for the defendant, *G. A. Stewart.*

Supreme Court of Judicature.

COURT OF APPEAL.

March 10 *and* 12, 1886.

(Before Lord ESHER, M.R., LINDLEY and LOPES, L.JJ.)

THE WEST NORFOLK FARMERS MANURE COMPANY LIMITED *v.* ARCHDALE. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Commissioners of Sewers—Jurisdiction—Tidal and navigable river—Ancient protective banks—Bill of Sewers 1531 (23 *Hen.* 8, *c.* 5)—*Sewers Act* 1833 (3 *& 4 Will.* 4, *c.* 22), *ss.* 10 *and* 47.

Walls, banks, culverts, and other defences, whether natural or artificial, situate by the sea coast, or tidal navigable rivers, as described in the Bill of Sewers 1531, *and the Sewers Act* 1833, *do not, by sect.* 10 *of the latter statute, ipso facto vest in the Commissioners of Sewers, but only after such commissioners have shown some exercise of jurisdiction as referred to in sect.* 47 *of the same Act. Sect.* 10 *by itself merely gives the commissioners an enabling power.*

The doctrine established in the case of Attorney-General *v.* Tomline (42 *L. T. Rep. N. S.* 880; 14 *Ch. Div.* 58) *was meant to apply to the natural protective banks against the sea, and against the approach of such tidal rivers as are equivalent to the sea.*

The plaintiffs were the owners and occupiers of land adjoining a tidal navigable river, and the defendants were the owners or occupiers of other land adjoining the same river. Upon the defendants' land there existed a sea wall or bank fronting the river.

It was alleged that the bank was an ancient bank, erected and maintained for the purpose of preventing the overflow of the river, and was under the jurisdiction of the Commissioners of Sewers in pursuance of the statutes in that behalf. It was also alleged that the defendants wrongfully cut down and destroyed a portion of the bank, whereby the plaintiffs' property was injured through the overflowing of an extraordinary high tide. The plaintiffs claimed damages. There was no evidence of any prescriptive liability on the defendants to keep the bank in repair.

Held (affirming the judgment of the court below), that walls and banks adjoining a tidal navigable river, which, by sect. 10 *of the Sewers Act* 1833 *were to be within the jurisdiction of the Commissioners of Sewers, were not to be considered public walls, so as to make the occupiers of land on which such walls were situated liable for damage caused by cutting through them, unless the commissioners had taken to the sea walls in such a way as to make them the property of the commissioners under sect.* 47 *of the same Act; and that, as there was no evidence to that effect, the plaintiffs' claim could not be maintained.*

THIS was an action by the West Norfolk Farmers' Manure Company Limited, carrying on business as manufacturers of artificial manures at Lynn, Norfolk, to recover damages against George Archdale, who had a life interest in certain property situated near the plaintiffs' works, Robert Rands his tenant, and James Page his agent, for injuries and losses sustained by the plaintiffs in consequence of their premises being flooded during the night of the 11th March 1883, by reason, it was alleged, of the wrongful act of the defendants in destroying an ancient bank or sea wall, by lowering a part of it.

George Archdale resided in London. The property at Lynn, of which he was tenant for life, consisted of a cottage, known as Brasier's Cottage, and a blubber-house, and land adjoining the tidal navigable river Nar, or Sandringham Eau, which flows into the river Ouse.

The predecessors of Archdale were engaged in the Greenland and Baltic trade, and the land was bought for a depôt, and particularly as the site for a blubber-house to which whales were brought.

The blubber-house was converted into a slaughter-house by Robert Rands, who was a butcher, and was tenant from year to year of the property which he had held from Michaelmas 1870.

James Page, as agent for Archdale, managed and let the property for him.

The plaintiff company were owners and occupiers of a piece of land adjoining the river Nar. They purchased the land in 1872 and erected buildings thereon.

There were two sea walls or embankments on the defendants' property, respectively known as the outer bank and the inner bank. The inner bank fronted on, but was at some distance from, the river. The outer bank was nearer the river and directly fronting it. The inner bank had evidently been an outer bank originally, but not within living memory. It was admitted that the inner bank was an ancient bank, not made within the memory of man.

Shortly after he had taken the premises, Rands obtained Page's permission to lower the inner bank, to better enable him to get a horse and cart over it to and from his slaughter-house. The permission was given entirely without the consent or even the knowledge of Archdale.

On the 8th March 1883 Page received a letter from the plaintiffs' manager calling his attention to a predicted high tide, and requesting him to attend to the bank where it had been lowered by Rands, so as to prevent any overflow of tidal water there. Archdale was not informed of this communication, and never knew anything about it until after the extraordinary high tide had happened. He did not know until then that the bank had been lowered by Rands.

On the 11th March 1883, at about 8 p.m., the extraordinary high tide referred to occurred at Lynn. It rose about five feet above the usual height of ordinary spring tides. The river Nar as well as the river Ouse, the main river, overflowed its banks to a very considerable extent, causing great destruction to property in Lynn and the immediate neighbourhood.

The water came over the banks on Archdale's land in great quantity in several places, as also through the gap which had been made by Rands.

The plaintiffs' premises were flooded, and much damage was done to their stock of artificial manures.

The plaintiffs thereupon brought this action, and by their amended statement of claim, they

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

alleged that the bank on the land in the occupation of the defendant Rands, was an ancient bank erected and maintained for the purpose of preventing the water of the river Nar from overflowing the land in the occupation of the plaintiffs and the lands of the other neighbouring proprietors on the same level; and that the bank was under the jurisdiction of the Commissioners of Sewers for the county of Norfolk, in pursuance of the statutes relating to the maintenance of sewers.

The plaintiffs also alleged that the defendants wrongfully cut down and destroyed a portion of the bank and made a wide passage through the same; and that on the 11th March 1883 large quantities of water from the river Nar flowed through the passage so made, and flowed into, upon, and over the land of the plaintiffs, by reason whereof large quantities of goods standing on the plaintiffs' land were wholly destroyed and rendered useless to the plaintiffs, and other such goods were greatly deteriorated in value, and the plaintiffs were put to great expense in removing the water and in drying a portion of their goods and otherwise.

Alternatively the plaintiffs alleged that the defendant Archdale and his predecessors in title to the land from time immemorial had been used to repair the bank; and that the plaintiffs and their predecessors in title had been entitled to have the bank repaired by the defendant Archdale and by his predecessors in title.

The plaintiffs further alleged that the defendant Archdale wholly neglected to repair the bank, and it was allowed by him to become ruinous, and, in consequence of its ruinous condition, water flowed through the bank upon the date and in the manner set forth, and caused the injuries set forth in the statement of claim.

The plaintiffs claimed the amount of 2476*l.* 16*s.* in respect of the damages sustained by them.

The plaintiffs delivered amended particulars, stating that the bank was cut into and allowed to become ruinous at the point through which the water passed, as alleged in their statement of claim, in or about the spring of 1871; and that since that period the bank remained unrepaired, and was allowed to become gradually more ruinous until after the 11th March 1883, the date of the damages complained of.

In the amended statement of defence the defendant Rands stated that he did not cut down or destroy the bank or make a passage through the same. The defendants Archdale and Page stated that, if the bank was cut down (which they did not admit), it was not cut down by their permission or authority. They objected that giving the permission and authority alleged to have been given by them afforded no ground of action in point of law. They denied that the defendant Page was the agent of the defendant Archdale as alleged.

All the defendants stated that the bank alleged to have been cut down was not a bank fronting the river Nar; that the bank was not an ancient bank, and it was not erected nor had it been maintained for the purposes alleged; that the bank was not under the jurisdiction of the Commissioners of Sewers; that the defendants would rely for a defence upon the Statutes of Limitations; that, if the bank was cut down as alleged there was no breach of duty on the part of the defendants in cutting down or permitting the cutting down of the same; that, if the bank was under the jurisdiction of the Commissioners of Sewers, it was always maintained subject to a right of way through the same with carts and carriages for the owners and occupiers of the defendants' land, and the alleged wrongful act of the defendants was a lawful exercise of the right of way; that the bank was cut down with the leave, licence, and acquiescence of the Commissioners of Sewers; that the bank was cut down (if at all) a long while before the year 1873, and the defendants Archdale and Rands before the 11th March 1883 had acquired a right to have the bank so cut down, and to have the said passage through the same.

The defendants also stated that the plaintiffs acquiesced in the cutting down of the bank, and in the passage through the same; that water did not flow from the river Nar through the passage on to the land of the plaintiffs; that the injury to the plaintiffs' goods was caused by an extraordinary high tide, and no damage was caused by the alleged wrongful act of the defendants; that the damage was caused by water which flowed on to the plaintiffs' land from places other than the passage; that the plaintiffs, by their own negligence, caused or contributed to their own injury; that goods of the plaintiffs were not destroyed or injured to the extent alleged; and that the plaintiffs were not put to the expenses alleged.

The defendant Archdale stated that he and his predecessors in title were not used to repair the bank as alleged. He denied the existence of the alleged prescriptive right; and he denied that he had neglected to repair the bank, or allowed the bank to become ruinous.

It was agreed that the amount of damages should be referred, and that the question of liability should be tried.

The action was accordingly tried at the Norwich Assizes on the 24th and 25th July 1885, before Huddleston, B. and a special jury.

Three points were raised on behalf of the plaintiffs: First, that the bank had been put up for the protection of the whole back country, and therefore the defendants had no right to meddle with it; secondly, that there was a prescriptive liability on the defendants as owning the land to keep the bank in repair for the benefit of other neighbouring lands; and, lastly, that the bank was within the jurisdiction of the Commissioners of Sewers, by the Bill of Sewers (23 Hen. 8, c. 5) and the amending Act, 3 & 4 Will. 4, c. 22, and therefore none of the defendants had any right to interfere with it, although it was on Archdale's land.

His Lordship reserved judgment, and then directed a verdict to be entered for the defendant Archdale; and a nonsuit as to the other two defendants.

The plaintiffs gave notice for a new trial.

The application was heard before Mathew and Smith, JJ., on the 8th and 9th Dec. 1885, when the judgment was upheld.

The plaintiffs appealed.

The appeal was heard on the 10th and 12th March 1886.

Lumley Smith, Q.C. and *Alan Macpherson* (*Horace Browne* with them) for the appellants.—The Bill of Sewers of 1531 gives the Commis-

sioners of Sewers jurisdiction to survey all the walls, ditches, banks, &c., by the coasts of the sea and marsh grounds; to assess people to repair them; and to appoint bailiffs to watch them. Sect. 10 of the Sewers Act of 1833 declares that all walls, banks, culverts, &c., upon, over, and adjoining to any rivers, streams, &c., which are now navigable, or in which the tide now does ebb and flow, shall be within the jurisdiction of the commissioners. The defendants are liable under the authority of *Attorney-General* v. *Tomline* (42 L. T. Rep. N. S. 880; 14 Ch. Div. 58). They referred also to

29 & 30 Vict. c. 61;
Hudson v. *Tabor*, 36 L. T. Rep. N. S. 492; 2 Q. B. Div. 290;
Reg. v. *Leigh*, 10 A. & E. 398.

Murphy, Q.C., and *Wightman Wood* for the respondents. — [Lord Esher, M.R. — We shall only call upon you to argue upon the question whether the wall was or was not within the jurisdiction of the Commissioners of Sewers.] In order to show that the wall was within their jurisdiction, there must be some evidence of an exercise of authority by the Commissioners of Sewers. Sect. 10 of the Sewers Act 1833 merely declares over what banks, &c., the commissioners may have jurisdiction, over which they are authorised to exercise such jurisdiction. But the property in such banks does not vest in the Commissioners of Sewers until they have "taken to" the banks in some such way as is described in sect. 47, by which the property passes to the commissioners in any lands, &c., "purchased, obtained, erected, constructed, and made by, or by the order of, or which are or shall be within or under the view, cognisance, or management of any Commissioners of Sewers." The plaintiffs have been unable to produce any evidence to that effect. The mere fact that the bank was an old bank is not sufficient to bring the bank within the jurisdiction of the commissioners, there being no evidence at all of any exercise by the commissioners of jurisdiction over the bank. Moreover, as there was an outer protecting bank, it cannot be taken that the inner bank was within their jurisdiction. They referred also to

Callis on Sewers, p. 74;
Hudson v. *Tabor* (*ubi sup.*).

Lumley Smith, in reply, cited

Stracey v. *Nelson*, 12 M. & W. 535.

Lord Esher, M.R.—This action could only have been maintained against the defendants if it could have been shown that the bank which was cut was within the jurisdiction of the Commissioners of Sewers in this sense—that it was a bank which had come under the exercise of that jurisdiction. In such case, the bank being vested in the commissioners—I do not say the property in it, but the bank being vested in them—for the purpose of being kept up for the public benefit, it might be said that, if the defendants cut the bank, and by that wrongful act against the public authority injured the plaintiffs, they would be liable. The very commencement of that proposition would involve, therefore, that the bank which the defendants cut was so far vested in the Commissioners of Sewers for the benefit of the public that it was the duty of the commissioners to have kept it up, and that the defendants took upon themselves to destroy the effect of that. It is said that sect. 10 of the Sewers Act 1883 did give the commissioners that vested authority and duty with regard to the bank. When I look, however, at sect. 10 of that Act, and at sect. 47, so as to construe the Act, it seems to me that Mr. Wightman Wood's argument, which he put with the utmost clearness, is conclusive. It seems to me that sect. 10 only shows what banks the commissioners may, if they take the proper steps, bring within the exercise of their jurisdiction. It seems to me also that it is only in respect to those banks which they have brought within the exercise of their jurisdiction that it can be said that the same are vested in them as a public authority for the purpose of protection, and that nobody can meddle with those banks. Here, if you assume that the bank in question is the outside bank—if you assume that that is what might be called the "protective" bank from the waters of the tidal river—you want more than that, viz., that the commissioners have (in rougher language) "taken to" that bank as a bank within their jurisdiction. In that view of the matter, the bank would be a bank within sect. 10, and one which therefore the commissioners might have taken within their jurisdiction, so as to bring it within sect. 47. There was, however, no evidence that they ever had done that. I cannot help thinking that that really has been always the construction placed upon the statute, although that construction has not hitherto, so far as I am aware, been expressly decided in any case. I repeat that I cannot but think that the invariable practice in such cases as this has been to show, not merely that the bank existed, but that the Commissioners of Sewers had done something, and there was evidence of their having done something, which showed they had "taken to" it, so as to make it a bank within their authority. If you can show that their servants have done things with regard to it, or have inspected it, that would be enough. Any evidence to show that they have adopted it will be sufficient; but there is no evidence of that sort here. Upon that ground, even assuming this to be a bank which would protect the country from the river, it seems to me that there was no case to go to the jury. I cannot help thinking that the second point taken is also a very strong one; but it is not necessary to decide the case upon that. It is very strong to my mind that there were two banks—what have been called the "outer" bank and the "inner" bank—and that there was no evidence to show which was really the protecting bank. It is for the plaintiffs to prove their case. If the plaintiffs show that there are two walls, one outside and one inside, either of which may be the protecting wall, they have, as it seems to me, not gone far enough. They ought to show that the inner wall was the protecting bank. However, I do not consider it necessary to decide the case on the second point, although, as I have said, I think it a very strong one. It seems to me the legal point taken is the right one—that the proper construction of the statute is that which was placed upon it in the argument for the defendants. If that is the right construction of the statute, then there was no evidence to show that the commissioners had ever adopted this bank as a bank which was within their jurisdiction. I think, therefore, that the appeal fails, and that the judgment of the Divisional Court must be affirmed. I may say that, with regard to the case of *Attorney-General* v.

Tomline (*ubi sup.*), it seems to me that the effect of it has been exaggerated, and that the doctrine there established was meant to apply to the natural protecting banks against the sea, and against the approach of such tidal rivers as are equivalent to the sea.

LINDLEY, L.J.—I also think this case is not made out by the plaintiffs. I think the case must turn upon the true construction of sects. 10 and 47 of the Sewers Act of 1833. When that Act was passed—that is to say, in the year 1833—as I understand it, that which is called the "outer" bank, and the bank disputed about, existed as it does now. That there was a bank of some sort is tolerably plain. That there was a better bank inside is also tolerably plain. Upon the evidence which is before us I should not myself be prepared to say that the Commissioners of Sewers might not have exercised jurisdiction over this inner bank, within the statute of 1833, on the ground that the outside bank was no effectual bank at all, and that the inside bank was, in fact, an adjoining bank within the meaning of sect. 10. I do not mean, upon the evidence before us, to decide that one way or the other. All I mean to say is, that I am not satisfied on this evidence that the commissioners might not, in 1833 or since, have come to the conclusion as to which was really the adjoining bank. I will not say how that is. But, assuming that the commissioners might have come to the conclusion that this inner bank was the substantial defence, and therefore that it was within sect. 10, I am satisfied that it is necessary for them to make it within their jurisdiction by doing some act which evidenced the fact that they regarded it as one of those matters which they ought to have attended to. I admit that you cannot get it from sect. 10 alone, but it appears to me you can get it, and ought to get it, from sect. 10 in conjunction with sect. 47. All that sect. 10 says, omitting the earlier portion of the section, is, that all walls, banks, culverts, bridges, dams, floodgates, and other works erected, or to be erected, in, upon, over, or adjoining to any such rivers, streams, sewers, or watercourses, shall be from henceforth, to all intents, constructions, and purposes, within and subject to the jurisdiction of the Commissioners of Sewers, that is to say, vested in the commissioners. It does not do more than that which it says; that is, it gives the commissioners the power, as I understand, to take these things under that section, if, in their judgment, it is necessary or expedient so to do. Then, sect. 47 points, I take it, to the vesting of the property. It provides that "the property of and in all lands, tenements, hereditaments, buildings, erections, works, and other things, which shall have been, or shall hereafter be purchased, obtained, erected, constructed, or made by, or by the order of, or which are or shall be within or under the view, cognisance, or management of any Commissioners of Sewers," and so on. The words are not "subject to the jurisdiction which is provided by that Act," but a different phrase is adopted, viz., "in or under the view, cognisance, or management of any Commissioners of Sewers;" that is to say, vested in them. Then the section makes it an indictable offence to meddle with the thing so vested. Undoubtedly there was in this case no proof whatever that this bank, assuming, as I do for a moment, that it is within sect. 10, was a bank which had been "purchased, obtained, erected, constructed, or made." Constructed and made it was not, as there was an old bank; but there was no evidence that it was purchased or obtained by the commissioners, nor was there any evidence at all that it was, in point of fact, "in or under the view, cognisance, or management" of the commissioners. It appears to me that that is where the plaintiffs' case breaks down. I do not think they can put their case so high as that. If a person cuts through an internal bank, which may or may not be a protecting bank, but which is a bank which the commissioners have not taken in fact—either purchased or obtained, or taken under their view, cognisance, or management—I do not think an action would lie. It appears to me that the plaintiffs do not make out their case on that. I say nothing about the other points. That is substantially the view which was adopted by Huddleston, B.

LOPES, L.J.—The plaintiffs in this action cannot succeed unless they can show that the bank in question was subject to the jurisdiction of the Commissioners of Sewers for the benefit of the public. Now there is a question raised here, and an important question too, with regard to the construction of two sections in the Sewers Act 1833; I mean sect. 10 and sect. 47. I think that Mr. Wightman Wood has put the true construction on those two sections. I do not think that the effect of those sections is that every bank, when erected, adjoining the sea or a navigable river (such a bank as is described in sect. 10), I do not think, I say, that it can be contended that that bank *ipso facto* vests in the commissioners. I think the true construction to be deduced from these two sections is, that it does not *ipso facto* vest, but that the commissioners must do something to bring it within their jurisdiction. If that be the true construction of these two sections it seems to me entirely to dispose of this case, because most distinctly there is no evidence to show that the Commissioners of Sewers ever "took to" either of these banks. There is only one other observation I desire to make, and that is with regard to the case of *Attorney-General* v. *Tomline* (*ubi sup.*) which has been cited to us. I quite agree with what has fallen from the Master of the Rolls, that that case only applies to the natural protecting banks against the seas or to banks erected by the Crown, either under the Crown itself or through the agency of the Commissioners of Sewers. I think, therefore, that this appeal ought to be dismissed.

Solicitors for the plaintiffs, *Andrew, Wood*, and *Glasier*, agents for *J. S. B. Glasier*, Lynn.

Solicitors for the defendants, *Field, Roscoe*, and *Co.*, agents for *Partridge* and *Co.*, Lynn.

Friday, May 14, 1886.

(Before Lord Esher, M.R., Bowen and Fry, L.JJ.)

The Dewsbury and Heckmondwike Waterworks Board (appls.) *v.* The Assessment Committee of the Penistone Union (respts.). (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Poor rate—Rateable value—Water rates in aid of water rents—Deduction for wear and tear— 39 *&* 40 *Vict. c. clxxxv., s.* 106.

By a special Act (39 *&* 40 *Vict. c. clxxxv.*) *the appellants were empowered to levy a water rate when the amount received from the water rents was insufficient to meet all the expenses, outgoings, and liabilities of the waterworks board, and in order to make up any deficit there might be.*

Held (*by Manisty and Smith, JJ., and by the Court of Appeal*), *that, in assessing the appellants to the poor rate in respect of their reservoirs, pipes, and works, the amount collected by means of the water rate ought to be taken into account in ascertaining the net rateable value of the property.*

Held (*by Manisty and Smith, JJ.*), *that a certain percentage on the total cost of the property ought to be deducted for wear and tear or destruction of property in estimating the net rateable value; and that what may happen to be the adequate remuneration to a contractor for erecting the appellants' works is not the true measure of the net rateable value.*

Judgment of Manisty and Smith, JJ. affirmed.

Special case, stated by consent and by order of Manisty, J. pursuant to 12 & 13 Vict. c. 45, s. 11.

1. In the year 1876 an Act, known as the Dewsbury and Heckmondwike Waterworks Act 1876, was passed for the purpose of consolidating and amending the Acts then in force relating to the Dewsbury and Heckmondwike Waterworks, and of authorising the construction of new works, and for other purposes therein mentioned. By the said Act (sect. 3) it was provided that the several persons who at the time of the passing thereof were members of certain united boards appointed by the council of the borough of Dewsbury, in the West Riding of the county of York, and the local board of health for the district of Heckmondwike, in the said riding, respectively, and their successors to be from time to time appointed under the provisions of the said Act, should be and were thereby incorporated under the name of the Dewsbury and Heckmondwike Waterworks Board. The appellants are the board so incorporated.

2. The respondents are the Assessment Committee of the Penistone Union in the said riding.

3. The appellants are the occupiers of certain rateable property in the township of Thurlstone, in the respondents' union, and, by the valuation list now in force, the appellants are now, and have been since the year 1875, assessed in respect thereof as follows: Name of occupier, Dewsbury and Batley United Board of Health; name of owner, Dewsbury and Batley United Board of Health; description of property, reservoirs, &c.; name or situation of property, Dunford Bridge, Windledow; estimated extent, fifty-three acres; gross estimated rental, 2600*l.*; rateable value, 1600*l.*

4. On the 19th June 1882 a rate was made in respect of the said property on the basis of the said rateable value of 1600*l.*

5. On or about the 7th July 1882 the appellants gave notice of objection to the respondents; and, having failed to obtain any relief, the appellants, on the 20th Sept. 1882, gave to the respondents due notice of an intention to appeal against the said rate, on the ground (amongst others) that they were overrated. Afterwards, by an order of Manisty, J., dated the 4th May 1883, and by consent of the parties hereto, the questions arising in respect of the said appeal were ordered to be determined upon a special case.

6. The appellants' works in the respondents' union consist of two reservoirs, which are used solely for supplying compensation water under the obligation imposed by the appellants' Act, and of 2 miles 770 yards of conduit and pipe, with the necessary weirs and works, which supply the appellants' district, and the appellants derive no direct profit whatever in the respondents' union, and their property directly earns nothing there, but only indirectly conduces to the earnings and receipts of the appellants in their own district.

7. The amount which has been expended by the appellants upon the whole of their works, irrespective of the reconstruction of the embankment of a reservoir known as the Dunford Bridge Reservoir, is 202,473*l.*, and the amount which has been expended by the appellants upon the reconstruction of the said embankment is 18,300*l.* The respondents refer to sects. 127, 128, 130, and 131 with regard to the payment of this sum. Of the above sum of 202,473*l.*, 45,875*l.* and the whole of the said sum of 18,300*l.* were expended in the township of Thurlstone; but the said expenditure of 18,300*l.* did not increase the benefit of the appellants' occupancy either in the respondents' union or elsewhere; but the appellants have had, and now have, the full benefit of the expenditure of the said sum of 45,875*l.*, of which 41,000*l.* represents the two compensation reservoirs, and 4875*l.* represents the conduit and pipe and other works mentioned in paragraph 6. The adequate remuneration to a contractor on the aggregate sum of 45,875*l.* would not be less than the present assessment.

8. The amount paid for interest upon borrowed money during the year 1882 by the appellants was the sum of 9902*l.* 3*s.*, and the amount received during the same year by the appellants was the aggregate sum of 15,878*l.* 17*s.* 1*d.*, of which 6127*l.* 4*s.* 10*d.* was received from public water rates, and 9751*l.* 12*s.* 8*d.* from water rents. The public water rates are levied to supply, and do supply, any deficiency between expenditure and the amounts received from water rents, which are the maximum rents allowed by the Act.

9. The ordinary working expenses of the appellants during the year 1882 amounted to the sum of 2118*l.* 8*s.* 3*d.*.

10. The appellants, or any hypothetical tenant of the waterworks, require as working capital the sum of 2000*l.*, in respect of which a deduction from income at the rate of 7½ per cent. for interest and contingencies should be allowed, but without any allowance for tenant's profits.

11. The total cost of the appellants' property, subject to depreciation, wear and tear, or destruction, is 180,000*l.*; and 1*l.* per cent. on that amount is a proper deduction to be made from income to form a reserve fund for renewals and replacements.

(*a*) Reported by H. D. Bonsey and P. B. Hutchins, Esqrs., Barristers-at-Law.

12. The appellants contend that the net rateable value of the whole of their works is to be estimated as follows:

	£	s.	d.
Total yearly income derived from water rents, paragraph 8	9751	12	3
Expenditure as in paragraph 9	2118	8	3
	7633	4	0
Working capital, 2000*l.*; interest thereon at 7½ per cent., paragraph 10	150	0	0
	7483	4	0
Reserve on 180,000*l.* at 1 per cent., as in paragraph 11	1800	0	0
	5683	4	0
Rates at 4*s.* in the pound upon 4736*l.*, the percentage being admitted	947	4	0
	£4736	0	0

13. The appellants further contend that the net rateable value of their property in the respondents' union is to be estimated at the sum of 1073*l.*, which is ascertained as follows: Total cost of works, 202,473*l.*; cost of works in township of Thurlstone, 45,875*l.*; net rateable value of the whole, 4736*l.*; net rateable value in the township of Thurlstone, 1073*l.* On this contention the gross estimated rental of the works in the township of Thurlstone would be 1743*l.*

14. The respondents, on the other hand, contend that the net rateable value of the property which only indirectly contributes to the appellants' earnings is to be estimated upon the principle laid down in the *Mile End Old Town case* (L. Rep. 10 Q. B. 208; 16 L. J. 184, M. C.) and the *West Middlesex case* (1 E. & E. 716; 28 L. J. 135, M. C.). And the respondents further contend that the public water rate as well as the water rents are to be taken into account in estimating the rateable value of the property, which they contend is not occupied for public purposes, but for the private benefit of a section of the public, namely, the particular water consumers supplied by the appellants; and the rateable value should be the rent at which the property could reasonably be expected to let to a tenant who did not occupy the property for commercial purposes only, and had the same power of levying a public water rate as the appellants have.

If the court should be of opinion that the appellants are right in their contention, the present assessment is to be reduced from 2600*l.* gross and 1600*l.* net, to 1743*l.* gross and 1073*l.* net; but if the court should be of opinion that the respondents are right, the present assessment is to be confirmed. All costs of and incidental to the appeal, and of and incidental to this case, to be in the discretion of the court, and judgment is to be entered in conformity with the decision of the court, and for such costs as the court may adjudge on motion by either party at the sessions next, or next but one, after such decision shall have been given.

The question for the opinion of the court is, whether the principles contended for by the appellants, or those contended for by the respondents, be correct, upon which the net rateable value of the property of the appellants in the respondents' union should be calculated, or on what principle and by what process the said rateable value is to be ascertained.

Nov. 11, 1885.—*Arthur Charles*, Q.C. (*West* with him) for the appellants.—By sect. 47 of the Dewsbury and Heckmondwike Waterworks Act 1876 (39 & 40 Vict. c. clxxxv.), the expenses and receipts of the waterworks are to be divided between the Dewsbury Corporation and the Heckmondwike Board. The Corporation or the Board, as the case may be, are not to levy any higher public water rate than may be required to discharge so much of the expenses of maintaining, repairing, restoring, and extending the waterworks, and of carrying the Act into execution, &c. In finding out what the hypothetical tenant would give, the restrictions must be considered:

Mayor of Peterborough v. *Stamford Union*, 31 W. R, 949.

There is no beneficial occupation, and the hypothetical tenant would not consider the rate when estimating what he would give:

West Bromwich School Board v. *Overseers of West Bromwich*, 13 Q. B. Div. 929;
Corporation of Worcester v. *Droitwich Assessment Committee*, 36 L. T. Rep. N. S. 186; 2 Ex. Div. 49;
Hare v. *Overseers of Putney*, 45 L. T. Rep. N. S. 337; 7 Q. B. Div. 228.

He also cited

Jones v. *Mersey Docks*, 13 L. T. Rep. N. S. 643; 11 H. of L. Cas. 443;
Overseers of Chorlton v. *Guardians of Chorlton*, 47 L. T. Rep. N. S. 96; 51 L. J. 458, Q. B.;
Reg. v. *Wells*, 16 L. T. Rep. N. S. 790; L. Rep. 2 Q. B. 542;
Reg. v. *Cambridge Gas Light Company*, 8 Ad. & E. 75;
Reg. v. *Burstall Local Board*, 1 *Times* L. Rep. p. 541.

Castle (*Jelf*, Q.C. with him) for the respondents.—The appellants have drawn no distinction between property used for private purposes and property used for pecuniary purposes, *e.g.*, a railway station makes profit by means of the railway, but no tenant would be found for a station only. In the case of *Reg.* v. *The Proprietors of the West Middlesex Waterworks* (28 L. J. 135, M. C.) the principle contended for by the respondents that the adequate remuneration of a contractor is a measure of the net rateable value, was approved. Outlay may or may not be a test of the rent a tenant would pay. The appellants contend that the hypothetical tenant would give nothing because he would get nothing from the premises; but he must be regarded as a hypothetical landlord as well as hypothetical tenant. The distinction between a statutory restriction on the land itself and on the occupiers was pointed out in the *Overseers of Chorlton* v. *The Guardians of Chorlton* (*ubi sup.*) The appellants ought not to make deductions; the corporation is not working to make profit, and a sinking fund for depreciation and renewal cannot be allowed. *Cur. adv. vult.*

Dec. 21.—The judgment of the court (Manisty and Smith, JJ.) was delivered by

MANISTY, J.—The question left to us in this special case is upon what principles and by what process the net rateable value of the appellants' property is to be ascertained. Three points were argued before us. First, the appellants insisted that, in ascertaining the net rateable value of their property, the amount collected by means of the water rate, pursuant to the provisions of the 39 & 40 Vict. c. clxxxv., was not to be taken into calculation. Secondly, they contended that the 1 per cent. upon 180,000*l.* for depreciation, wear, and tear, or destruction of their property, should

be allowed by way of deduction in estimating the net rateable value thereof. And, thirdly, they contended that what might happen to be the adequate remuneration to a contractor for erecting their works was not the true measure of what the net rateable value of their property was, as was argued by the respondents. As to the first point, it was contended that the effect of the provisions of the Dewsbury and Heckmondwike Water Act 1876 (39 & 40 Vict. c. clxxxv.), ss. 3, 47, 91, 97, 98, 99, 105, and 106 was, that the water rate was only to be levied as and when the amount received from the water rents was insufficient to meet all the expenses, outgoings, and liabilities of the waterworks board, and to make up any deficit there might then be; and that, inasmuch as no tenant could possibly be found to give anything for a property from which he was unable to make any profit, therefore the amount recoverable by means of the water rate ought not to be taken into calculation when estimating what a hypothetical tenant would give for the property of the waterworks board. It was argued thus: Suppose, said the appellants, that by their Act it was enacted that the local board should acquire assets solely by means of a water rate, and that by the same Act it was provided that no more should be levied by this rate than was required to meet all expenses, outgoings, and liabilities; in such case, they said, surely the hypothetical tenant would give nothing for a property out of which it was only possible to receive assets equal to the amount of the outgoings. That was their argument; we think, however, for reasons below, that it cannot be maintained. In *Jones* v. *Mersey Docks* (*ubi sup.*) it was expressly held that all property capable of beneficial occupation, and which, if let to a tenant, was capable of producing a rent (excepting always property occupied by Her Majesty or her servants) was rateable. As to what constitutes a beneficial occupation, Blackburn, J., in delivering the opinion of the majority of the judges in the House of Lords, said: "In order therefore that a valid rate may be imposed, it is essential that the occupation should be of value beyond what is required to maintain the property, for if the occupation be of so little value that the hypothetical tenant (under the Parochial Assessment Act) would either give no rent or a rent which, after deducting the average annual expense of the maintenance, would leave no overplus, there is nothing to rate." The cases of *Jones* v. *Mersey Docks*, already mentioned; *Mayor and Corporation of London* v. *Stratton* (L. Rep. 7 H. of L. 477); *Corporation of Liverpool* v. *Wavertree* (2 Ex. Div. 55, n.); *Hare* v. *Overseers of Putney* (45 L. T. Rep. N. S. 337; 7 Q. B. Div. 223); and *West Bromwich School Board* v. *Overseers of West Bromwich* (13 Q. B. Div. 929), have, as it seems to us, decided that if property is incapable, by reason of the prohibition placed upon it by statute, or by reason of its barrenness, which cannot be cured, of yielding a profit in anyone's occupation, then it is not rateable; but that, if the property is not absolutely prohibited by statute from being occupied at a profit by anyone, or is not the barren rock spoken of by Lord Cranworth in *Jones* v. *Mersey Docks*, incapable of being occupied by anyone at a profit, then it is rateable. It was upon the same principle (as it seems to us) that the late Williams, J. and Smith, J. decided the case of the *Corporation of Peterborough* v. *Overseers of Wilsthorpe* (31 W. R. 949) as was, pointed out by Bowen, L.J. in the West Bromwich case, when the case was under appeal. In the West Bromwich case it was expressly decided that the school board were liable to be rated because their premises were capable of beneficial occupation in the hands of someone, though, possibly, not in theirs; and so also in the case of the *Overseers of the Poor of Chorlton-upon-Medlock* v. *Guardians of Chorlton Union* (*ubi sup.*), it was held that, inasmuch as the restriction was only upon the then tenant, the limitation of non-rateability contended for could not be maintained. The case of *Reg.* v. *Burstall Local Board* (*ubi sup.*) appears in no way to conflict with the above principles. And the case of the *Assessment Committee of the Altrincham Union* v. *Cheshire Lines Committee* (15 Q. B. Div. 597), reported in the Court of Appeal since this judgment was written, is to the same effect. Now, in the present case, can it be said that there is imposed by the Act (39 & 40 Vict. c. clxxxv.) such a prohibition that there can be no beneficial occupation of the waterworks by anyone? We will assume that Mr. Charles's contention is correct upon the terms of the statute, viz., that water rate is never to be levied except to make up any deficiency there may be between the amount received from water rent and the expenses, outgoings, and liabilities of the waterworks board. In this case the expenses, outgoings, and liabilities of the waterworks board include 9902*l.* 3*s.* per annum interest upon borrowed moneys, and 2118*l.* 8*s.* 3*d.* per annum for ordinary working expenses, making a total of 12,020*l.* 11*s.* 3*d.* To meet these and other items, should there be any deficit after collecting the water rents, the water rate is to be first resorted to. Take the following case: A man invests 20,000*l.* in, say, gasworks, or any other property. His annual working expenses are 2100*l.*; he has a fund provided for him upon which he may draw not only to recoup him his annual working expenditure, but also to pay him 4 per cent. for interest upon his 200,000*l.* (viz., 8000*l.* per annum): could it be contended in such a case that the occupation of the property is not a beneficial occupation? Surely not, and in our opinion it makes no difference whether the capital invested be or be not borrowed money. We are clearly of opinion that the property in the present case is capable of being beneficially occupied, and that, consequently, it is rateable. We are also of opinion that the amount collected by means of the water rate ought to be taken into account in ascertaining the net rateable value of the property. It is, in our opinion, immaterial from what source the income is derived, so long as it is incidental to the ownership of the property. As to the second question, viz., whether 1 per cent. upon the 180,000*l.* mentioned in the case has to be deducted in estimating the net rateable value of the property: if we understand paragraph 11 of the case correctly the question put to us is, in substance, whether the 1 per cent. should be allowed as the "probable average annual cost of repairs:" (see 6 & 7 Will. 4, c. 96, s. 1.) We answer this question in the affirmative. As to the third point, we are clearly of opinion that what may happen to be the adequate remuneration to a contractor for erecting the appellants' works is not the true

measure of the net rateable value of their premises. This is not the test applied by the Parochial Assessment Act, nor is it a test which has ever, to our knowledge, been recognised in a court of law; and, what is more, it is obviously so unreliable and fallacious, as was pointed out during the argument of this case, that, in our judgment, no reliance whatever can be placed upon it. In our opinion, inasmuch as the appellants have failed upon the main contention in this case, viz., as to whether or not the water rate ought to be taken into account when estimating the rateable value of their property, the judgment should be given for the respondents with costs.

Judgment for respondents, with costs.

The Dewsbury and Heckmondwike Waterworks Board appealed from the above judgment.

Friday, May 14.—*Charles*, Q.C. and *West* argued in support of the appeal.

Jelf, Q.C. and *Castle*, for the respondent, were not called upon.

Lord ESHER, M.R.—The statements of fact in the special case show that the corporation is entitled to levy water rents up to a certain maximum, and if the water rents do not come up to the expenses the corporation is entitled to levy a rate in aid to make up the deficiency. There is nothing in the case which amounts to a statement that there will always be a deficiency; the statement is only that when there is a deficiency then there may be a rate in aid. The question is, whether the power to levy a rate in aid ought to be taken into account in assessing the annual value of the property of the appellants for the purpose of the poor rate. I think that, to make the head-note to the report of the case of the *Mayor of Peterborough* v. *The Stamford Union* (31 W. R. 949) a correct statement of the law, it ought to be expanded so as to read thus: "Where land is occupied by a local authority for public purposes the land is to be assessed to the poor rate at the rent which a tenant would pay if subject to the same restrictions and entitled to the same advantages as the local authority." It is clearly an advantage to have the power to levy a rate in aid to make up any deficiency which may occur, and at the same time, if the maximum of the water rents exceeds the expenses, to be entitled to keep the balance and therefore this ought to be taken into account in assessing the appellants' property. That is the true principle, and therefore I am of opinion that the judgment of the court below is right and ought to be affirmed. With regard to the second point taken on behalf of the appellant, where the case was likened to that of the rector of a parish receiving an independent income, as in *Reg.* v. *Christopherson* (53 L. T. Rep. N. S. 804; 16 Q. B. Div. 7), the answer is, that riches derived *aliunde* would be no part of the business of the waterworks board; but in the present case that which is to prevent a loss in carrying on a business is an advantage attached to that business.

BOWEN and FRY, L.JJ. concurred.

Appeal dismissed.

Solicitors for appellants, *Ridsdale* and *Son*.

Solicitors for respondents, *Torr*, *Janeways*, *Gribble*, and *Oddie*.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Friday, March 26, 1886.

(Before MATHEW and SMITH, JJ.)

THE OVERSEERS AND GUARDIANS OF MANCHESTER (apps.) *v.* THE GUARDIANS OF THE ORMSKIRK UNION (resps.). (*a*)

Poor law—Settlement by residence—Break of residence—Divided Parishes Act 1876 (39 *&* 40 *Vict. c.* 61), *s.* 34.

A pauper, by virtue of her employment as a nurse by the trustees of the Manchester Royal Infirmary, resided for five years (with the exception of two periods of absence of three and five months' duration respectively, when she was sent to a branch establishment) in the appellant township. By the terms of her engagement as nurse she was required to undertake whatever duties she was ordered, whether as a hospital or a private nurse. On the occasions of her absence at the said branch establishment, which, though a separate building in a different parish, was entirely under the management of the said Royal Infirmary, the pauper left behind her at the Royal Infirmary the greater part of her property and effects, and she went there from time to time for her wages and for change of clothing as she required it.

Held (affirming the order of the justices), that the two periods of absence of the pauper did not constitute a break of residence, and that she had gained a legal settlement in the appellant township by three years' residence within the meaning of 39 *&* 40 *Vict. c.* 61, *s.* 34.

THIS was a special case stated by consent, and by the order of Smith, J., in pursuance of 12 & 13 Vict. c. 45, s. 11.

On the 7th Aug. 1885 the respondents obtained an order of the justices of the county of Lancaster, adjudicating the settlement of Louisa Elizabeth Eastwood, a pauper lunatic, to be in the township of Manchester, in the county of Lancaster.

1. The pauper, a single woman aged thirty-seven years, was employed by the trustee of the Manchester Royal Infirmary as an indoor resident nurse from the 3rd Nov. 1873 to the 20th July 1878, when she was discharged from their service.

2. The terms of her engagement were contained in a printed list of conditions then in use at the said Royal Infirmary, a copy of which was given to nurses on their being engaged, on which list of conditions the following clauses appear with regard to the terms of engagement of nurses:

"The nurses and probationers are under the authority of the lady superintendent of nurses of the infirmary, who is responsible for the proper observance of the regulations.

"They will be required to undertake whatever duties they may be ordered, whether as hospital or private nurses.

"The nurses must give one calendar month's notice before leaving, and will receive the same from the lady superintendent of nurses, except in case of bad conduct or wilful disobedience, when they will be liable to instant dismissal."

3. Save as in next paragraph mentioned, the

(*a*) Reported by F. A. CRAILSHEIM, Esq., Barrister-at-Law.

pauper, during her term of employment by the said trustees, served them, and lived at Manchester Royal Infirmary, in the township of Manchester.

4. From some time in the month of January until some time in the month of June 1876, and again from the 29th Sept. to the 25th Dec. 1877, the pauper was sent, by direction of the said lady superintendent, from the said Manchester Royal Infirmary to, and she served the said trustees, and resided at a branch establishment of the said Manchester Royal Infirmary known as the Monsall Fever Hospital, being in the township of Newton, in the Prestwich Poor Law Union, in consequence of an influx of infectious cases at such fever hospital; but on each occasion when the pressure of work at the said Monsall Fever Hospital had decreased, she returned by direction of the said lady superintendent to the said Manchester Royal Infirmary.

5. The Monsall Fever Hospital in the years 1876 and 1877, although a separate building, was entirely under the management of the said Royal Infirmary. It had no qualified resident medical attendant, but simply a matron, and all wages at this time were paid from the said Royal Infirmary at the Monsall Hospital. If it was necessary that a nurse should be dismissed during the quarter from the said Monsall Fever Hospital, it could only be done by the lady superintendent of nurses at the said Royal Infirmary, and the nurse so dismissed must have gone to the said Royal Infirmary for her wages.

6. When, owing to an influx of infectious cases or other cause, nurses were wanted at the said Monsall Fever Hospital, the resident medical officer at the said Royal Infirmary, who daily visited the said Fever Hospital, applied to the said lady superintendent to send the necessary nurses from the said Royal Infirmary, and when their services were no longer required there they returned, by direction of the said lady superintendent, to the said Royal Infirmary, unless ordered for duty elsewhere.

7. On the first occasion of the absence of the pauper from the township of Manchester, in paragraph 4 mentioned, the pauper left behind her at the said Manchester Royal Infirmary the greater portion of her property and effects in her box in the dormitory used by her at the said Royal Infirmary. It was the practice of the said lady superintendent to tell nurses when sent to the said Monsall Hospital to take as little of their clothing as possible with them to the said hospital.

8. It has been ascertained that the pauper, on the said first occasion of absence at the said Monsall Hospital, from time to time went to the said Royal Infirmary for change of clothing as she required it, and it was the practice with nurses so to do.

9. It was the rule and practice when a nurse had been sent from the said Royal Infirmary to the said Monsall Fever Hospital or elsewhere, for the said lady superintendent to make use of the space vacated by her in the dormitory and elsewhere for the accommodation of some other nurse or person, as occasion might require. But it cannot now be ascertained what was done in this particular instance.

The appellants assert, and the respondents deny, that the absence of the pauper from the said Royal Infirmary in the township of Manchester, in paragraph 4 mentioned, constitute a break of residence.

The question for the court is, whether or no, upon the facts above set out, the pauper acquired a legal settlement in the township of Manchester under the provisions of sect. 34 of 39 & 40 Vict. c. 61, by reason of a three years' continuous residence therein.

Addison, Q.C. for the appellants.—It is submitted that the absence of the pauper for these two periods of time from the hospital constitute a break of residence. During her absence it cannot be that she constructively resided there, because she had not the power and intention of returning at any time. The absence was under a contract, as in *Reg.* v. *Stapleton* (1 El. & Bl. 766), and she could not return without a breach of contract. Absence which does not constitute a break of residence must be voluntary and really temporary:

Reg. v. *The Guardians of Stepney Union*, 52 L. T. Rep. N. S. 959; 54 L. J. 12, M. C.;
Reg. v. *Guardians of Glossop Union*, 35 L. J. 148, M. C.; L. Rep. 1 Q. B. 277;
Reg. v. *Guardians of Worcester Union*, 30 L. T. Rep. N. S. 357; L. Rep. 9 Q. B. 340;
Reg. v. *Guardians of Stourbridge Union*, 34 L. J. 179, M.C.

Smyly, for the respondents, was not called upon.

Mathew, J.—I am of opinion that, upon the findings of fact in the case, there was no break of residence by the pauper. It is only necessary for us to examine the facts set out in the special case, and to consider the alternative residence that has been suggested, for this to be apparent. The pauper acquired a residence under an engagement at the hospital. Under that engagement she binds herself to undertake whatever duties she may be ordered to perform. The authorities at Manchester had a right to order her to leave the hospital and to go to a private house or elsewhere. It appears on the case that she was ordered in 1876, and again in the following year, to attend certain fever patients at a hospital away from Manchester, and to remain there attending to them for some months. While she was so employed her wages were paid to her from the institution at Manchester, and her clothes and effects remained at that institution, and thither she returned after her duties at the Monsall Hospital were ended. It is clear that her absence at the Fever Hospital was not for the purpose of residing, but for the purpose of fulfilling her duties under her contract of service. The character of her absence is plainly within the terms of her contract. I am clearly of opinion that there was no real break of residence, and therefore the order of the magistrates must stand.

Smith, J.—The question for us to decide is, whether, on the facts set out in the special case, there has been a break of the residence gained by the pauper under sect. 34 of the Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61). The pauper was engaged as a resident nurse at the Manchester Royal Infirmary in 1873, and she continued to reside there till 1878, with the exception of two periods of absence. By sect. 34 of the Poor Law Amendment Act 1876, persons who reside for three years in a parish in such a

manner as to have acquired in each of those years a status of irremovability in accordance with the statutes in that behalf shall be deemed to be settled there. It is obvious that, under that section, the pauper obtained a settlement at Manchester. Under the terms of her engagement at the Royal Hospital the superintendent was entitled to send her out from time to time to nurse patients in private houses or elsewhere, and she did, in fact, so send her out on two occasions. It was contended by Mr. Addison that this was a break of residence, and he argued that this pauper had, in fact, contracted to serve out of Manchester, and he cited Lord Campbell's judgment in *Regina* v. *Stapleton* (1 E. & B. 766). The effect of that judgment is that, if a man having a residence in parish A. voluntarily contracts to go into parish B. and not to return, that constitutes a break of residence. The facts are different here. The contract of the pauper in this case is to go wherever the superintendent may order her to go as her servant. It seems to me that the case of *Regina* v. *The Worcester Union* (30 L. T. Rep. N. S. 357; L. Rep. 9 Q. B. 340) is in point: there the pauper had gone away to work outside the parish in which he had begun to reside, and had, in fact, begun a new residence. Lord Blackburn in his judgment says that "it is not the case of a pauper being hired out by the master of the workhouses, but his leaving the workhouses voluntarily to go to work." If, in that case, the pauper had been sent to work by his master out of the parish, there would have been no break of residence. It seems to me that all this nurse did was to carry out the terms of her contract, and I am clearly of opinion that her absence on those two occasions did not constitute a break of residence. This appeal must therefore be dismissed.

Order affirmed.

Solicitors for the appellants, *Johnson, Weatherall, and Co.*, for *Linge*, Manchester.

Solicitors for the respondents, *Gregory, Rowcliffe*, and *Co*, for *Parr, Sadler*, and *Dickinson*, Ormskirk.

Monday, March 22, 1886.

(Before MATHEW and SMITH, JJ.)

KIRWIN (app.) *v.* HINES (resp.). (*a*)

Prosecution of brothel-keeper — Alternative procedure—25 *Geo.* 2, *c.* 36, *ss.* 5, 6, *and* 7—58 *Geo.* 3, *c.* 70, *s.* 7—48 *& 49 Vict. c.* 69 (*Criminal Law Amendment Act* 1885), *s.* 13.

In a prosecution of a brothel-keeper under sect. 13 *of the Criminal Law Amendment Act* 1885, *it is competent to the prosecutor either to proceed summarily under that Act independently of the earlier Acts, or he may, at his option, comply with the preliminary steps specified in sect.* 5 *of* 25 *Geo.* 2, *c.* 36 *as amended by sect.* 7 *of* 58 *Geo.* 3, *c.* 70, *and then become entitled to a reward.*

THIS was a case stated by one of the magistrates of the police-courts of the metropolis under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose as in the following case stated.

1. At the Thames Police-court, in the county of Middlesex and within the metropolitan police district, an information was preferred, on the 10th Dec. 1885, before the sitting magistrate, by Edwin Henry Kirwin (hereinafter called the appellant), against Louisa Hines (hereinafter called the respondent), under sect. 13 of the Criminal Law Amendment Act 1885, charging for that she, the said respondent, did keep a brothel at 62, Oxford-street, Stepney, in the said county, and being the tenant, lessee, or occupier, knowingly permitted such premises to be used as a brothel. Thereupon the said magistrate issued his summons to the respondent to appear and answer the matter of the said information, and upon the 17th Dec. the said information was heard and determined at the said police-court, the said parties respectively being then present, and upon such hearing the same was dismissed without costs.

2. And whereas the appellant, being dissatisfied with such determination upon the hearing of the said information, as being erroneous in point of law, did, pursuant to sect. 2 of the said statute 20 & 21 Vict. c. 43, duly apply in writing for a case to be stated, setting forth the facts and the grounds of such determination as aforesaid for the opinion of the court, and did duly enter into a recognisance as required by the statute in that behalf, the said magistrate, in compliance with the said application and the provisions of the said statute, did state and sign the following case.

3. Upon the hearing of the said information, before the facts were put in evidence, it was contended on the part of the respondent that the information was not laid in the manner and form provided by the said Criminal Law Amendment Act 1885, inasmuch as by the concluding sentence of sect. 13 of the said Act, the procedure enacted as to prosecutions of bawdy-houses by sects. 5, 6, and 7 of the Act 25 Geo. 2, c. 36, as amended by sect. 7 of the Act 58 Geo. 3, c. 70, was made binding on all prosecutions under the said section 13 of the said Criminal Law Amendment Act, and the said information was not properly laid in respect that no notice in writing had been given by two inhabitants of the parish paying scot and bearing lot therein to any constable or other peace officer of the like nature, and that the overseers of the poor had not been summoned or had any reasonable notice to attend, nor had such overseers or such constable entered into any recognisance to give or produce material evidence as by the said Acts of 25 Geo. 2, c. 36, and 58 Geo. 3, c. 70, was provided and enacted.

4. It was contended on the part of the appellant that the said information being properly laid in the manner provided by the Summary Jurisdiction Acts, was valid for the purposes of a prosecution under the said sect. 13 of the said Criminal Law Amendment Act, and that, on the true construction of the said last-mentioned section, it made provision for a new method of procedure in prosecuting brothel-keepers and other persons guilty of the new statutory offences by the same section for the first time created, namely, the ordinary procedure of the Summary Jurisdiction Acts leading to summary conviction, but subject to an appeal to a court of general or quarter sessions against such convictions; that the said new method of procedure was intended to be different from and less cumbrous than the procedure already provided by the Act of 25 Geo. 2,

(*a*) Reported by F. A. CHALLENER, Esq., Barrister-at-Law.

c. 36, and that the last sentence of the said sect. 13 ought to be construed, not as limiting or governing the said new method of procedure, but as enacting the formal enactments necessary to enable any prosecutors who desired it to proceed under the Act 25 Geo. 2, c. 36, as amended by the Act of 58 Geo. 3, c. 70, and by the said sect. 13, and to recover the costs and payments of the said Act of 25 Geo. 2, c. 36 provided for, and to obtain convictions thereunder, either summarily or otherwise, as they might elect; and that the amendments of the said Acts of 25 Geo. 2, c. 36, and of 58 Geo. 3, c. 70, were rendered necessary, among other things, by the fact that the said sect. 13 had already, by the first sentence thereof, in subsects. 2 and 3, created certain new statutory offences, which were not included in the definition of the keeping of a brothel at the common law, and were not previously indicted as a common nuisance, and would not have been within the provisions of the said Act of 25 Geo. 2, c. 36, unless the same had been mentioned and amended in that behalf.

The magistrate was of opinion that the whole 13th sect. of the said Criminal Law Amendment Act was to be construed together, as enacting and regulating the summary procedure on prosecution for the offence of keeping a brothel, which hitherto had only been punishable on prosecution by indictment; that the intent and effect of the last clause of the said section was, among other things, to apply to the power of summary prosecution in such cases a general security (similar to that extended by the Vexatious Indictments Act to the procedure in all prosecutions by way of indictment for the offence of keeping a disorderly house) against the risk that any such summary prosecution might be fraudulently instituted or compromised behind the back of the magistrate after summons issued, or dropped through the failure of the informant to appear on the hearing; that it was not open to the appellant to proceed by way of information and summons in disregard of the enactments in the said section mentioned as applying to prosecutions under the said section; and the magistrate therefore gave his determination against the appellant in the manner before stated.

The questions of law arising on the above statement for the opinion of the court therefore are:—1. Whether the ordinary method of procedure by information and summons provided by the Summary Jurisdiction Acts is or is not available for prosecutions under sect. 13 of the Criminal Law Amendment Act 1885. 2. Whether any person desiring to prosecute under the said sect. 13, has, or has not, an election to proceed by the ordinary procedure provided by the Summary Jurisdiction Acts, or by the procedure provided by the Act of 25 Geo. 2, c. 36, as amended by sect. 7 of the Act of 58 Geo. 3, c. 70, and by sect. 13 of the Criminal Law Amendment Act 1885.

Sect. 5 of 25 Geo. 2, c. 36, enacts that, in order to encourage prosecutions against persons keeping bawdy-houses, gaming-houses, or other disorderly houses, if any two inhabitants of any parish or place, paying scot and bearing lot therein, do give notice in writing to any constable (or other peace officer of the like nature, where there is no constable), of such parish or place, of any person keeping a bawdy-house, gaming-house, or other disorderly house, the constable or such officer as aforesaid, so receiving such notice, shall forthwith go with such inhabitants to a justice of the peace, and shall, upon such inhabitants making oath before such justice, that they believe the contents of such notice to be true, and entering into a recognisance in the penal sum of 20*l.* each to give or produce material evidence against such person for such offence, enter into recognisances in the penal sum of 30*l.* to prosecute with effect such person, and such constable or other officer shall be allowed all reasonable expenses, and shall be paid the same by the overseers; and in case such person shall be convicted of such offence, the overseers of the poor of such parish or place shall forthwith pay the sum of 10*l.* to each of such inhabitants. A penalty is also imposed on overseers neglecting to pay such expenses of the prosecution.

By sect. 7 of 58 Geo. 3, c. 70, it was further enacted that a copy of the notice given to the constable should also be served on the overseers of the poor of such parish or place, and that such overseers should be summoned or have reasonable notice to attend before the justice, and should then also enter into recognisances to prosecute.

By sect. 13 of the Criminal Law Amendment Act 1885 (48 & 49 Vict. c. 69), it is enacted that

Any person who (1) keeps or manages or acts or assists in the management of a brothel, or (2) being the tenant, lessee, or occupier of any premises, knowingly permits such premises or any part thereof to be used as a brothel or for the purposes of habitual prostitution, or (3) being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is wilfully a party to the continued use of such premises or any part thereof as a brothel, shall on summary conviction in manner provided by the Summary Jurisdiction Acts be liable (1) to a penalty not exceeding twenty pounds, or, in the discretion of the court, to imprisonment for any term not exceeding three months, with or without hard labour, and (2) on a second or subsequent conviction to a penalty not exceeding forty pounds, or, in the discretion of the court, to imprisonment for any term not exceeding four months, with or without hard labour; and in case of a third or subsequent conviction such person may, in addition to such penalty or imprisonment as last aforesaid, be required by the court to enter into a recognisance, with or without sureties, as to the court seems meet, to be of good behaviour for any period not exceeding twelve months, and in default of entering into such recognisance, with or without sureties (as the case may be), such person may be imprisoned for any period not exceeding three months, in addition to any such term of imprisonment as aforesaid.

Any person on being summarily convicted in pursuance of this section may appeal to a court of general or quarter sessions against such conviction.

The enactments for encouraging prosecutions of disorderly houses contained in sects. 5, 6, and 7 of the 25 Geo. 2, c. 36, as amended by the enactments contained in sect. 7 of the 58 Geo. 3, c. 70, shall, with the necessary modifications, be deemed to apply to prosecutions under this section, and the said enactments shall, for the purposes of this section, be construed as if the prosecution in such enactments mentioned included summary proceedings under this section as well as a prosecution on indictment.

Finlay, Q.C. (*Costelloe* with him) for the appellant.—The Criminal Law Amendment Act 1885 created a new mode of procedure in a summary manner, and the magistrate was therefore wrong in holding that the preliminaries to the indictment specified in 25 Geo. 2, c. 36, and 58 Geo.

c. 70, must still be recognised in a prosecution under the recent Act, which is quite independent of the old Acts. There is nothing in the Act of 1885 either expressly or impliedly saying that the prosecutor is bound to go through the old preliminaries in all cases. It is optional to the prosecutor to go through the old preliminary steps and then proceed in a summary manner, or to proceed in a summary manner in the ordinary way. It is therefore submitted that the magistrate was wrong, and judgment ought to be for the appellant.

The respondent did not appear.

Mathew, J.—I am of opinion that the learned magistrate took an erroneous view of the legislation on this subject, and that he came to a wrong conclusion. The earlier statutes referred to in the 13th section of the Criminal Law Amendment Act 1885, were statutes of the character described in the last clause of that section, that is to say, they were designed for the encouragement of prosecutions of a certain class of offences by entitling the prosecutors to rewards. The prosecutors of those offences were to take the preliminary steps specified in the earlier statutes in instituting an indictment, and were then to be in a position to claim certain rewards. It appears to have been thought, when summary proceedings were provided for by the recent Act, that possibly prosecution under the earlier Acts might be discouraged if the same rewards were not given to those who made use of the new mode of procedure, so the 13th section provides as follows: "The enactments for encouraging prosecutions of disorderly houses contained in sects, 5, 6, and 7 of 25 Geo. 2, c. 36, as amended by the enactment contained in sect. 7 of 58 Geo. 3, c. 70, shall, with the necessary modifications, be deemed to apply to prosecutions under this section, and the said enactments shall, for the purposes of this section, be construed as if the prosecution in such enactments mentioned included summary proceedings under this section as well as a prosecution on indictment." That says as plainly as possible that the same reward shall be recoverable by a prosecutor proceeding in a summary manner as by a prosecutor proceeding by indictment; that is to say, if he chooses to have recourse to the preliminary proceedings set forth in the Acts of Geo. 2 and Geo. 3, then he may add either the proceeding by indictment or the proceeding in a summary manner, and then be entitled to the reward. But the Criminal Law Amendment Act of 1885 is independent of the earlier Acts, and the procedure under the later Act may also be taken by itself at the option of the prosecutor. The view of the learned magistrate was, therefore, incorrect, and this appeal must be allowed.

Smith, J.—I am of the same opinion.

Appeal allowed.

Solicitor for the appellant, *Minton Slater*.

March 26 and April 5, 1886.

(Before Mathew and Smith, JJ.)

The Tyne Boiler Works Company Limited (apps.) *v.* The Tynemouth Union (resps.). (*a*)

Poor rate—Rating of boiler works—Machinery capable of being removed without injury.

In assessing premises used as boiler works to the poor rate, machinery and plant ought to be taken into account as enhancing the rateable value of the premises, where such machinery (though capable of being removed without injury to itself or to the freehold), is essentially necessary to the carrying on of the business to which the premises are devoted, and where it is intended to remain connected with the premises so long as they are used for the same purpose.

Laing *v.* The Overseers of Bishopwearmouth (37 *L. T. Rep. N. S.* 781; 3 *Q. B. Div.* 299) *followed.*

This was a case stated by the Court of Quarter Sessions of and for the county of Northumberland.

1. On the 9th Jan. 1885 an appeal against a rate was heard by the said Court of Quarter Sessions, in which the Tyne Boiler Works Company Limited were the appellants, and the overseers of the poor of the parish of Longbenton and the assessment committee of the Tynemouth Union were the respondents. The rate against which the said appeal was brought was a rate for the relief of the poor of the parish of Longbenton, in the said county, made the 28th June 1884, whereby the appellants were rated in respect of premises in the said parish occupied by them, as hereinafter appears.

2. The valuation, assessment, and rate in question were as appears from the following extract from the rate-book:

Occupier.	Owners.	Description.	Gross Estimated Rental.	Rateable Value.	Rate at 10d. in the pound.
Tyne Boiler Works Company Limited.	Tyne Boiler Works Company Limited.	Boiler works. Land	£ 590	£ 501	£ s. d. 20 17 6

3. The grounds of appeal were, that the appellants were overrated in respect of the said premises.

4. All proper notices were given, and steps taken, to entitle the appellants to raise upon the appeal the questions and objections raised by them herein appearing.

5. The appellants were, at all material times, and still are, the tenants and occupiers of the premises in the said parish before referred to, and which are known as the Tyne Boiler Works. The said premises comprise upwards of 5100 square yards of land upon the banks of the Tyne, part of which land was and still is covered by a large brick building roofed in, the roof being supported by the walls of the building, and by iron columns, and the rest of the said land being, with the exception of certain offices and boiler or engine sheds, erected on parts thereof open and uncovered by buildings.

6. The premises were and are held by the appellants as assignees under a lease from the

(*a*) Reported by F. A. Crailsheim, Esq., Barrister-at-Law.

corporation of Newcastle-upon-Tyne, which was granted to Joseph Pollard for a term of seventy-five years from Sept. 1864. In or about 1868 or 1869 Messrs. Thompson and Boyd, who were then the assignees of the term created by the said lease, erected the brick building mentioned in paragraph 5, and placed therein the engine in the following list referred to as No. 2, and the boiler, in the same list referred to as No. 1, and certain of the shafting and machinery still on the premises, for the purpose of making boilers and erecting machinery on board vessels, and also for the purpose of making forgings. The appellants have, since they became assignees of the said term and occupiers of the said premises, purchased and placed upon them other machinery and plant in addition to that put up by Messrs. Thompson and Boyd, and have used the said lands and buildings, together with the boilers, engine, plant, and machines thereon, for making boilers and erecting them on board vessels. The proximity of the premises to the Tyne makes them suitable for boiler works, but at successive periods previous to their being occupied by the appellants they have been used for manufactures or purposes of different kinds.

7. It was agreed and admitted that, in arriving at the rateable value of 501*l.*, at which the said premises are assessed, the machinery and plant hereinafter specified, which were and are upon the said premises, had been taken into consideration as enhancing the rateable value of such premises, viz: In the main building. Water supplies: 1, boiler; 2, main engine; 3, main shafting; 4, fan blasts; 5, blast pipes; 6, hydraulic accumulator; 7, pair of hydraulic pumps near end of building, ditto near accumulator; 8, two small open return water tanks; 9, flanging machine; 10, riveting machine; 11, two plate-edge planing machines; 12, plate bending rolls; 13, punching machine; 14, punching, plate shearing, and angle shearing machine; 15, three roll drills; 16, radial drilling machine; 17, boiler shell drilling machine; 18, grindstone; 19, drilling machine; 20, screwing machine; 21, rivet-heating furnace; 22, two hand-power travelling cranes. Outside the main building: 23, shear legs with engine and boiler; 24, line of rails from main building to shear legs; 25, punching and shearing machine; 26, line of rails in middle of yard; 27, jib crane; 28, plate rolls; 29, plate furnace; 30, open smithy fire in yard. It was further agreed between the parties on the hearing before the Court of Quarter Sessions, that if the whole or any part of the above-mentioned machinery and plant ought not to have been taken into consideration in assessing the premises, then the rateable value should be reduced by the whole sum of 22l*l.*, or by a proportionate amount to be afterwards agreed upon between the parties, as sufficient to give effect to their decision. Photographs of the more important parts of the machinery were also by agreement placed before the magistrates, and were afterwards referred to as adjuncts to this case.

8. Of the above specified machinery and plant, the boiler No. 1 was, as usual, set on a brick seating on a building or shed outside the main building. The steam from that boiler was conveyed to the main engine through iron pipes which pass through the wall of the main building. The main engine No. 2 was fixed by iron screw bolts to masonry foundations, on which a wall was constructed for the fly-wheel of the main engine. The hydraulic riveting machine, the two hand-power travelling cranes, the plate rolls, the flanging machine, the accumulators, and the boilers attached to the shear legs, are not attached either to the soil or the building, but rest by their own weight. The main standards have an iron bolt passed through the end walls of the main building. The fly-wheel shaft passes through the wall of the main building, and is carried by a bearing fixed to an iron box built into the wall of the main building. The main shafting runs along the entire length of the main building, and is supported by the main wall of the building by means of bracket bearings on iron plates fixed to the wall buttresses. Each bracket is fixed to the wall by six iron screw bolts passing through the main wall. All the machines are driven from the main shafting by means of leather belts. The fan blast for supplying an air blast to the smithy fires is sunk in a hole in the ground, and is driven from the main shaft. The blast pipes for conveying the air are earthenware pipes laid under ground, branches being taken to the various smithy fires. The smithy fires are open hearths and fires built of brick, having an air blast conveyed to each by means of the fan blast and blast pipes mentioned in the immediately preceding paragraph. The smithy fires are capable of being moved to another place. They rest on the ground solely by their own weight. Such removal would necessitate the moving of the air-blast pipes along with the fires. The hydraulic plant consists, first, of an accumulator, which rests by its own weight on concrete foundations; and, secondly, of pumps in connection therewith. The water pipes pass under ground to the accumulator. The hydraulic riveting machine, the plate roller, the flanging machine, the accumulator, and the boiler for the shear legs, rest by their own weight upon cement or stone foundations prepared for them. The boiler is connected by steam pipes with the engine which works the shear legs. The two hand-power travelling cranes are not fixed, but run along the whole length of the main building on rails laid on balks of timber which rest upon brackets forming part of the columns which support the roof of the main building. The shear legs are placed on the edge of a timber jetty or quay built on timber piles, which are driven into the bed of the river, and project beyond the stone quay out into the river. They are worked by means of a separate engine and boiler. A line of iron rails laid on sleepers, for waggons, connects the main building with the jetty. The wall drills are bolted to iron brackets, which are held in position by iron screw bolts passing through the main wall of the building, and secured by a plate on the other side. The jib cranes are attached to the iron columns which support the roof of the building, and are worked by steam by means of a steam-pipe from the main boiler. With these exceptions the whole of the machinery and plant referred to in this case are held in position in the following manner: A foundation of stone, timber, or concrete is prepared for the individual machine. Into this foundation bolts are let and fastened by lead or cement. When the machine is brought into position, it is hoisted by the crane over the

foundation, and let down in such a manner that the holes pierced in the lower portion (or bed plate) of the machine would slide over the bolts fixed in the foundation. A nut is screwed on to the top of each bolt to steady the machine. All the machines are worked by belts from the main shafting. When a machine has to be removed, the nuts are unscrewed and the machine hoisted up over the bolts, which remain in the foundation.

9. It was proved that the whole of the above specified machinery and plant were in fact the property of the appellants, and not of the corporation of Newcastle-on-Tyne, the owners of the freehold, the same having been brought upon the premises either by the appellants or their predecessors in the occupancy of the premises under the lease before referred to.

10. All the said machinery and plant are required for the purpose of boiler-making, and are arranged and adapted for use upon the said premises for manufacturing and setting up boilers, and are used by the appellants for such purposes; but further than appears by this case, there was not any intention on the part of the appellants of making such machinery and plant part of the soil or hereditaments, or of permanently annexing them thereto.

11. The machines constituting the said machinery and plant were each of them, as machines, except so far as herein appears, separate and distinct from each other, and could be and were in practice from time to time bought, sold, renewed, and removed, as separate and distinct articles.

12. The said machines and plant could be and are in practice taken down or removed when and as required, either for repairs or rearrangement, or change in the use of the premises, or for any other purpose, and that without injury to themselves or structural damage to the hereditaments.

13. The object of the attachment described in the 8th paragraph of this case is the steadying the machines in working, and the preventing them from being pulled by the belting by which they were worked.

14. The above method of attachment does effectually steady the machines in working, and prevents them from being pulled by the belts, and it is also convenient if and when occasion arises for the machines being for any purpose removed.

15. The mode in which the rateable value of the premises was arrived at was by ascertaining the gross estimated rental which a tenant from year to year might reasonably be expected to be willing to give for the use of them (inclusive of the machinery and plant before specified), and by making the statutory deductions from such rental.

16. The appellants contended that the above specified machinery and plant were not, nor any of them, part of the freehold or hereditament, but were chattels, and that they were not, nor were any of them, rateable, or to be taken into consideration as enhancing the rateable value of the hereditaments.

The respondents, on the other hand, contended that the said machinery and plant were necessary to the beneficial occupation of the premises as boiler works, that being the purpose to which they were appropriated, and ought to be taken into consideration as enhancing the rateable value of the hereditaments to which they were attached.

17. The magistrates considered that, at least before them, the case of *Laing* v. *Overseers of Bishopwearmouth* (3 Q. B. Div. 299; 37 L. T. Rep. N. S. 781) was conclusive, and in accordance with what they understood to be the principles laid down in that case, they held that the machinery and plant had been rightly taken into consideration in estimating the rateable value of the premises to which the appeal related. It being, however, urged upon them by the counsel for the appellants that the special case in *Laing* v. *Bishopwearmouth* had been agreed upon by the parties themselves out of court, and that it was desired to test the soundness of the principle alleged to have been enunciated by the decision in that case, by arguments on a special case, to be stated by the Court of Quarter Sessions, and counsel for the respondents not objecting to this being done, the order dismissing the appeal was made, subject to a special case to be stated for the opinion of the court.

18. Each party was to be at liberty, if and so far as the court should permit, to refer to shorthand notes of the hearing at quarter sessions, or to the photographs of the machinery then produced, or to the articles of association of the appellant company, by way of supplementing this case upon any point or points which might appear to the court to require further elucidation.

19. The question for the opinion of the court is, whether the decision above stated was correct or incorrect, and if incorrect, in respect of what items, matter, or principles. If the court should be of opinion that the whole of the said machinery and plant was properly taken into consideration as enhancing the rateable value of the premises to which the appeal relates, the decision of the magistrates is to be affirmed.

R. T. Reid, Q.C. (with him Sir *Horace Davey*, S.G., and *Cyril Dodd*) for the appellants.—The principle upon which these premises ought to be rated is, that the machinery ought not to be taken into consideration in assessing the rateable value, unless it is so permanently attached to the land as to be part of the premises and inheritance. That is not the case here. The respondents rely upon the case of *Laing* v. *Bishopwearmouth* (37 L. T. Rep. N. S. 781; 3 Q. B. Div. 299), the headnote of which is that, in assessing shipbuilding premises to the poor rate, the value of machinery attached to the premises is to be taken into consideration in ascertaining their rateable value, where such machinery (though some of it may be capable of being removed without injury to itself or the freehold) is essentially necessary to the business to which the premises are devoted, and intended to remain permanently attached to them so long as they are applied to their present purpose. But it is submitted that there are other cases decided by courts of co-ordinate jurisdiction which are quite inconsistent with that decision, and the correct law is that machines ought not to be rated at all unless they are permanently fixed to the premises:

Reg. v. *Lee*, 13 L. T. Rep. N. S. 704; L. Rep. 1 Q. B. 241.

Blackburn, J., in his judgment in that case, says: "The rule laid down has been that, where the

things are attached to the premises so as to be part of the premises, although they are removable, still they are part of the premises, although there may be a right to remove them. But if things or chattels be fixed to the premises, but so as to be still chattels, being only fixed and steadied for the purpose of use there, they remain chattels altogether, so that they would not be part of the premises at all; although fixed for the purpose of enjoyment of them, still they remain movable chattels." This is precisely in favour of the view that the court is now asked to take. The same principle is laid down in *Reg.* v. *Halstead* (32 J. P. 118). In his judgment in that case Blackburn, J. says, "The question as to these (*i.e.*, the machines) will be, are they part of the premises or not?" In the case of *Chidley* v. *The Churchwardens of West Ham* (32 L. T. Rep. N. S. 486), Blackburn, J. said: "Now, I am not prepared to say that the various articles described in the present case may not be taken into account as enhancing the value of the premises; but that question is not asked, and we are only to say whether the things are rateable." This dictum is what we may call the *origo mala* which led to the decision in *Laing* v. *The Overseers of Bishopwearmouth*. In the same judgment Blackburn, J. said: "All the items are there nothing more than chattels which rest and steady themselves by their own weight, or with the slight assistance of a screw, and are not fixtures, and not rateable as part of the premises. Whatever is fixed to the realty so as to pass as landlord's fixtures in a demise of the premises must be taken to be part of the premises for the purpose of ascertaining its rateable value." It has not been found in the case that the machines in question are fixtures. All that has been found is that, in accordance with *Laing* v. *The Overseers of Bishopwearmouth*, the magistrates held that the machinery and plant had been rightly taken into consideration in estimating the rateable value of the premises. The point, therefore, is, that if the case of *Laing* v. *The Overseers of Bishopwearmouth* is intended to lay down that machinery, not so affixed to the land as to be part of the premises, is to be taken into consideration as enhancing the rateable value of the premises, then that case is inconsistent with many other cases and previous decisions. It is not disputed that machinery may be taken into consideration if it is so affixed as to form part of the freehold, and that the fixtures in such a case would be rateable. The test is twofold, and depends upon whether the machinery can be easily removed *integre, salve, et commode*, without injury to itself or to the fabric of the building, and whether it was intended to be permanently annexed to the freehold for the benefit and substantial improvement of the inheritance:

Reg. v. *Lee*, 13 L. T. Rep. N. S. 704; L. Rep. 1 Q. B. 241.

Unless there is the element of practical permanence it is not sufficient to show that the machinery must be used as long as the business for which the premises are used is carried on. They also cited and referred to the following cases:

Hellawell v. *Eastwood*, 6 Ex. 295; 20 L. J. 154, Ex.
Holland v. *Hodgson*, 26 L. T. Rep. N. S. 709; L. Rep. 7 C. P. 328;
Reg. v. *Birmingham and Staffordshire Gas Light Company*, 6 A. & E. 634;
Reg. v. *Guest*, 7 A. & E. 951;
Reg. v. *Southampton Dock Company*, 20 L. J. 155, M. C.; 14 Q. B. 587.

Sir *R. E. Webster*, Q.C. (with him *W. Graham* and *J. Edge*) for the respondents.—Our contention is that, when premises cannot be used without the machinery upon them, when and as long as such machinery is used, it is to be taken into consideration in estimating the rateable value of the premises. As was pointed out by Blackburn, J. in *Chidley* v. *The Churchwardens of West Ham* (32 L. T. Rep. N. S. 486), the machinery in a case like this must be taken into account as enhancing the value of the premises. The proper test is, whether the machinery is attached to the land for the purpose of the business being permanently carried on. The sense in which the word "permanent" is used in *Laing* v. *The Overseers of Bishopwearmouth* is, that the machinery must be there as long as the premises are applied to their present purpose. This machinery clearly forms a necessary part of the premises, and if it is not to be taken into consideration in rating the premises, then the place ought not to be rated as works at all, but merely as so much land. In the case of *Reg.* v. *Lee*, Lush, J. says: "The question is, what is the rateable subject which is comprised within the premises to be rated?" I apprehend that the premises to be rated are to be taken as they are, with all their fittings and appliances by which the owner has adapted them to a particular use, and which would pass as part of the premises by a demise of them to a tenant." The Court of Quarter Sessions were bound to consider whether the machinery and plant in question were necessary to the use to which the premises were put. For these reasons it is submitted that the decision of the quarter sessions was right, and ought to be upheld.

C. Dodd in reply.

Cur. adv. vult.

The judgment of the court (Mathew and Smith, JJ.) was delivered by

Mathew, J.—This is a case stated by the Court of Quarter Sessions to determine whether the premises occupied by the appellants as a boiler factory have been properly rated to the poor rate. The property in question comprised upwards of 5000 square yards of land by the river Tyne, held under a lease for a long term of years, and upon which a large brick building had been fitted up with machinery and plant for the purpose of making boilers and erecting them on board vessels. In arriving at the rateable value, the machinery and plant had been taken into consideration as enhancing the value of the premises, but, as the machinery and plant were not so affixed to the soil as to form part of the freehold, it was insisted by the appellants that they ought not to be taken into account in assessing the rateable value of the premises. It was admitted upon the argument of the case by the learned counsel for the appellants, that the justices had properly applied the principle laid down in the cases from the case of *Rex* v. *St. Nicholas, Gloucester* (1 Term Rep. 723), decided in 1783, to that of *Reg.* v *The North Staffordshire Railway* (30 L. J. 68, M. C.), decided in 1860, namely, that when things, although capable of being removed, are permanently connected with the land, to be used, while so connected, for the purpose for which the land is

employed, they must be taken into account in assessing the rateable value of the premises. It was contended before us, on behalf of the appellants, that more recent cases had overruled those decisions, and had established that, unless the machinery was annexed to the freehold for the purpose of improving the inheritance, and came within the definition of what is a fixture in the strictest sense, it ought not to be taken into account. Reliance was placed upon the language of the late Cockburn, C.J. and of Blackburn, J., in the case of *Reg.* v. *Lee* (13 L. T. Rep. N. S. 704; L. Rep. 1 Q. B. 241), and upon the decisions in *Reg.* v. *Halstead* (32 J. P. 118); and *Chidley* v. *The Churchwardens of West Ham* (32 L. T. Rep. N. S. 486). In the case of *Reg.* v. *Halstead* the machines were worked by steam power, and used in a silk-mill in weaving silk, being affixed to the floor by iron screws. It was held that they ought not to be taken into account in estimating the rateable value of the mill, on the ground that they were chattels only. In *Chidley* v. *The Churchwardens of West Ham*, it was said that the plant of a distillery, including tanks so large as to form the entire roof of the building, mash tubs, pumps, and reservoirs, although attached permanently to the soil, were not fixtures, and did not contribute to the rateable value of the premises. On examining these cases closely it seems to us that they fail to support the appellants' case. In *Reg.* v. *Lee* the judges recognised the full authority of the previous decisions, and only as an alternative ground for their judgments treated the plant of gasworks as in the nature of fixtures, incorporated with the land on which they were placed. In the *Halstead* case the court does not seem to have decided more than that the conclusion come to at quarter sessions, that the articles in question were mill furniture only, could not be said to be wrong in law. In the case of *Chidley* v. *The Churchwardens of West Ham* the question submitted to the court was, whether the articles in question were rateable, and not whether they should be taken into account in determining the rateable value of the distillery, and, while a doubt was expressed which would seem to have been well founded, whether the court was answering the questions intended to be put, the judges held that the articles *per se* were not rateable unless they formed as fixtures part of the premises rated. Further, we have had before us what appears to be a full report of the argument and judgment in *Laing* v. *The Overseers of Bishopwearmouth* (37 L. T. Rep. N. S. 781; 3 Q. B. Div. 209). That was the authority upon which the Court of Quarter Sessions acted in this case. It was argued in that case, as in this, that the recent decisions to which we have referred had thrown doubt upon what had previously been supposed to be the law; but the court declined to accept that view, and repeated the rule in terms which seem to us clearly applicable to this case, namely, that machinery ought to be taken into account where the whole of it is essentially necessary to the business to which the premises are devoted, and where it is manifest that the machinery is intended to remain connected with the premises so long as they are used for the same purpose. Here the land and machinery combined are used for carrying on the business, and there seems to be no reason why the combination which is essential to this use of the land, should not be rateable. We think that the order of the justices must be upheld.

Appeal dismissed.

Solicitors for the appellants, *Flux* and *Leadbitter*, for *Leadbitter* and *Harvey*, Newcastle-on-Tyne.

Solicitors for the respondents, *Crossman, Crossman*, and *Prichard*, for *Kidson, McKenzies*, and *Kidson*, Sunderland.

Tuesday, March 30, 1886.

(Before Day and Wills, JJ.)

Reg. v. Lord Mayor of London and Stubbs and Irving; *Ex parte* Gostling. (*a*)

Criminal law—Vexatious Indictments Act 1859—*Rule under* 11 *&* 12 *Vict. c.* 44, *s.* 5—*Charge of conspiracy — Charge dismissed for want of evidence—Refusal of justice to bind prosecutor over to prosecute charge*—22 *&* 23 *Vict. c.* 17, *ss.* 1 *and* 2.

Where a prosecutor bonâ fide prefers before a justice, and within his jurisdiction, a charge or complaint in respect of an offence within the Vexatious Indictments Act 1859, *and the justice dismisses it for want of evidence, such dismissal is equivalent to a refusal to commit, and the prosecutor is entitled to require the justice to take his recognisance to prosecute the charge or complaint by way of indictment.*

This was an application for a rule for a *mandamus* to the Lord Mayor of London to take the recognisances of one Gostling, according to sect. 2 of the Vexatious Indictments Act 1859, to prosecute by way of indictment a charge of conspiracy against the defendants Stubbs and Irving.

The prosecutor charged the defendants, as directors of a company within the city of London, with conspiring to cheat and defraud the shareholders.

When the case first came on for hearing a witness was called by the prosecutor, on his *subpœna duces tecum*, to produce the books of the company; but the witness refused to produce them, on the ground that he had not the books in his possession or custody.

Certain adjournments were allowed for the purpose of enabling the prosecutor to apply to the Queen's Bench Division for an attachment of the witnesses for the non-production of the books. The court refused to order the witnesses to produce the books.

The only evidence given was by the first witness, who was asked questions only as to his subpœna, and whether he had the books.

When the matter came finally before the Lord Mayor, he refused to allow another adjournment. The prosecutor then called a witness who, it appears, gave no evidence at all with reference to the charge of conspiracy. No further evidence was offered.

The Lord Mayor, on the prosecutor failing to produce any further evidence, which would warrant an adjournment, dismissed the summons.

The prosecutor then claimed to be bound over in his recognisances by the Lord Mayor to prosecute the charge of conspiracy against the defen-

(*a*) Reported by W. P. Eversley, Esq., Barrister-at-Law.

dants under 22 & 23 Vict. c. 17, but the Lord Mayor refused to do so.

The prosecutor obtained a rule *nisi* for a *mandamus* to the Lord Mayor, commanding him to show cause why he should not take the prosecutor's recognisances to prosecute the said charge.

By 22 & 23 Vict. c. 17, s. 1:

No bill of indictment for . . . . conspiracy . . . . shall be presented to or found by any grand jury, unless the prosecutor presenting such indictment has been bound by recognisance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognisance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law at Westminster, or of her Majesty's Attorney-General or Solicitor-General for England.

By sect. 2:

Where any charge or complaint shall be made before any one or more of her Majesty's justices of the peace that any person has committed any of the offences aforesaid, within the jurisdiction of such justice, and such justice shall refuse to commit or to bail the person charged with such offence to be tried for the same, then, in case the prosecutor shall desire to prefer an indictment respecting the said offence, it shall be lawful for the said justice, and he is hereby required to take the recognisance of such prosecutor to prosecute the said charge or complaint, and to transmit such recognisance, information, and depositions, if any, to the court in which such indictment ought to be preferred, in the same manner as such justice would have done in case he had committed the person charged to be tried for such offence.

Danckwerts, for the Lord Mayor of London, showed cause.—This application ought to be dismissed; for before a justice can bind over a prosecutor to prosecute he must have jurisdiction to commit. Here the magistrate had no such jurisdiction, on the ground that he had no evidence before him upon which he could act. There was a total absence of any evidence in this case. It is necessary for a magistrate to have evidence before him on which to commit under 11 & 12 Vict. c. 42, and it is equally necessary for him to have it if he is to take the recognisances of the prosecutor to prefer the charge before the grand jury. In this case there was no evidence at all before him on which he could act. Under the Vexatious Indictments Act 1859 the magistrate has only power to take the recognisances of the prosecutor if he has refused to commit the person charged. The magistrate must have something on which to found his discretion. This charge was not in reality dismissed; the proceeding practically fell through because there was no evidence to support it. The prosecutor sought to obtain evidence, and adjournments were made to enable him to procure it if he could, but he failed to do so; and on the last adjournment the magistrate refused to grant another, and dismissed the charge on the ground of there being no evidence to support it. All the prosecutor had done was simply to lay an information, take out a summons, bring the defendants before the court, obtain several adjournments, and then finally refuse to produce any evidence. Under those circumstances the Lord Mayor had no power to bind over the prosecutor, because the Vexatious Indictments Act was introduced for the protection of defendants, and this protection would be wholly illusory if under such circumstances a justice could be called upon to bind over the prosecutor to prosecute before a grand jury. The object of that Act is to enable the person charged to know what the case is which he will have to meet before the grand jury; but that object will be defeated if a prosecutor, as in the present case, is to be allowed, without producing evidence before the justice, to prosecute before the grand jury. It was on this ground that the Lord Mayor refused to take the recognisances of the prosecutor. The argument amounts to this, that under the Vexatious Indictments Act, it is a condition precedent that the magistrate should refuse to commit or to bail. Here the Lord Mayor did not do that, but simply dismissed the summons for lack of evidence. The prosecutor now, if he can get further evidence, may lay a fresh information and commence proceedings *de novo*. The magistrate here never got as far as the stage of whether he should commit or not; that stage depends upon the existence of evidence. Here there was none, and so the Vexatious Indictments Act does not apply, and the magistrate rightly used his discretion.

Cluer, in support, was not called on.

Day, J.—I am of opinion that in this case the magistrate should have accepted the recognisance of the prosecutor to prosecute under the Vexatious Indictments Act. It seems to me that this case is within it. It is a case of a complaint or charge made before the magistrate, wherein the magistrate has refused to commit. It seems to me that the charge was one within the jurisdiction of the magistrate. The charge was for a conspiracy within the city of London. The magistrate had jurisdiction over conspiracies within the city of London; he refused to commit, he dismissed the charge, and, to my mind, that is tantamount to refusing to commit. Then it was said it was not a substantial charge or complaint, but, in my opinion, it was a substantial charge, and, so far as one can see, it was a *bond fide* charge; there is no reason to suppose otherwise. I should not for a moment suggest that in a case where mere illusory charges are made—charges which persons are not seriously making, or that they cannot be supposed really to intend to prosecute—this statute is intended to apply. I do not accede to the argument of Mr. Danckwerts that it is necessary there should be a certain amount of evidence, although not enough evidence rationally to support the charge. It is sufficient for me to say that there has been a substantial charge or complaint made—a serious charge or complaint made, and one made *bond fide*—one which was within the jurisdiction of the justice, and wherein he has refused to commit on bail. These conditions seem to me to be fulfilled in this case. In my judgment, the Lord Mayor should have accepted the recognisances, and it is a case in which I think the *mandamus* should go.

Wills, J.—I am of the same opinion. I do not wish to say what might be the case if a prosecutor before the Lord Mayor or a magistrate simply said, "I make a charge against A. B. and C. D. I have no evidence to support it now, but I call upon you to bind me over." I will wait until that case occurs. That is not the present case. The present case is one where the prosecutor struggled hard to get the evidence which he deemed to be necessary for the prosecution of his case, and then having failed, the magistrate

thought there was no evidence before him upon which he could convict, and the magistrate dismissed the charge. It seems to me to be a strong refinement of language to say that this dismissing a charge under the circumstances is not a refusal to commit. The magistrate declined to commit. Mr. Danckwerts does not deny he declined to commit. He says although he declined to commit he did not refuse to commit. That is too subtle for the apprehension of the Bench—at least, in the present instance, although it may not be so at the Bar. I cannot follow it really, and when you come to look what the law was before the Vexatious Indictments Act passed, one sees that there is no occasion to resort to such subtleties. The law before that was, that a man might go before the grand jury and present his bill without any premonitory attack of any sort or kind upon the defendant. That is effectually put a stop to. He cannot do that unless he has delivered his attack, in the first instance, before the magistrate. He is not compelled to fight the matter before the magistrate on the same ground, or the same lines, or the same evidence; he does afterwards, but he must begin before the magistrate, and he must try to get a committal from the magistrate, and, having done that, he may then, if he is so minded, proffer himself to be bound over to prosecute. It is said that under those circumstances there is no protection for the accused. But there is this very efficient protection; that a prosecutor cannot get further until he enters into recognisances not only to prosecute but to pay the costs if he is unsuccessful, which seems to me a very good protection for the defendant. It seems to me that when you look at what the law was, there is no reason whatever to depart from the ordinary meaning of language, and that in the ordinary meaning of language the Lord Mayor in this case did refuse to commit, and, that being so, the *mandamus* will go.

Rule absolute. (*a*)

Solicitor for the applicant, *W. F. Stokes.*

Solicitor for the Lord Mayor, *The City Solicitor.*

March 30, 31, *April* 1 *and* 5, 1886.

(Before Lord COLERIDGE, C.J., HAWKINS and MATHEW, JJ.)

Re THE ELECTION FOR THE SOUTHERN OR THORNBURY DIVISION OF THE COUNTY OF GLOUCESTER: BENJAMIN ST. JOHN ACKERS, petitioner; EDWARD STAFFORD HOWARD, respondent. (*b*)

Election Petition—Parliament—Ballot paper—Absence of official mark from face thereof—Validity of vote—The Ballot Act 1872 (35 *&* 36 *Vict. c.* 33).

According to the true construction of the Ballot Act 1872 (35 *&* 36 *Vict. c.* 33), *regard being had to the rules, forms, and directions contained in the schedules thereto, the absence of the official mark from the face of a ballot paper does not avoid the vote.*

THIS was a case reserved, in pursuance of the 12th section of 31 & 32 Vict. c. 125, by Field and Day, JJ., two of the judges for the time being for the trial of election petitions in England, at a court duly held by them at the Shire-hall, Gloucester, in the county of Gloucester, for the trial of the parliamentary election petition for the southern or Thornbury division of the said county, wherein Benjamin St. John Ackers was petitioner and Edward Stafford Howard the respondent, the petition praying that it might be determined that Edward Stafford Howard was not duly elected or returned for the division, and that his election and return were wholly null and void, and that the petitioner was duly elected and ought to have been returned for the division.

On the said trial it appeared to the judges that a question of law with reference to certain ballot papers (which had been admitted and counted upon the poll for the respondent, but which were not marked on both sides with an official mark or with the official mark, either stamped or perforated, but only with an official mark on the back thereof) required to be further considered by the Queen's Bench Division of the High Court of Justice, and they thereupon postponed their judgment, and the granting of the certificate in respect of the election and return until the determination of such question by the court, and reserved the question accordingly, and afterwards stated the following

CASE.

It was upon such trial proved before us that the returning officer had, at the counting of the poll after objection taken and considered, counted 224 ballot papers for the respondent and 49 ballot papers for the petitioner, which had been delivered to the voters respectively by the presiding officer, the same not having been marked upon the face with the official mark required by the Ballot Act.

Upon argument we affirmed such decision of the returning officer, but on the application of the petitioner we have stated this case for the opinion of the Queen's Bench Division of the High Court of Justice.

The question for the opinion of the court being whether we were right in so holding.

If the court should be of opinion in the affirmative, the petitioner abandons any further scrutiny.

The court is prayed after decision to return the case with such decision to us for certificate or further scrutiny as may be necessary.

H. Matthews, Q.C. and *Stroud* for the petitioner.

Gully, Q.C. (with him *A. T. Lawrence*), for the respondent, raised a preliminary objection.—The 12th section of the Parliamentary Elections Act 1868 (31 & 32 Vict. c. 125) only empowers a judge to reserve a question in like manner as questions are usually reserved by a judge on a trial at Nisi Prius. At Nisi Prius such questions are only reserved when they go to the root of the whole case. [Lord COLERIDGE, C.J.—Does not this point involve the whole of the case?] If the decision of the court is in favour of the respondent, the whole case will be disposed of, but not otherwise. It will certainly be more convenient, if this point must be decided by this court at some time, that it should be decided now, rather than that it should be sent back for the completion of the scrutiny and then decided, because, if this court upholds the decision of the learned judges, the expense of the remainder of the scrutiny will

(*a*) At the request of counsel, a rule under 11 & 12 Vict. c. 44, s. 5, was substituted for the *mandamus*.

(*b*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

be saved. It was, however, thought right, as the respondent did not consent to this case being stated, that the attention of the court should be called to this point.

Lord COLERIDGE, C.J. — We are of opinion that this Act never contemplated that a case should be stated for the opinion of this court merely in order to assist the election judges in their inquiry; and we protest against the Act being so construed that whenever a difficulty arises the judges may invoke the assistance of this court. In this case, however, as the petitioner presses us to hear the point, and as Mr. Gully, on behalf of the respondent, admits that he would prefer that it should be heard now rather than at a later period, we will proceed to hear and decide the question. But it must not be taken that this court has assented to this mode of invoking its authority. It is not therefore to be understood that any of us give any opinion as to the technical propriety of hearing the case, but, under the circumstances, we will hear it.

H. Matthews, Q.C. and *Stroud* for the petitioner. —The question is whether the absence of the official mark from the face of the ballot paper invalidates the vote; and it is submitted that the decision of the learned judges that it does not do so practically strikes out the clause of the 2nd section of the Ballot Act 1872 (35 & 36 Vict. c. 33) (*a*), which provides that the ballot paper shall be marked on both sides with an official mark. The word "shall" is imperative and not merely directory, as was decided in *Hunt* v. *The Wimbledon Local Board* (39 L. T. Rep. N. S. 35; 40 L. T. Rep. N. S. 115; 4 C. P. Div. 48), where it was held that the plaintiff could not recover on a contract, since the words of the 174th section of the Public Health Act 1875 directing that such contract should be under the seal of the urban authority were imperative. This case was approved by the House of Lords in *Young* v. *The Mayor and Corporation of Royal Leamington Spa* (49 L. T. Rep. N. S. 1; 8 App. Cas. 517). [Lord COLERIDGE, C.J.—Surely there are many cases in which the word "shall" has been held to be merely directory, as, for instance, in certain cases under the Bills of Sale Acts and in registration cases, where it has been held that a voter is not disentitled by reason of the omission of the overseer to do something which an Act of Parliament says he "shall" do.] In *Wanklyn* v. *Woollett* (4 C. B. 86) the indorsement of an appeal not having been signed by the revising barrister, the court refused to allow the appellant to be heard; and the word has never been held to be merely directory, except in the case of purely ministerial acts, as in

Brumfitt v. *Bremner*, 9 C. B. N. S. 1;
Morgan v. *Parry*, 17 C. B. 334; 25 L. J. 141, C. P.

[MATHEW, J.—The effect of such a construction would be to invalidate a vote for the omission of a thing to which the voter's attention is never directed.] All franchises are granted upon condition that they shall be duly executed:

Com. Dig. tit. "Franchise" F. 21, G. 3;
The City of London v. *Vanacre*, 5 Mod. 438; 12 Mod. 270;
The Eastern Archipelago Company v. *The Queen*, 2 E. & B. 856; 23 L. J. 82, Q. B.;
The Liverpool Borough Bank v. *Turner*, 2 De G. F. & J. 502.

In the *City of London* v. *Vanacre* (*ubi sup.*) Lord Holt says that all franchises are granted upon condition that they shall be duly executed according to the grant, and if the parties to whom they are granted neglect to perform the terms of the patent it may be repealed. [HAWKINS, J.—If the voter complies with all the directions given to him, has he not done enough?] In *Pickering* v. *James* (L. Rep. 8 C. P. 489) the court were unanimous that it was the duty of the voter to see that the ballot paper was delivered to him properly marked. [HAWKINS, J.—The voter is obliged

(*a*) The Ballot Act 1872 (35 & 36 Vict. c. 33) provides as follows:

2. In the case of a poll at an election the votes shall be given by ballot. The ballot of each voter shall consist of a paper (in this Act called a ballot paper) showing the names and descriptions of the candidates. Each ballot paper shall have a number printed on the back, and shall have attached a counterfoil with the same number printed on the face. At the time of voting the ballot paper shall be marked on both sides with an official mark, and delivered to the voter within the polling station, and the number of such voter on the register of voters shall be marked on the counterfoil; and the voter having secretly marked his vote on the paper, and folded it up so as to conceal his vote, shall place it in a closed box in the presence of the officer presiding at the polling station (in this Act called "the presiding officer"), after having shown to him the official mark at the back. Any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter shall be entitled to vote for, or on which anything, except the said number on the back is written or marked by which the voter can be identified, shall be void and not counted. After the close of the poll the ballot boxes shall be sealed up so as to prevent the introduction of additional ballot papers, and shall be taken charge of by the returning officer, and that officer shall, in the presence of such agents, if any, of the candidates as may be in attendance, open the ballot boxes, and ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidates or candidate to whom the majority of votes have been given, and return their names to the Clerk of the Crown in Chancery. The decision of the returning officer as to any question arising in respect of any ballot paper shall be final, subject to reversal on petition questioning the election or return.

4. Every officer, clerk, and agent in attendance at a polling station shall maintain and aid in maintaining the secrecy of the voting in such station, and shall not communicate, except for some purpose authorised by law, before the poll is closed, to any person any information as to the name or number on the register of voters of any elector who has or has not applied for a ballot paper or voted at that station, or as to the official mark, and no person whosoever shall interfere with or attempt to interfere with a voter when marking his vote, or otherwise attempt to obtain in the polling station information as to the candidate for whom any voter in such station is about to vote or has voted, or as to the number on the back of the ballot paper given to any voter at such station. Every officer, clerk, and agent in attendance at the counting of the votes shall maintain and aid in maintaining the secrecy of the voting, and shall not attempt to ascertain at such counting the number on the back of any ballot paper, or communicate any information obtained at such counting as to the candidate for whom any vote is given in any particular ballot paper. No person shall directly or indirectly induce any voter to display his ballot paper after he shall have marked the same, so as to make known to any person the name of the candidate for or against whom he has so marked his vote. Every person who acts in contravention of the provisions of this section shall be liable, on summary conviction before two justices of the peace, to imprisonment for any term not exceeding six months, with or without hard labour.

to look and see that there is a mark on the back because he has to show it to the presiding officer.] It is equally obligatory upon him to look for the mark on the face. [MATHEW, J.—Where is the duty imposed on him? Why may he not assume that the presiding officer has done his duty? The mark on the back is important in order to prevent unauthenticated papers being put in, and therefore there is a specific enactment that if it is absent the vote shall be void, but there is no such enactment in case the mark is absent from the face.] It is equally important, because after the papers are opened the back must never be looked at again, except by order of the court (sect. 4). Secrecy is of the essence of voting by ballot, and if the back of the paper could be looked at afterwards for the official mark, a note might be taken of the number and the voter identified. The voter must take every precaution. In the *Oldham case* (1 O'M. & H. 151, 163) Blackburn, J. struck off a vote given at the wrong polling booth, saying: "It simply comes to this, the poll clerk should have refused the vote, and the voter should have gone to the proper booth. It is not at all an intentional mistake, it was the fault of the voter as well as the poll clerk." That doctrine applies here. When the paper is opened, and it is found that there is no mark on the front, the back cannot be looked at because by sect. 4 (*a*) any attempt to ascertain the number on the back is an offence against the Act. The plan of the Act is that before the ballot paper is put into the ballot box the face of it must not be seen, and that after it comes out the back must not be seen:

Stowe v. *Joliffe*, 30 L. T. Rep. N. S. 299, 795; L. Rep. 9 C. P. 446.

For this reason the official mark is equally necessary on both sides, and the returning officer is bound to reject, if there is no mark on the face. It should be remembered that by rule 31 the agents of the candidates are allowed to be present. The mode of counting prescribed by rule 34 (*a*) shows that this was the intention of the Legislature. [HAWKINS, J.—A direction to keep the faces of the papers upwards does not prevent a glimpse at the back to see if the official mark is there. Besides, the Act says that the absence of the official mark from the back makes the paper void, and how can the returning officer find out whether it is void for that reason if he does not look?] That is corrected in the polling station, since it is the duty of the presiding officer to prevent any paper from being placed in the box without the official mark on the back. [HAWKINS, J.—Then rule 36 says that he is to "indorse" the word "rejected" on the papers he rejects. How can he write on the back without seeing the back?] "Indorse" does not necessarily mean "write on the back." The rule would be satisfied, and, read with the other rules, really means that the returning officer is to write the word "rejected" upon it. That this is not a strained interpretation appears from the Bills of Exchange Act 1882 (45 & 46 Vict. c. 61), s. 32; Byles on Bills, 152; and *Ex parte Yates; Re Smith* (27 L. J. 9, Bank.). Besides, the vote must be first rejected and then indorsed, so that in any case the back would not be seen until the vote has been declared invalid. As to the argument founded on the maxim, *Expressio unius est exclusio alterius*, to the effect that, as sect. 2 says that the absence of the mark from the back shall make the ballot paper void, and does not say that the absence of the mark from the front shall have the same effect, and that therefore the absence of the mark from the front does not avoid the vote; that argument has no weight, because there are many causes which admittedly avoid a vote which are not mentioned in sect. 2, and it cannot therefore be contended that sect. 2 contains an enumeration of all the cases in which a paper is to be rejected. [HAWKINS, J. — Suppose a voter insists upon putting his paper into the box without showing it to the presiding officer.] Then the objection that there is no mark on the back cannot be maintained afterwards, for the backs cannot be examined:

Stowe v. *Joliffe* (*ubi sup.*).

[HAWKINS, J.—But has the presiding officer a right to prevent the voter from putting in his vote if he insists upon doing so without showing it?] Yes; unless the official mark is shown to him. He is bound to keep order, and that means that he is bound to see everything done in accordance with the directions of the Act. [Lord COLERIDGE, C.J. — The court in *Woodward* v. *Sarsons* (32 L. T. Rep. N. S. 867; L. Rep. 10 C. P. 733) do not seem to have insisted on such a rigid compliance with the rules as that now contended for by the petitioner. It is there laid down that, "if these requirements are substantially fulfilled, then there is no enactment and no rule of law by which a ballot paper can be treated as void, though the other directions in the statute are not strictly obeyed."] That case relates solely to the different points raised in it, and does not apply here. [Lord COLERIDGE, C.J.—Can you distinguish between what you ask us to do here and what the court has refused to do in those registration cases in which it has been held that non-compliance with a statute on the part of an official, although it may perhaps give rise to a remedy against the official does not affect the voter?] The decisions in *Morgan* v. *Parry* (17 C. B. 334), *Brumfitt* v. *Bremner* (9 C. B. N. S. 1), and *Wanklyn* v. *Woollett* (4 C. B. 86) have no application here, since a decision that the

(*a*) Rules 34 and 36 of the Rules for Parliamentary Elections contained in the first schedule of the Ballot Act 1872 (35 & 36 Vict. c. 33) are:

34. Before the returning officer proceeds to count the votes, he shall, in the presence of the agents of the candidates, open each ballot box, and, taking out the papers therein, shall count and record the number thereof, and then mix together the whole of the ballot papers contained in the ballot boxes. The returning officer, while counting and recording the number of ballot papers and counting the votes, shall keep the ballot papers with their faces upwards, and take all proper precautions for preventing any person from seeing the numbers printed on the backs of such papers.

36. The returning officers shall indorse "rejected" on any ballot paper which he may reject as invalid, and shall add to the indorsement "rejection objected to," if an objection be in fact made by any agent to his decision. The returning officer shall report to the Clerk of the Crown in Chancery the number of ballot papers rejected and not counted by him under the several heads of, 1. Want of official mark; 2. Voting for more candidates than entitled to; 3, Writing or mark by which voter could be identified; 4. Unmarked void for uncertainty; and shall on request allow any agents of the candidates, before such report is sent, to copy it.

official mark on the front of the paper is useless and unessential would cause a serious breach in the principle of secrecy which is the essence of the Act.

Gully, Q.C. (with him *A. T. Lawrence*) for the respondent. — The question must be looked at not only from the candidate's point of view, but from that of the voter. The 2nd section of the Act gives the three reasons which are to make a ballot paper void, and it cannot be supposed that the Legislature intended that votes should be rejected for other reasons than those clearly mentioned in that section. The contention of the petitioner is that a fourth reason should be added to those given. The want of official mark referred to in rule 36 is not the want of the mark on the face, but the want of it on the back mentioned in the 2nd section. Further, the returning officer must to some extent observe the backs of the papers, because it is definitely said that if there is no mark on the back the vote shall be void, and it is quite possible that votes might intentionally or otherwise be put into the ballot box without the presiding officer having an opportunity of seeing the mark. A ballot paper would also be avoided by a voter writing on the back anything by which he could be identified, and the returning officer must see that there is nothing of that kind upon the back of the paper. Besides, it is absolutely inevitable that, in the course of counting the papers, when they are turned out of the ballot boxes, and in opening them out, the back must be to some extent observed, so that it can be seen whether the official mark is there, thus doing away with the absolute necessity of having the mark upon the face. In the *Wigtown case* (2 O'M. & H. 215) Lord Ormidale in rejecting papers for the want of the official mark on the back, says: "No doubt this is a hardship upon the voter in one sense, but in the 'directions as to voting' reference is made to the official mark, and the voter has a particular duty to perform in reference to it; that is to say, he must fold up the ballot paper so as to show the official mark on the back. Therefore his attention is directed to that matter, and it is his own fault if he does not see that the mark is upon his voting paper." There is therefore a reason for avoiding a vote for the want of the mark on the back, whereas the attention of the voter is never directed to the necessity of there being the mark on the face. Besides, it would be very unlikely that the presiding officer or agent, if present at the counting, would be present at the particular place where the particular paper of which they had taken a note might be turned up, so that in reality the connivance of several persons would be necessary before there could be a possibility of fraud; and it would certainly be the duty of a presiding officer to prevent an agent from taking notes of the numbers of the counterfoils. Further, it cannot be that each presiding officer is to be a judge of the validity of a ballot paper; in fact, the returning officer is constituted the judge, and he is therefore bound to look at the backs of the papers after they are turned out of the ballot boxes. The omission of the mark on the back makes the ballot paper void, the omission of the mark on the front is a mere irregularity. [They were stopped by the Court.]

Stroud in reply. *Cur. adv. vult.*

April 5.—The judgment of the court (Lord Coleridge, C.J., Hawkins and Mathew, JJ.) was delivered by

HAWKINS, J.—The only question for our decision is whether it is essential to the validity of a vote given under the Ballot Act 1872, for a candidate for election to serve in Parliament, that the ballot paper on which such vote is given shall be marked on both sides with an official mark as prescribed by the 2nd section of that Act, or whether it is sufficient, so far as the validity of the vote is concerned, if the back of the ballot paper is so marked. At the trial of this election petition, before Field and Day, JJ., not less than 273 votes were objected to on one side or the other—of these, 224 were votes for the respondent and 49 for the petitioner—on the ground that the ballot papers on which such votes were given, though duly marked on the back, have no official mark on the face. These objections were overruled by the learned election judges, who, however, granted a case for the opinion of this court. The case was exhaustively argued by Mr. H. Matthews and Mr. Stroud in support of the objection, and by Mr. Gully and Mr. Lawrence against it. It ought to be stated that, this being a special case, only one counsel had a right to be heard. It was only under very exceptional circumstances, and as a matter of great indulgence, that the court heard two counsel for the petitioner. We have arrived at the conclusion that the judgment of the election judges is right, and that the votes are good. In considering the construction to be put upon the various provisions in the Ballot Act, it should be borne in mind that no enactment contained in it affects the franchise; the Act relates to procedure alone. The right to vote exists exactly as it did before that Act was passed; that Act merely directs the mode in which the vote shall be given, the main object of it being to ensure, as far as possible, secrecy. In construing the provisions contained in the body of the Act regard must also be had to the schedules which comprise rules for parliamentary elections, forms to be used, and directions for the guidance of voters; for by sect. 28 of the Act it is expressly enacted that "the schedules to this Act, and the notes thereto, and directions therein, shall be construed and have effect as part of this Act." Before referring to the 2nd section—which prescribes the mode in which the ballot is to be taken—it will be convenient to have a clear understanding of the officers to be engaged, the duties imposed upon them respectively, and the machinery, &c., to be provided for the conduct of a parliamentary election. In the first place, the duty of taking the poll, in the event of more candidates being nominated than there are vacancies to be filled up, is, by sect. 1, paragraph 2, cast upon the returning officer, and he is to take such poll in the manner prescribed by the Act. By rule 15 he is to provide a sufficient number of polling stations. By rule 16 each polling station is to be furnished with compartments "in which the voters can mark their votes screened from observation." By sect. 8, coupled with rule 20, the returning officer is to provide, (*inter alia*), ballot boxes, ballot papers, stamping instruments, described in the rule as "instruments for stamping thereon (that is, on the ballot papers) the official mark" (hereafter

referred to), copies of the register of voters, and materials for voters to mark the ballot papers. By rule 21 it is provided that he shall appoint a presiding officer to preside at each polling station, and by sect. 8 he is required to appoint and pay such officers as may be necessary for effectually conducting the election. The 9th section and the 21st rule impose upon the presiding officer the duty of keeping order at his station. The 10th section invests the presiding officer with the powers of a deputy returning officer in matters relating to the poll, and the same section vests in him and any clerk appointed by the returning officer to attend a polling station power to ask the questions and administer the oath authorised by law to be asked of and administered to voters. Rule 50 provides that the presiding officer may do, by the clerks appointed (*i.e.*, by the returning officer) to assist him, any act which he is required or authorised to do at a polling station, except ordering the arrest, exclusion, or ejection of any person from the polling station. With this machinery provided, and these officers appointed and in attendance, let us now see how a voter on the register entitled to record his vote is to proceed. A voter can only record his vote upon a ballot paper provided for him by the returning officer and handed to him in the polling station. The form of such ballot paper is prescribed by the second schedule to the Act. It is to be attached to a counterfoil. The front or face of the ballot paper must contain a list of the candidates, showing their names and descriptions, and arranged alphabetically in the order of their surnames (sect. 2 and rule 22). On each ballot paper a number is to be printed on the back and each counterfoil is to have a corresponding number printed on the face (sect. 2). The first step for a voter to take is to apply at his polling station for a ballot paper; this is equivalent to tendering his vote (sect. 15). Before he is entitled to have a ballot paper furnished to him, the voter claiming must give his name and description to the presiding officer, or some clerk appointed by the returning officer for that purpose; and thereupon such presiding officer or clerk ought to turn to the register of voters, and, if he finds the name of the voter in such register, his duty is to call out the number, name, and description of such voter as stated in the register (rule 24), so that all present may know that the person being or claiming to be the individual so named has applied for and is about to receive a ballot paper. This really gives no more information to anybody than that A. B. or C. D., or somebody claiming to be A. B. or C. D., and numbered so-and-so on the register, is about to vote. It calls attention to the person of the individual who claims to vote in that name, and gives facility for proof in case of alleged personation. The register number of the claiming voter is then to be marked by the officer or clerk on the counterfoil. This being done, no difficulty (except in cases of personation where identity is disputed) can afterwards arise in tracing each ballot paper to the voter to whom it is delivered. For the number on the back of the ballot paper would enable reference to be made to the counterfoil from which it was torn, while the register number marked on the face of the counterfoil would enable reference to be made to the register itself, where the name, &c., of the voter would be found. Before, however, a ballot paper is delivered to an intending voter, it is required by sect. 2 and rule 24 that "immediately before it is delivered to the elector it shall be marked on both sides with the official mark, either stamped or perforated." The duty so to mark, or to see that each ballot paper is so marked before it is delivered to the voter, clearly lies on the presiding officer or a clerk appointed for that purpose (*Pickering* v. *James*, L. Rep. 8 C. P. 489.) The voter has no such obligation cast upon him; he is only required by sect. 2 to show the official mark on the back to the presiding officer before he puts the ballot paper in the box. Rule 25 requires that on receipt of the ballot paper the voter shall go into one of the compartments, and there mark his paper and fold it up so as to conceal his vote, and then put his ballot paper so folded up into the ballot box, and quit the polling station. Sect. 2 of the Act, however, requires that the voter shall place his ballot paper in the box in the presence of the presiding officer "after having shown to him the official mark at the back." What this official mark is to be is clearly within the discretion of the returning officer; but it is clear the Legislature intended it should be a secret mark, for rule 20 requires that the returning officer shall keep it secret, and that an interval of not less than seven years shall intervene before it is again used for the same purpose. The object being to keep the official mark a profound secret, there being no provision for making it known even to the voter himself, it is a little extraordinary that the voter should be required so to fold his ballot paper as to expose that mark on the back of the paper and to show it to the presiding officer. Yet this is directed by sect. 2 of the Act; and the second paragraph of that section makes void any vote recorded on a ballot paper which has not on its back the official mark. Now, it is clear that the votes under discussion in this case do not fall within this objection, for the ballot papers have on their backs the official mark. Mr. Matthews, however, very strenuously contended that it was equally essential that the official mark should appear upon the face of the paper, and he insisted that the only inspection of the back of the ballot paper permitted by law was the inspection of the official mark required to be shown to the presiding officer immediately before its being placed in the ballot box, and that any inspection of or reference to the back of the paper, after once it was deposited in the box, was contrary to the provisions and spirit of the Act, for that to refer to the back would practically be to enable the party so inspecting to gain knowledge of the number of the counterfoil, and with that knowledge to ascertain the register number and name of the voter; and, following out this argument, he urged that after the deposit in the box the face alone could be inspected, and therefore it was essential that the official mark should there appear to establish the authenticity of the paper, and its identity with that delivered out to the voter, which was the sole object of the Legislature in requiring an official mark to be placed on the paper. We are unable to take this view of the case. As a matter of fact, it would be practically impossible for the returning officer to fulfil the duty imposed on him by section 2 after the close of the poll without having inspection of the backs of the ballot papers. They are

required to be put into the box folded so as to conceal the vote and to expose the official mark on the back. In the box, therefore, the backs alone are exposed. By rule 34, before the returning officer proceeds to count the votes in the presence of the agents of the candidates, he is required to open each ballot box and take out the papers therein, count the numbers thereof, and mix the whole of the papers together; to do this he and the agents must of necessity see the papers folded with only the backs exposed as they were placed in the box. It is true that from such an inspection it is to the last degree improbable that any useful information could be obtained. Then, again, the result of the poll is to be ascertained by counting the votes given to each candidate (section 2). Rule 34 requires the returning officer while counting and recording the number of ballot papers, and counting the votes, to keep the ballot papers with their faces upwards, and take all proper precautions for preventing any person from seeing the numbers printed on the backs of such papers. Now, in order to fulfil the requirements of this rule it is absolutely necessary that the folded papers should be opened in order to expose their faces, and in opening them it is impossible to avoid seeing the backs. Moreover, the rule does not say, nor does any section in the Act, that the returning officer or the agents shall not see the backs. It rather assumes that they must and will see the backs of the papers, and enjoins upon the returning officer the duty to take all proper precautions to prevent the numbers being seen. There is still another matter to be noticed which appears conclusively to show that the returning officer has not only the right, but that the duty is cast upon him, to examine both sides of the ballot papers before he declares the result of the poll. It is his duty to count the votes, and the second paragraph of section 2 expressly enacts that he shall not count (*inter alia*) any ballot paper which has not on its back the official mark, and that a ballot paper open to this objection shall be void. In determining whether a ballot paper is void or ought not to be counted the returning officer acts judicially, and his decision is declared (by section 2) to be final, subject only to reversal on petition. Questioning the election or return, how can the returning officer discharge his duty and give his decision respecting an objection depending upon something which is alleged to exist on or be omitted from the back of the ballot paper without inspecting the back of the paper? To us the question seems to answer itself. Lastly, by rule 36, the returning officer is required to indorse "rejected" on any ballot paper he may reject as invalid. Mr. Stroud ingeniously argued that this rule does not mean that the word "rejected" shall be written on the back, but on the face of the paper. If this is the meaning of the rule, all we can say is that the Legislature has selected an unfortunate word to express its intention, for both in Walker's and Webster's Dictionary the meaning of the verb "to indorse" is defined "to write on the back." This is the construction we place on the word used in rule 36. It follows that in order to indorse the ballot paper the returning officer must see the back of it. It is not necessary for the decision of the present case for us to determine whether or not it is the duty of the presiding officer to look at the ballot paper of a voter and see that it is marked with the official mark before it is placed in the box, nor what course he should pursue if a voter attempts to put in the ballot box a voting paper which is obviously without an official mark. This is a matter upon which the judges of the Court of Common Pleas were equally divided in the case of *Pickering* v. *James* (L. Rep. 8 C. P. 489), Bovill, C.J. and Grove, J. entertaining the opinion that no such duty is cast upon the presiding officer, Keating, J. and Brett, J. entertaining the opposite view. We think it right, however, to say that we adopt the latter view, which certainly is most in accordance with what seems to us to have been the intention of the Legislature. Why a voter should be required to show the official mark at the back of his voting paper to the presiding officer if that officer was not bound to look at it, or to take any action in the event of his seeing that the voter had either mistaken the mark or was endeavouring to palm off a spurious mark, we are at a loss to imagine. On the other hand, if the presiding officer, having the duty cast upon him to see that each paper is properly marked before it enters the box, sees on its presentment by the voter that inadvertently a ballot paper has been delivered, but without the official mark, he can at once rectify the inadvertence and prevent the loss of an honest vote by informing the voter of the omission, cancelling the unstamped paper (of course being first satisfied it is, in fact, the genuine paper delivered out to the voter), and delivering out to him another paper duly stamped, upon which he may effectually record his vote. Whether, if the voter insists upon a ballot paper which the presiding officer thinks is void for want of an official stamp being deposited in the box, the presiding officer has a right to refuse to allow it to be so deposited is a question open to grave argument; for the returning officer alone is appointed to decide respecting the validity of any ballot paper, and it may be that, though irregular, the presiding officer is bound to admit it, leaving it to the returning officer on the counting to decide whether it ought to be rejected or otherwise dealt with. Upon this point, therefore, we abstain from offering any opinion. In this case the question is not whether the presiding officer or those to whom the conduct of the election was intrusted have in all respects discharged the duty cast upon them, but whether, by reason simply of the omission to stamp the ballot papers on the faces (the marks on the back being admittedly regular), the voters have lost their votes. We are of opinion they have not; they have, in our opinion, complied with every requirement of the statute and the rules, and have strictly followed the directions prescribed in schedule 2 for their guidance. Having done this, to hold that their votes are void by reason of an omission not pointed out as material either by statute, rules, or directions would be to hold that the statute, rules, and directions were but false misleading guides to the observance of the obligation enjoined by law. This we are not prepared to do. If the Legislature had intended that the absence of the official mark from the face of the ballot paper should avoid the vote, it is impossible to suppose that in declaring in section 2 what votes shall be void and not counted it would have confined itself to the

absence of the mark on the back. It would be difficult to suggest a case to which the maxim so often quoted during the argument, "*Expressio unius est exclusio alterius*," could be more justly and fittingly applied. For the reasons we have given, we adjudge the votes to be good, and affirm the decision of the election judges. The costs must be paid by the petitioner.

Solicitors for the petitioner, *Doyle* and *Sons*, for *Taynton* and *Sons*, Gloucester.

Solicitors for the respondent, *Merediths, Roberts*, and *Mills*, for *Gwynn* and *Gwynn*, Bristol.

Monday, Nov. 30, 1885.

(Before Mathew and Smith, JJ.)

Reg. v. Wheatley and another (Justices of the West Riding of Yorkshire). (*a*)

Public Health Act 1875 (38 & 39 *Vict. c.* 55), *ss. 94 and 96—Nuisance—Justices' order to owner of premises to abate same—Works necessary for that purpose to be specified in order—Forms* (*A.*) *and* (*C.*) *in Schedule* 4 *of the Act.*

The owner of certain dwelling-houses having been served by the local board of the district, being the urban sanitary authority, with notice under sect. 94 *of the Public Health Act* 1875, *requiring him "to abate a nuisance on his said property arising from untrapped drains, and for that purpose to execute such works as may be necessary to completely remove the nuisance and to effectually prevent its recurrence;" and having neglected to comply therewith, a complaint was preferred against him by the local board before the justices in petty sessions, when the justices made an order under sect.* 96 *of the Act, ordering him "to abate the said nuisance within a specified time, and to execute such works and do such things as may be necessary for that purpose, so that the same should no longer be a nuisance or injurious to health."*

Held, by Mathew and Smith, JJ., upon a rule for a certiorari to quash the order, that the order was bad for not specifying therein, as prescribed by the Form (*C.*) *of order given in schedule* 4 *of the Act, the works and things to be executed and done by the owner to abate the nuisance, and that the rule for a certiorari to quash it must therefore be made absolute.*

The justices in petty sessions, having made an order under sect. 96 of the Public Health Act 1875 (38 & 39 Vict. c. 55), requiring the defendant (the appellant) to abate a certain nuisance on his property within a time specified, "and to execute such works and do such things as might be necessary for that purpose, so that the same might no longer be a nuisance or injurious to health," the defendant, by way of appeal against such order, obtained a rule *nisi* for a writ of *certiorari* to bring up and quash the said order, on the grounds (1) that the notice served on the applicant by the local board was bad for not specifying the works to be executed and the things to be done; and (2) that the said order was bad on the same ground, and for being founded on a notice that was invalid.

The following are the facts of the case:—The appellant, one Adam Cowburn, was the owner of several dwelling-houses situated in High-street, Liversedge, within the district of the local board (being the urban sanitary authority) for the district of Liversedge, and the sewer into which the drains from the said houses ran was connected with the main sewer of the local board under the public highway. On the 11th Aug. 1885 Cowburn was served by the local board's inspector of nuisances with a notice under sect. 94 of the said Act, informing him that the local board, being satisfied of the existence of a nuisance on his property in High-street, in the occupation of A. G. Sheard and others, "arising from untrapped drains;" did thereby require him, within three days from the service thereof, to abate the same, "and for that purpose to execute such works as might be necessary to completely remove the nuisance, and to effectually prevent its recurrence." This notice was drawn up in accordance with the form (A.) given in schedule 4 of the Act, but it did not state or specify anything to be done or works to be executed, for the purpose of abating the nuisance.

Cowburn, having failed to attend to or comply with the notice, was summoned to appear before the justices upon an information at the suit of the clerk to the board, alleging that "in and upon certain premises in High-street, Liversedge, there was a certain drain in such a state as to be a nuisance, or injurious to health;" and upon the hearing of the said complaint on the 2nd Oct. 1885 the justices made the above-mentioned order, under sect. 96 of the Act, requiring him to "abate the said nuisance within one month from the service of this order, or a true copy thereof, and to execute such works and do such things as may be necessary for that purpose, so that the same should no longer be a nuisance or injurious to health."

The following sections of the Public Health Act 1875 (38 & 39 Vict. c. 55) are those materially relating to the question:

By sect. 92, the duty is imposed on the local authority to cause an inspection of their district to be made from time to time, with a view of ascertaining what nuisances exist calling for abatement under the provisions of the Act, and to enforce such provisions for the abatement thereof; and by

Sect. 93, information of any nuisance under the Act in the district may be given to the local authority by any person aggrieved thereby, or by any two inhabitant householders of the district, or by any official of such authority, or the relieving officer, or any police officer or constable.

Sect. 94:

On the receipt of any information respecting the existence of a nuisance the local authority shall, if satisfied of the existence of any nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose.

By sect. 95:

If the person on whom the notice to abate has been served makes default in complying with any of the requisitions thereof within the time specified . . . . the local authority shall cause a complaint relating to such nuisance to be made before a justice, and such justice shall thereupon issue a summons requiring such person to appear before a court of summary jurisdiction.

(*a*) Reported by Henry Leigh, Esq., Barrister-at-Law.

Sect. 96:

If the court is satisfied that the alleged nuisance exists, or that although abated it is likely to recur in the same place, the court shall make an order on such person requiring him to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance within a time specified in the order, and to do any works necessary for that purpose; or an order prohibiting the recurrence of the nuisance, and directing the execution of any works necessary to prevent the recurrence; or an order both requiring abatement and prohibiting the recurrence of the nuisance.

Forms A. and C. above referred to are fully set forth in the judgment of Mathew, J.

The rule *nisi* obtained by the appellant as above mentioned now came on to be argued, and

F. Marshall, for the justices, showed cause against it, and contended that the order was good. It was not necessary that either the notice by the local board or the order of the justices should specify the works and things to be executed and done, and it was enough that the justices, being satisfied that a nuisance existed, made the order as they had done, and left it to the owner, the appellant defendant, to take the proper measures for abating it. It is plain that the owner or occupier of the premises must know better than anybody else the nature and cause of the nuisance, and, therefore, also how to proceed in dealing with and abating it; whereas the justices, in all probability, neither would nor could know anything of the cause of the nuisance, and even if they should happen to do so, they would not be likely to know what would be the proper and best steps to take to remove it. To hold that the justices must specify the works and things to be done would often work great hardship upon the owners of property, in putting them to the cost of executing works which, when done, might prove to be inefficient, and so a further heavy additional expense would necessarily fall on the owner. Both the notice and the order here sufficiently complied with the requirements of the statute, and the merely failing to specify on the face of the order the works and things necessary to be done, did not, it is submitted, render the order invalid. [Mathew, J. referred to the form (A.) of notice to owners, under sect. 94, and form (C.) of the order of justices, given in schedule 4 of the Public Health Act 1875, as showing that it was intended by the Act that the works and things to be executed and done for abating the nuisance should be specified in the notice and order.] The following authorities were cited:

Ex parte The Mayor, Aldermen, and Burgesses of Liverpool, 27 L. J. 89, M. C.;
The Nuisances Removal Act 1855 (18 & 19 Vict. c. 121), ss. 12 and 13;
Barnes v. *Akroyd and others*, 26 L. T. Rep. N. S. 692; 41 L. J. 140, M. C.; L. Rep. 7 Q. B. 474;
Whitaker v. *The Derby Urban Sanitary Authority*, 55 L. J. 8, M. C. (No. for Feb. 1886);
Reg. v. *The Inhabitants of Kent*, in notes to *Whitaker* v. *Derby Urban Sanitary Authority* (*ubi sup.*);
Reg. v. *Whitchurch*, 50 L. J. 41, M. C.; 6 Q. B. Div. 545; s.c. in the Court of Appeal, nom. *Ex parte Whitchurch*, 45 L. T. Rep. N. S. 379.

Charles, Q.C. and *J. Ashton Cross*, *contra*, in support of their rule, distinguished the case of *Ex parte The Mayor, &c., of Liverpool* (*ubi sup.*); and cited the following cases:

Whitaker v. *The Derby, &c., Authority* (*ubi sup.*);
Reg. v. *The Inhabitants of Kent* (*ubi sup.*);
Ex parte Saunders, 52 L. J. 89, M. C.; 11 Q. B. Div. 191;
Reg. v. *Llewellyn*, 55 L. J. 41, M. C.; 13 Q. B. Div. 681.

They referred also to forms (A.) and (C.) in schedule 4 of the Act, and argued that they showed that the justices ought to have specified in the order the works and things that were necessary to be done to abate the nuisance, and that the order was invalid for want of the same being specified therein.

Mathew, J.—The order of the justices in this case directed the owner of the premises on which the nuisance existed to abate the nuisance, and "to execute and do such works and things as might be necessary for that purpose, so that the same should no longer be a nuisance or injurious to health;" and the order has been objected to as being an invalid order, because it did not specify in terms what works and what things the owner was required to do. The question for our consideration and determination is, whether or not it is imperatively required by sect. 96 of the Public Health Act 1875 that the necessary works and things should be specifically mentioned in the order. In support of the order, as it stands, it was contended, on behalf of the justices, that the Act of 1875 did not render it absolutely necessary for them to specify in their order the particular works and things that were necessary to the abating of the nuisance; and it was urged that there might frequently be cases in which they would not know, and would not have the means of ascertaining, what ought and what was best to be done in the matter; and that one consequence of their being held bound to specify the particular works in their order under such circumstances would be to put the owner of the premises to a useless expense in executing works which might after all prove to be inefficient for the purpose, and thus would impose on him the hardship of a second and additional outlay in executing further necessary works; and upon that ground alone it was said that it was clearly to be inferred that the statute intended that the owner (or occupier), who was more likely than anybody else to know what was the proper and best remedy for a nuisance arising upon his own property, should simply be directed by the justices to take the necessary steps to abate it, leaving it to him to take such steps as he should consider to be best adapted for the purpose. That is an argument that may, I think, be met by saying that the difficulty suggested by the hardship of the owner or occupier being possibly put to a second outlay and expense in cases where the justices should specify the particular works to be done, is quite as likely to arise in cases where the owner or occupier has been simply ordered to do what is necessary, and has been left to act on his own judgment as to what is necessary if it should turn out that the works executed by him proved to be ineffectual and the nuisance were not abated, as the justices might, and doubtless would, require further works to be executed by him at of course a further and additional expense. That, I think, cannot have been the intention of the Legislature, nor can I entertain a doubt that it was intended by the statute that the justices were to be the persons to decide and to direct what works and things were to be executed and done. It is said on their behalf that they are not

the proper or competent judges of what is necessary to be done in such cases, but I cannot agree with that view of the matter. Under sect. 92 the local authority have power to inspect all premises in their district for the express purpose of ascertaining what, if any, nuisances exist, and of putting in force the statutory provisions for abating then; and by sect. 94 the local authority, when satisfied of the existence of a nuisance, are empowered to serve a notice on the person by whose act, default, or sufferance it arises or continues, or upon the owner or occupier of the premises, requiring him to abate the same and to execute such works and do such things as may be necessary for that purpose. Who then is to prescribe what are the works and things to be done? Looking at the language of sects. 92, 94, and 96, I have no doubt that the Legislature intended that the justices before whom in petty sessions these questions come, and who have all the facts of the case before them, and not the owner or occupier of the premises, are the persons to decide the question and direct what works and things are necessary to be done. That that is so is shown also by the forms of notice and order set out in schedule 4 of the Act, it being provided by sect. 317, "that the schedules are to be read and have effect as part of the Act, and that the forms in schedule 4, or forms to the like effect, varied as circumstances may require, shall be used and be sufficient for all purposes." Now form (A.) in schedule 4 is the form of "notice requiring the abatement of a nuisance," and by it the owner or occupier is required "to abate the same, and for that purpose to," the notice here says: "[*state here anything required to be done or works to be executed.*]" The notice in that form, it will be seen, requires the abatement of the nuisance, and also states what is required to be done to effect that purpose. Then comes form (C.), the form of the order of justices, which in the operative part of it, is as follows: "We, in pursuance of the said Act, do order the said owner or occupier within [*specify the time*] from the service of this order, or a true copy thereof, according to the said Act [*here specify anything required to be done or works to be executed, as for instance, &c., &c.*"]. I am clearly of opinion therefore that the statute requires that the justices should specify in the order the works and things necessary to be executed and done by the owner to abate the nuisance, and that this rule for a *certiorari* should be made absolute, and the order be quashed.

SMITH, J.—I am of the same opinion. The question is an important one; and, though not unfrequently arising, there has hitherto been no direct decision upon it; for the case of *Reg.* v. *The Mayor, &c., of Liverpool* (*ubi sup.*), which was cited before us as an authority in favour of the respondent justices, appears on a closer consideration of it not to be so, the present point not having been decided there; we may, therefore, discuss and decide it here, unfettered by any authority. According to the construction of sect. 94, as contended for by the learned counsel for the respondents, no meaning or construction would be given to the last words of the section, "and to execute such works and do such things as may be necessary for that purpose," if it is not necessary that the notice should specify what is to be done. I think that by sect. 94 the notice must require the abatement of the nuisance within the specified time, and must also specify what, if any, works and things are necessary for that purpose. Here that has not been done, and the notice therefore does not comply with the requirements of sect. 94. In this opinion I am fortified by sect. 95, under which a person making default in complying "with any of the requisitions of the notice may be summoned before the justices," a proviso which would appear to be useless if the notice contained no requisitions, but, as is the case here, simply called on him to abate the nuisance. I agree entirely with what has been said by my brother Mathew with regard to the forms in schedule 4, as well as with the judgment given by him and my brother Day in the case of *Reg.* v. *Llewellyn* (*ubi sup.*).

Rule absolute. Order to be quashed.

Solicitors for the appellant owner, *Bell, Brodrick*, and *Gray*, agents for *G. Curry*, Cleckheaton.

Solicitors for the respondents, *Chester, Mayhew, Broome*, and *Griffiths*, agents for *J. Ibberson*, Dewsbury, clerk to the justices.

Williamson, Hill, and *Co.*, agents for *Thomas Mitcheson*, Heckmondwike, for the local board.

ELECTION PETITIONS.

STEPNEY.

Feb. 21, 1886, *and following days.*

(Before DENMAN and FIELD, JJ.)

ISAACSON *v.* DURANT. (*a*)

Parliamentary election — Petition — Practice — Public Prosecutor — Cross-examination — Evidence—Voting in two divisions of same borough—Effect of—Voting paper—Mark—Uncertainty—Production of voting paper—Power of court—Counterfoil—Number on—Election expense—Hanoverian voters.

The Public Prosecutor is not entitled to administer a general cross-examination, without definite object, to every witness called in the course of the hearing of a petition.

Cross-examination with the view of showing that a mistake has been made in giving to one voter the paper intended for another, is not admissible.

S. B. having voted in the Stepney Division, and then in Whitechapel:

Held, that his statement upon oath was evidence of the vote given in Whitechapel, without the further production of the Whitechapel voting paper.

Held, further, that the first vote was good, and that the second did not, unless given with a corrupt intention, involve the offence of personation.

Where a voter's name is wrongly placed upon the register for two divisions of the same borough, he is entitled to elect in which he will vote.

It is competent for the judges, at the hearing of an election petition, to examine a voting paper before the vote given thereupon is proved to have been bad. The provisions of the Ballot Act against inspecting voting papers do not apply to the court.

A trivial expense, not authorised by the schedule to the Corrupt and Illegal Practices Prevention Act 1883, *and returned amongst "election expenses" is not necessarily illegal.*

(*a*) Reported by J. E. VINCENT, Esq., Barrister-at-Law.

Persons born in Hanover before 1837, *resident in this country and not naturalised; persons born in Hanover since* 1837, *resident in this country and not naturalised; and persons born in Prussia of Hanoverian parents born before* 1837, *and now resident in this country and not naturalised, are all aliens and not entitled to the franchise.*

THIS was the petition of Mr. F. W. Isaacson against the return of Mr. J. C. Durant, as member of Parliament for the Stepney Division of Tower Hamlets, at the General Election of 1885. The petition contained the usual allegations, and in particular an allegation that certain persons had voted in favour of the sitting member who, although they were registered as voters, were disqualified from voting, and prohibited either by statute or by the common law. The petitioner claimed the seat.

Charles, Q.C., *Jeune*, *Richards*, and *Isaacson* for the petitioner.

Gully, Q.C. and *Asquith* for the sitting member.

Rickards for the Public Prosecutor.

The nature of the evidence and the arguments sufficiently appears from the judgments reported below for the most part, but the following incidental points were raised in addition:

(1.) *Rickards*, on behalf of the Public Prosecutor, proceeded, upon the examination of each witness, to administer a general cross-examination.

DENMAN, J. (upon the second day of the hearing).—We have carefully considered the provisions of the Corrupt Practices Act 1883 with regard to the powers and duties of the Public Prosecutor, and we are of opinion that counsel on his behalf are not entitled to cross-examine witnesses. Such cross-examination can only be used subject to the leave of the court, and must not be used merely for "fishing" purposes.

(2.) Two votes having been given in the name of George Carley, the Court held that cross-examination with the view of showing that a mistake had been made, the name George Carley having become accidentally substituted for George Carey, could not be admitted.

(3.) Solomon Blitz having voted in the Stepney Division first and then recorded his vote in the Whitechapel Division, it was contended that the voting paper delivered in the Whitechapel Division alone was evidence of that vote; but the Court held that the voter's evidence upon the matter was admissible. Upon several cases of this character,

DENMAN, J.—We are prepared to give judgment in the cases of the voters who voted twice in different divisions; first in Stepney, and then in another division. It was contended that in such case the first vote was void and the voter guilty of the offence of personation. If so, he would be guilty of a very serious offence, not only a misdemeanour, but a felony, and there are provisions requiring the returning officer to take steps to prosecute. Now, of course, if the law made the act such an offence, the court would have no alternative but to hold the vote void. But, on a full consideration of the enactments, we have come to the conclusion that the first vote was good, and that if the second vote was given honestly the voter would not be guilty of the offence in the absence of corrupt intention. Here it is admitted that the voter voted innocently, being registered in different divisions; and there is every reason for the admission, as this was the first occasion of voting for these divisions, and it was not unreasonable for the voter to suppose that he might vote in both. Then it is to be considered whether, when the first vote was given honestly, that vote was a "corrupt practice" which made it void. The enactment, I think, is that every person who has voted is prohibited from voting again, and if he votes again at the same election his vote is to be void, and he is to be guilty of a "corrupt practice," which implies that the act is wilfully wrong and corrupt. The vote is to be void, not both votes, unless the first was given corruptly with intent to give a second corruptly at the same election. Here the first vote was given honestly, without any such corrupt intention to vote again illegally. No doubt the second vote was invalid, but the first would not be so unless given with the corrupt intention to vote again illegally. It is enacted certainly that a person shall be guilty of personation who, having voted, shall apply for another voting paper with intent to vote again in the same election. This implies, no doubt, that the offence of personation might be committed in some cases in which a man voted twice. But in such a case as the present it was not personation, and it has more than once been held that if the votes are given honestly the offence is not committed. On the general principle, therefore, that personation is not an offence unless corrupt, the first vote is valid, though the second is not. It cannot be supposed that the Legislature intended that a man who had voted honestly a second time in a different division should be guilty of a felony. I do not think that such was the intention of the Legislature—that a man for a mere blunder was to be treated as guilty of a felony.

FIELD, J.—I am of the same opinion. The voter ought not to have been put upon the register in both divisions, as it is enacted that a person shall not be registered more than once in the same borough. Being thus registered, however, he had a right to elect in which division he would vote, and he elected to vote in Stepney, and did so vote, and there is nothing to prohibit him from so voting, as there is no evidence that he so voted with the intention of voting again illegally. Thus he voted lawfully in Stepney. That it is a case of election was decided in *Reg. v. Tugwell* (L. Rep. 3 Q. B. 704), a municipal case, but decided on the same principle—that by voting first in one division the voter made his election. That being so, the second vote could not vitiate the first, unless the case came under sect. 36 of the Corrupt Practices Act as a "corrupt practice" by way of personation. Now, the offence of personation at common law is personating another man. But the Act has declared that what was not personation shall be deemed to be so. It is enacted in a curious and complicated kind of way. But here the voter has not been guilty of any corrupt intention. It took me twenty minutes to find out, by piecing together several enactments in different Acts, the exact nature of the statutory offence, and it cannot be held that, under such circumstances, the voter could be held guilty of a "corrupt practice" by way of personation. In the *Glou-*

ester case (2 O'M. & H. 62) it was held that personation could not be committed without corrupt intention, and here that is negatived. No doubt a difficulty has been created by the language of the statutory definition of the offence, which does not contain the words "corrupt," or "wilfully, or "knowingly," and so it might be argued that it is the act which is struck at, with or without the corrupt intention. But I am satisfied that it would be a very wrong construction of the statute thus to make an innocent act a felony incurring two years' hard labour and political disfranchisement. I cannot bring myself to hold that the offence is committed under such circumstances.

(5.) Various voting papers were produced and challenged on the ground of uncertainty. The Court held that a paper with a mark opposite the words "Voting paper" was void for uncertainty, and that a voting paper upon which a rude circle had been marked was void for want of compliance with the Ballot Act, since it could not have been intended for a cross, or for a part of a cross. Where, however, a voter had made first a horizontal line and then a perpendicular line not intersecting the horizontal line, both lines being clearly opposite to the name of one candidate, the Court held that the vote was good.

(6.) Upon a question whether it was competent for the judges to examine a particular voting paper before the vote had been proved bad, the Court held that there was nothing in the Ballot Act to prevent judges engaged on a petition from examining any paper. The prohibition against "any persons" does not extend to the court upon the trial of an election petition.

(7.) There is nothing in the Ballot Act to render a vote void for want of the right number on the counterfoil.

(8.) The sitting member's election expenses contained the following item: "George Cooper, for loss of a hat, five shillings." The Court held that this, although not authorised by the schedule, was not an illegal expense, and that to hold it to be such would be a *reductio ad absurdum*.

The learned judges further reserved the following questions for the opinion of the Queen's Bench Division:

(1.) Are persons who were born in the kingdom of Hanover before the accession of Her Majesty Queen Victoria, but who have not been naturalised in this country, aliens and thereby disentitled to vote at parliamentary elections?

(2.) Are persons born in Hanover since the accession of the Queen, and of parents born before that event, within the above category?

(3.) Is a person born in Prussia since the accession of Her Majesty, and of parents born in Hanover in the reign of George III., within the above category?

Lord COLERIDGE, C.J. delivered the written judgment of the court (consisting of Lord Coleridge, C.J., Hawkins and Mathew, JJ.).—The case raises a short but curious point, whether Hanoverians born before the accession of the Queen, at a time when the Crowns of England and Hanover were held by the same person, and resident in this country, but not naturalised, but in all other respects qualified, are entitled to vote. Two other points were raised, but it was admitted that they fall to the ground if the first point is decided adversely to the claim: first, whether persons born in Hanover since the accession of the Queen, of parents born before that event, are entitled; and secondly, whether a person born in Prussia since the accession of the Queen, of parents born in Hanover in the reign of George III., is so entitled. Now, it has long been settled that, where the Crowns of the two countries are held by the same person, the inhabitants of either are not aliens in the other, for in both they are subjects of the same person, and in such a case it is not denied that allegiance is due to the same person in a natural and not a political sense. As to the "damned and damnable" opinion to the contrary —for which, as Lord Coke says, the Spensers suffered—that need not now detain us; for in the case before us the facts are different from those in *Calvin's case*. We accept the decision in that case as of the highest possible authority and as binding upon us. In that case the question was whether a man born in Scotland after the accession of James I. to the Crown of England was an alien in England, and the court held that he was not. If, therefore, the voters in this case had been born in Hanover after the accession of the Queen to the Crown of the United Kingdom, then, supposing Her Majesty also was Queen of Hanover, they would have been in the position of Calvin in the case referred to. But the voters are not in that situation. They were born subjects of the King of Hanover and of Great Britain. At the death of King William IV., however, the two Crowns, according to different laws of succession, went to different successors—to his niece in these islands, to his brother in Hanover. The Hanoverians by birth who had needed naturalisation in the lifetime of William IV. needed it when the Hanoverian heir and successor of that monarch was no longer the Sovereign of these islands. The allegiance they owed was to William IV. and "his heirs according to law," and on the death of William IV. they owed it to the Duke of Cumberland, who was the heir and successor of his brother as King of Hanover, and became so in due course of law. They became aliens because the Sovereign to whom they owed allegiance was dead, leaving an heir. The Crowns had by accident been united in the same person. But when the union of the Crowns came to an end, the union of allegiance also came to an end. The allegiance was due to the King of Hanover, it was never due to the Queen of the United Kingdom, who was not and could not be Queen of Hanover. Two answers were made to this plain and simple mode of disposing of the case. It was first said that, in all cases where conflicting duties of allegiance arise, the subject has by law the right of election as regards which Sovereign he will be subject to. Two answers were made to this, both of which were conclusive. First, it is said that it is new. No trace of it is to be found in our law, and the cases to which we were referred are not authorities for it. The case of *Doe d. Thomas* v. *Acklom* (2 B. & C.) is no such authority. The question was whether the daughter of a man born the subject of the King before the treaty between this country and the United States, and who, but for that treaty, would have remained so, was an alien. The court held that she was, on the ground that her father had ceased to be a British subject and had become an alien, by virtue of the treaty in which the

King acknowledged and recognised the independence of the United States, as "free, sovereign, and independent," and relinquished all claims to their allegiance. Her father continuing to reside in the United States became a citizen and subject of those States. The court did not say a word as to "election;" but said in effect that the King having set free the inhabitants of those States from their allegiance, they had become aliens. No doubt, if the man had chosen to leave the States, and had gone to England or into any of the English dominions, he would have remained a British subject. But why? Because he never became a citizen of the newly-established States. *Auchmuts* v. *Mulcaster* (5 B. & C. 771) is the converse of this case, and is so treated by Lord Tenterden and his brother judges. In that case R. N. Auchmutz left America when the Treaty of 1783 was signed. He came to England and there resided for some years. Then he returned to America in the service of the British Government, and some years after, when that employment came to an end, he stayed in America, married there, and there he died. The court there held that, as he had not remained in the newly-made independent country when its independence was conceded, he was still bound by his allegiance to this country; and that his afterwards residing in America could no more get rid of that allegiance as the law then stood than residence in any other foreign country. The counsel in that case, it is true, speak of "election;" but the judges give no countenance to the doctrine, but assume and state what was the true doctrine at that time—that allegiance to the Crown of this country cannot be got rid of except by treaty to which the King of his country is a party and by which he relinquishes his claim to that allegiance. Still less is the case of *Jephson* v. *Rieza* (3 Knapp's P. C. Cas. 130) any such authority. The case as to the question of Mr. Wales being an alien is decided on the special facts found by the assessor and assumed by the court (p. 147) to be "uncontradicted;" that Mr. Wales, who had been a British subject, left Minorca within the time limited by the Treaty of Versailles, and that he never afterwards returned to Minorca. On this state of facts the judgment proceeds; and it would have been strange indeed if under these circumstances the court had come to any other conclusion that from the British allegiance which originally bound Mr. Wales he had never been released. In the case of *Re Bruce* (2 Cr. & J. 436) Bayley, B., in delivering the judgment of the court (in which Lord Lyndhurst concurred), does use the expression "option" and "election" as to a person born in Maryland in 1764, and who, in the opinion of the court, had taken advantage of the Treaty of 1783 to remain a citizen of the United States. They said in effect that the King having relinquished his claim to the allegiance of the American citizens, this particular American acquiesced in the relinquishment. The case goes no further, and will not help the petitioner. But, secondly, the suggestion of Mr. Charles is contrary to the elementary idea of allegiance itself. Allegiance is a thing to which there are two parties, the Sovereign and the subject; it is, as Lord Coke says, "Duplex et reciprocum ligamen;" and again, "Merito igitur ligeantia dictur a ligando, quia continet in se duplex ligamen." And again, "Ligeance is the mutual bond and obligation between the King and his subjects, whereby subjects are called liege subjects because they are bound to obey and to serve him, and he is called their liege lord because he should maintain and defend them. Therefore it is truly said that 'protectio trahit subjectionem et subjectio protectionem'" (*Calvin's case*, 7 Coke's Rep. 8). Blackstone is equally express: "It is a principle of universal law that the natural-born subject of one prince cannot by any act of his own—no, not by swearing allegiance to another—put off or discharge his natural allegiance to the former; for his natural allegiance was intrinsic and primitive, and antecedent to the other; and cannot be divested without the concurrent act of that prince to whom it was first due; it is unreasonable that by such voluntary act of his own he should be able at pleasure to unclose the bands by which he is connected to his natural prince" (Blackstone's Commentaries, vol. i. 370); and he remarks that, down to the time of the Revolution of 1688, for 600 years the oath, whenever administered, was "to be faithful to the King and his heirs." Now, the "natural prince," for a Hanoverian not naturalised in any other country is undoubtedly the King of Hanover or the sovereign who now by conquest represents that king—*i.e.*, the German Emperor. It is not suggested that either the King or the Emperor ever relinquished their claim to the allegiance of these subjects; that allegiance, therefore, remains. The inconveniences that would follow from this claim to elect at the will of the subject were pointed out in the argument, and they are, as far as an argument *ab inconveniente* ever can be, practically conclusive. If the Queen of these islands and the German Emperor were to go to war (*absit omen*, as the judges said in *Calvin's case*, but it has been and may be so again) any one of these resident non-naturalised Hanoverians would undoubtedly, if serving in the British army and taken prisoner, be liable to be shot as a traitor in arms against his sovereign, and the case would be the same with an Englishman (and there must be many such), residing in Hanover, not naturalised and serving in the German armies. The instance of Æneas Macdonald shows—though under a somewhat different head of law—that such a case is by no means imaginary. But that a man rightfully and legally in the allegiance of one sovereign could be also rightfully treated as a traitor by another cannot be the law. Yet it follows inevitably from Mr. Charles's argument when the essential character of allegiance is considered. Sir William Blackstone in the passage already cited gives such a man small consolation: "The natural-born subject of one prince to whom he owes allegiance may be entangled by subjecting himself absolutely to another; but it is his own act which brings him into this strait and difficulty of owing service to two masters." Sir William Blackstone plainly had never heard of the doctrine that a man could get rid, by election, of an allegiance he was born under. And in *Calvin's case* the difficulty is evaded by saying "that such a man might be *ad fidem utriusque*," without explaining what was to happen if the faiths conflicted. It was further pointed out that in this case there was no proof of an election in fact, no evidence how long these voters had resided in this country, nothing inconsistent with the supposition that one or all

of them might have come into this country quite recently, and even *animo revertendi*. All that we know is that they were born subjects of the then King of Hanover who was the sovereign of this country, and that they are now resident in this country, the present sovereign of which is not and never was or could be the sovereign of Hanover. The only real authority which Mr. Charles was able to produce was not the decision but the dicta of the judges in *Calvin's case*. They are dicta of great weight, as great probably as any dicta can be, for they are the dicta of very great lawyers after very long and exhaustive argument both at the bar and on the bench, Lord Bacon arguing as Solicitor-General in support of the view which the judges adopted, and Lord Coke tells us that the Lord Chancellor and twelve of the judges (including himself) concurred in it. Yet with all respect it must be said they are dicta only. They were not necessary for the decision; they were delivered on a matter which Lord Coke calls less than the dream of a shadow or a shadow of a dream, so little was it anticipated that the question of divided allegiance would ever become a practical one. The passage is remarkable: "If *post-nati* were by law legitimated in England it was objected what inconvenience and confusion would follow if (for the punishment of us all) the King's royal issue should fail, whereby these kingdoms might again be divided. But as to this it is less than a dream of a shadow or a shadow of a dream, for it hath been often said natural legitimation respecteth actual obedience to the sovereign at the time of the birth, for as the *ante-nati* remain aliens as to the Crown of England because there were several kings of the several kingdoms, and the uniting of the kingdoms by descent subsequent cannot make him a subject to that crown to which he was alien at the time of his birth; so albeit the kingdoms should by descent be divided and governed by several kings, yet it was resolved that all those that were born under one natural obedience while the realms were united under one sovereign should remain natural-born subjects and no aliens: for that naturalisation due and vested by birthright cannot by any separation of the crowns be afterwards taken away, nor he that was by judgment of law a natural-born subject at the time of his birth become an alien by such matter *ex post facto*." This, as will be seen, leaves to which kingdom, in case of the supposed severance, the allegiance would be due wholly uncertain; and it should seem that, if there were three or four separate kingdoms, there would or might be three or four separate allegiances. The truth is, as we have said, the judges never expected the case to arise, and did not trouble themselves to think about the consequences which would follow from this doctrine if a case they thought so improbable ever did arise. It must be remembered, further, that *Calvin's case* was decided in the time of James I., when the feudal system was still in vigour, and when the doctrines which were part of and resulted from it were the law of the land. It was the time of "scutages," and "aids," and "reliefs," and "primer seisins," and wardships, and fines for "livery" of estates, and values and forfeitures of marriages, and military tenures *in capite*. It is not to be wondered at if the language of the judges at such a time as to the character and consequences of personal allegiance—an allegiance which lay at the very root of the feudal system—was widely different from the language of Lord Tenterden and Erskine, J., of Lord Lyndhurst and Bayley, B., in the cases on which we have already remarked. The state of things has been changed, not only by the 12 Car. 2, c. 24, but by the Act of Settlement in the time of William III., and by the 1 Geo. 1, stat. 2, c. 4, to which so much reference was made in the course of the argument. The language of the statutes 4 Geo. 2 and 12 Geo. 3, as to the children and grandchildren of British subjects, is remarkable, for they speak of the English Crown and not the Sovereign, and to our minds clearly recognise that to the King in his politic, and not in his personal capacity, is the allegiance of his subjects due. For these reasons we think that the votes of the persons born in Hanover before the accession of Her Majesty, and not naturalised, must be disallowed. This being our opinion upon the first question submitted to us, it follows that the votes of the persons mentioned in the second and third questions must be disallowed also. Every case which has been cited to us is, as we think, when properly understood and the facts of it correctly appreciated, an authority for the respondent. The whole argument is with him; the only thing against him is the existence of the dicta to which we have referred. But these dicta appear to us to be plainly open to the remarks we have made upon them; and as none of us have any doubt as to the law, we think there should be no appeal.

Solicitor for petitioner, *E. T. Hughes*.
Solicitors for respondent, *Wilkins*, *Blyth*, and *Dutton*.

IPSWICH.

March 8 *to* 19, 1886.

(Before DENMAN and CAVE, JJ.)

PACKARD AND OTHERS *v.* COLLINGS AND WEST. (*a*)

Parliamentary election—General bribery and treating—Extensive corruption—Travelling expenses—Persons to keep order at meetings—Illegal employment.

General bribery and treating will void an election if proved to have existed upon the side of a successful candidate. Semble, that if general bribery and treating are proved, it is the duty of judges to report the prevalence of extensive corruption.

To offer a voter his travelling expenses with the intention of inducing him to come and vote for a given candidate is bribery, and the Corrupt and Illegal Practices Prevention Act 1883 *has not altered the law in this particular.*

Money paid by an agent of a candidate for the employment of persons to keep order at meetings connected with the election is an expense connected with the management and conduct of an election, within the meaning of sect. 28 *of the Act above-mentioned.*

Such employment is illegal within the meaning of sect. 17 *of the same Act.*

THIS was the petition of Edward Packard, Henry Edmund Lacon, and Hugh Turner, against the return of Henry Wyndham West and Jesse Collings for the borough of Ipswich at the general election of 1885. The petition charged corrupt

(*a*) Reported by J. E. VINCENT, Esq., Barrister-at-Law.

practices by the agents of the candidates, illegal practices by the candidates themselves, illegal practices by their agents, and general corruption.

Henry Matthews, Q.C. and *Coward* for the petitioners.

S. D. Waddy, Q.C. and *Asquith* for the respondents.

Liddle and *Hare* for the Public Prosecutor.

The nature of the evidence and the arguments sufficiently appears from the judgments below.

DENMAN, J.—In the present case the petition is short in form and does not charge anything like personal corruption by the respondents. It does, however, charge bribery by agents of the respondents—that is to say, by persons who were actually engaged in the canvass and management and conduct of the election. It does charge treating, of which there is very little evidence indeed which is tangible in the present case—it charges the offence of undue influence, as to which there is no proof except so far as it is involved in other charges, and it charges illegal practices by themselves and others on their behalf. As to general treating, I will make some observation upon that. I took a course about it which I think was right, but which requires explanation. The election which is impeached took place in November last, and the polling day was the 25th Nov. In the result, Messrs. West and Collings, who were at the time and during the last Parliament the two sitting members, were elected, Mr. West obtaining 3795 votes, Mr. Collings 3777 votes, and of their opponents Mr. Ind and Sir Wm. Charley the highest number was 3717, so that the majority of the lowest of the two respondents over the highest of the two next candidates was 60 votes. Something was said in opening the case about the general previous history of the borough. [His Lordship here reviewed the previous history of the borough and the changes in legislation on electoral matters during the past fifty years.] That being the state of the law and the course of legislation, for the second time only in my experience, and I believe for the second time only in the experience of any of Her Majesty's judges, we have had to investigate a case in which there have been serious charges made, and as to which it was impossible for us, with regard to the requirements of the Legislature, to do anything other than wait till the very end of the matter. As long as there was any person who had any ground to show against our reporting him for corrupt practices, and ground for urging that we should give him his certificate, until all that had been extracted, it was impossible for us, having regard to the real requirements of the statute, to give any judgment at all. Even in the Act of 1868, before this present Act was contemplated, it is imperatively required that the judges at the same time that they make their report upon the election shall also report what persons are to be reported, and say with their judgment what certificates are to be granted, and where it is further provided that these persons are to have the right to appear and actually show cause and give evidence—calling witnesses on their behalf—it is obvious that the tribunal would be wholly stultified in such a state of things as that, if they were bound to give their judgment after the parties have first been heard, they were liable to have that judgment entirely altered by evidence subsequently given. That was what we felt to be absolutely required of us, and in that conviction we have done our best, and are now prepared to give judgment in this case. Now, the charges which are made are those which I have already intimated, and inasmuch as one charge is a very serious one indeed—one which, if established, would have the very serious effect of itself voiding the election, and probably going further—I think it right at first to call attention to that, to our view of the duty we had to discharge in regard to it, and the course that we took with regard to the evidence or the intended evidence in relation to it. I allude to the charge of general bribery and treating. I do not hesitate to say that in my judgment, if a charge of general bribery and treating were to be established, it would be very difficult to draw any distinction between that and the necessity of reporting that extensive corruption had prevailed. They would seem to me to go together very much. I do not here see that there is any ground for thinking that general bribery or general treating has prevailed to such an extent as would justify us in going near any such report as that. The charge itself—the case relied upon by the petitioners—is confined to one out of five wards in the borough, and though I am far from saying that if general corruption all through that ward had been proved, if it had been proved that that ward was so corrupt that there would be no chance of a fair election, supposing it was confined to that ward alone, that I might not have held that there was general corruption sufficient to invalidate the election and cause us to hold that extensive corruption did prevail in the whole borough, I do not think that case has been made out. I should like to say a few words upon that charge, because I think it an important thing to be understood. I find in one of the cases—in the *Beverley case* (20 L. T. Rep. N. S. 792; 1 O'M. & H. 143)—the late Baron Martin laid down the doctrine in language which, if literally construed, would, perhaps, be enough in this case to warrant such a finding, because what he said was this, as reported: "If a judge is satisfied that the votes of a considerable number of persons were corrupted and bribed, however innocent the candidate may be, and however unconnected with corrupt practices, the election is void." He does not define what he means by the word "considerable." I cannot help thinking myself that any amount of corruption, say a dozen voters, is in any case considerable, making it an undesirable thing to have occurred. But I find it was a case in which 1000 persons out of 2600 were corrupted, and a case in which in the municipal election, immediately before the Parliamentary election, the same thing was done. The doctrine is laid down differently in different language in another case in the same volume, the *Stafford case* (21 L. T. Rep. N. S. 210; 1 O'M. & H. 230). Blackburn, J. says: "If there was general corruption, although it does not appear to have been done by an agent, or general intimidation, in that case by the common law the election would not be good. It is difficult in this case to say whether it was of sufficient magnitude to amount to that. That must depend upon the circumstances of the case, and to a considerable degree upon the majority. I cannot help thinking that though it

might be considerable, and an important matter if the majority of twelve, or some such number as that were obtained, but where there had been ten or a dozen persons concerned in bribery, that certainly cannot be true in the case where the majority is as large as sixty, still less where it is as large as 100, or still less if a 1000 or more. I think it must also depend upon the number of cases in which one has real reasons to suspect it has been such as to affect probably the whole of the election. If we held that bribery was so rife that there probably could not be a fair election held in the place, then they would have to say the election would be voided, subject that is only to this, that in the election in which we found bribery was rife we should find that that bribery had been in favour of the persons who had been elected. There must be that qualification always. It would be impossible for a person who had been fairly elected to be ousted merely because his opponents had been guilty of bribery. Therefore that qualification must also be included. Then, taking the case of general treating, there are many cases, and I need not go into them, in which similar language has been used. There is the *Drogheda case* (21 L. T. Rep. N. S. 402; 1 O'M. & H. 252), in which Keogh, J. laid it down very eloquently. There is also the *Bridgwater case* (1 O'M. and H. 113), in which Lord Blackburn put the test thus: "If bribery or corruption of such an extensive character, though not shown to have been connected with the candidate or his agent, is shown to have existed as not to make the election a fair election, then the election will be voided." In this particular case before us, at one stage of the case Mr. Matthews tendered evidence that persons going about to solicit votes found a difficulty to get votes, as if persons were standing out for their votes, and found a difficulty to get money. That evidence would have been admissible if the persons were standing out for money on behalf of one side only, which he did not say he was able to prove. Upon the whole, I think he exercised a wise discretion in not pressing that evidence further, because he did not intimate he was at all able to make out a case as to that which ought to be required before that part of our duty can be acted upon. I do not say in this case it was wholly unreasonable to insert a paragraph in the petition, but I do not think enough was proved, or could be proved, to void the election on that ground, and therefore we ought not to hold there has been anything like general bribery or treating. [Passing to individual cases, the learned judge dealt, *inter alia*, with the following case.] The next case is that of Garrard and Baxter—No. 4 in the particulars. The facts seem to be these: Baxter was a freeman living at Colchester. He was a person whose parents, or whose father, was a Conservative in politics, and who might, therefore, not like to vote for the Liberal candidates. He received a letter from Garrard, who was clearly the Liberal agent, asking him to vote for Messrs. West and Collings. In his answer to that letter Baxter said: "The loss of time would be so much that I shall have to lose a day." Then Garrard's own account afterwards was that he wrote this letter: "Dear Friend,—I have received your letter. You did not tell me where I was to vote. Please write and tell me. I am not sure that I shall come over, as the Colchester election is the day before, and it will be a loss to me, and I cannot afford the expense to come over." Then at a later stage of the case, when Baxter was recalled, he said, after he had had time for reflection, he had written that the loss of time would be too much, and the expense would be too much. Now the reply which he received from Garrard we have not before us because it has been lost, but I think we have a pretty good opportunity of knowing as nearly as possible what it was. There are three versions given of it. One is by Baxter, who says it was this: "Come as early as you can, and vote at the polling station in Cavendish-street," and then he said the lucre would find its way to South-street. Then Collings' account of the letter is this: "I believe it commenced with 'Dear friend,' and went on to speak with reference to his expenses, and the lucre will find its way to South-street, Colchester." Then Garrard's own account of it is this: "In reply to your letter, you vote at Cavendish-street polling station. I should advise you to come by an early train and return at once. You are not likely to be seen by your people," and then, in the margin of the letter, there was—"Some lucre shall find its way to South-street." Believing all these versions, it appears to me the most favourable construction you can put on that letter is that "money to pay your travelling expenses will be sent to you if you come to vote for West and Collings." I cannot see that there is any less construction to be put upon it than that. If you put any other construction upon it it must be this—if you come, some lucre, an indefinite quantity of lucre, will be paid to you, more than to cover your expenses and sufficient also to cover the loss of time, which Baxter had himself spoken of in his own letter. That would make it a worse case. Then it would come clearly within the definition of bribery in the Act of 1854, whereas, on the other hand, that is to say on the supposition of the less liberal meaning, it would merely be an offer to pay travelling expenses, and it would no doubt raise the questions so ably argued by Mr. Waddy. His contention was, that being a mere offer to pay travelling expenses, it was not now contrary to law. Now Garrard himself gives his own interpretation of it. He says he had an impression that payment of wages was illegal, but he had an opinion that the payment of travelling expenses was not illegal. But the case really will not turn upon what his notion may have been. If he made the promise in order to bring the voter, then it is held in many cases that this is fatal to the transaction. Now, in *Cooper and Slade* (6 H. of L. Cas. 747), this matter was gone into in the House of Lords very fully. There an agent had written to an out-voter, asking him to come and vote for a candidate, and giving the name of the candidate, adding, "Your railway expenses will be paid." Great judicial doubt existed as to whether this could be construed to be a conditional offer—an offer of the money provided he came—and the judges differed about it, until at last it came before the highest tribunal. That highest tribunal held that it was a conditional promise to pay the railway expenses if he came to vote for the candidate, and therefore they held that there had been bribery within sect. 2 of the Act of 1854, and that it was in fact,

a bargain between the candidate and the voter. No one has suggested that if there was a promise only, there is no legal difference between that and an actual payment. This was a bargain similar to that on the other case, equivalent to saying to the outer-voter, "If you will come and vote for me, I will give you money for paying the expense of your coming to vote." It is said, however, by Mr. Waddy that looking at the current of legislation this is not now bribery. He said everything in that view he possibly could; but in the very case cited by Mr. Waddy (the *Coventry case*, 20 L. T. Rep. N. S. 405; 1 O'M & H. 109), the enactments relating to the mere payment of expenses which are to be considered as altering the law laid down in *Cooper* v. *Slade ubi sup.*) must have been of no effect. Willes, J. lays it down that illegal payment would void the election, so that the election will be void if a promise were made to a voter as an inducement to vote. The law upon this subject was very fully considered in the *Horsham case* (3 O'M. & H. 54) by Quain, J. He gave a complete answer to Mr. Waddy's argument. In that case Quain, J. declared the election voided on account of bribery, and he stated the law as follows: "Upon the subject of travelling expenses it has been well known since *Cooper* v. *Slade* (*ubi sup*), where the judges construed the letter as a promise to a voter, and putting that construction upon it, it was decided that that was a bribe. Every payment of expenses, though fair and reasonable, to a voter to induce him to vote is bribery within the meaning of the Act; therefore as a proposition of law the offer to pay travelling expenses as a bribe admits, as Lord Wensleydale says, of no doubt whatever. Therefore the decision in *Cooper* v. *Slade* (*ubi sup.*) and what is more important for the present case, Willes, J.'s reference to the subsequent legislation which followed upon *Cooper* v. *Slade* (*ubi sup.*), remains untouched." That being the law upon the matter, that was followed again by a decision in the *Bolton case* (31 L. T. Rep. N. S. 194; 2 O'M. & H. 138). The Reform Act did not in the slightest degree alter the doctrine. It is clear the legislation has not altered the leading doctrine in *Cooper* v. *Slade*. Although paying travelling expenses is merely made an illegal act not in itself sufficient for voiding the election, yet if it is a promise under the condition that the voter should come up to vote it becomes bribery within the meaning of the Corrupt Practices Act, sect. 2. That is a complete answer at once to everything to be said on the subject, and disposes of the able argument by Mr. Waddy. That was a case decided in 1875, long after the Act of 1868, and I cannot find anything in subsequent legislation to alter the law as laid down. We must therefore hold that Garrard, an undoubted agent of the respondents, did an act which comes within the definition of bribery, and that compels us to hold that the election of the respondents is void. I wish I could say this was the only case of bribery proved by agents of the respondents. There are some charges of the kind besides those which depend upon Mickleburgh's evidence, as to which I cannot affirmatively say they are made out to my satisfaction. The worst of these cases, looking at the influence and position of the man, is, in my judgment, the case of Robert Norton. I find it impossible to put together the facts proved with regard to Robert Norton without coming to the conclusion that he was engaged in acts of bribery. Then as regards illegal practices, I am sorry to say I cannot accept the story he told as to his relation with the muscular men headed by Gunn as true. The evidence of Henry Gunn is irreconcilable with the account given by the men he employed, none of whom said they were employed either to protect himself or his brother, but whose business, according to Mr. West and Mr. Collings' own evidence, was necessary work—viz., to keep order, and to secure a fair hearing for Messrs. West and Collings. Therefore, I think, Norton must be reported for illegal practices. This brings the matter to the question as to whether the employment was illegal, which, by sect. 11, sub-sect. 3, voids the election. Mr. Waddy contended that no result followed; but I have come to the decided opinion that sect. 28 of the Act applied to such a case, and one of the main objects, viz., to prevent outrageous expenditure at elections, would be defeated if we said otherwise. I agree with Mr. Coward that this was really a question of fact. It is important that it should be understood as a matter of law that if any agent chooses to spend money in the promotion of his candidate's return, such a system, if adopted, will be fatal to the candidate who succeeds by himself. My brother Cave will enter more fully into this part of the case, which to my mind is very clear. John Stroulger has, I think, been clearly proved to have offered money for his vote to Thomas Harvey, and to have paid money after voting to George Suckling—he was a confederate of Robert Norton's. He gave a shuffling and untrue account of himself, and we shall be bound to report him, and not grant his certificate. William Abbott's case is a very peculiar one. He was evidently a man of some influence—a man whom it was considered desirable to get hold of. It is unnecessary to pursue his unsavoury course. We see him threatening Mr. Beaumont unless he gave him employment. We see him paying money to Taylor and Bloomfield, and we see him accepting a sovereign from old Dalby. He then changed over from yellow to blue. It is quite clear we should be neglecting our duty if we did not report him, and I cannot help thinking we should not be doing our duty if we did not refuse to grant him his certificate. With regard to William John Dalby, it was my impression that he also was, during the early portion of the day, working for the side contrary to that which his father usually supported, and that, fearing that he would incur the wrath of his father, he became an enthusiastic blue again; but, after the evidence given yesterday, I do not think I should be justified in drawing that conclusion, and in holding him guilty of bribery on the evidence of such an unsatisfactory witness as Robert Bennett. As regards Isaac Dalby, he has done himself honour, because he told us the whole truth. He has been guilty of giving a sovereign to William Abbott, to induce him to get votes. He will be reported, but he will get his certificate. Henry Gunn must also be reported for having given money to several chuckers out. This witness's evidence was so unsatisfactory that there was some doubt as to whether he ought to receive his certificate, and even now I have great doubts whether he has told us all he knows about the matter, but I think, on

the whole, he has told us the truth as regards the main question, and therefore think he should be reported, but should receive his certificate. Henry Norton and William Green must also be reported for illegal practices, and here also I have considerable doubt whether the court ought to grant them their certificates. The only ground on which I consented to grant them their certificates is this: that I think on the whole it is expedient that the certificate should be granted, if—even reluctantly—on the main question the truth is told. With regard to Bennett, it is a miserable spectacle, and it is not agreeable to find people guilty of illegal acts on such testimony. But he is just such a man as William Abbott was set to catch. Bennett will be reported, but I think, on the whole, he is entitled to his certificate. On George Suckling's case I now say no more than that I propose to adopt the same course to him. Robert Abbott, I think, has been proved to have accepted money for his vote from William Abbott. About Walter Double—he also, I think, should be reported and as to his certificate I have had more doubt; but on the whole I should place him in the same position as Henry Norton and William Green, and I should not refuse his certificate. The only other matter, I imagine, is the case of Noyes. I mention this for the purpose of saying that, though at first sight it looked very mysterious, and perhaps suspicious, I entirely accept Mr. Collings's explanation of the matter, and believe that, so far from it having been done with any corrupt motive, it was a course adopted for the purpose of putting down bribery. With regard to the 40*l.* paid to Nash, I am not of opinion that it should be taken notice of now, but I think it would be dangerous to adopt that course in future—the course of returning a lump sum instead of giving detailed statements. As to the costs, I see no reason to depart from the general rule, where no imputation of unfairness on the part of the petitioners is alleged, to order the unsuccessful party, in this case the respondents, to pay the costs.

CAVE, J.—The petition alleges that, at the election held on the 25th Nov. last, the respondents were, by their agents, guilty of bribery, treating, and undue influence, and either by themselves or their agents guilty of illegal practices. The petition also alleges the existence of general bribery, treating, and intimidation. The last allegation may be disposed of at once. There is, in my judgment, no evidence of any such general corruption or intimidation as would void the election at common law. It is necessary to say a few words about the machinery of the election. So far as I am able to discover, in each ward there was in existence before the contest began what was called a ward council of the Liberal Association, consisting of a chairman, secretary, and thirty members. On the approach of the election, the individual members of the council in each ward conducted and managed the affairs in that ward. In St. Clement's Ward James Stevens Garrard conducted the election, and Robert Norton, Henry Norton, Ellinger, and William Turner, were members of the council, and undoubted agents of the respondents. As to Robert Norton in particular, it was clear that he was in possession of a fund, part of which he devoted to the payment of persons for keeping order at the respondents' meetings. This part of the case is surrounded with mystery. It is however ascertained sufficiently for the present purpose that Robert Norton directed Gunn, a person of ambiguous character, to get persons for the purpose of keeping order at the meetings of Messrs. Collings and West. Gunn engaged a number of men, some of whom were voters, to attend meetings on the 16th, 17th, 18th, 19th, 20th, 21st, and 23rd Nov., and paid them half-a-crown each for their services, and these men were also engaged on the polling day for purposes not clearly ascertained, and were paid various sums ranging from half-a-crown to seven shillings. Some of the men were paid to attend meetings and keep order, on more than one occasion. They went to the Reform Club and were treated with beer, and each man received 1*s.* 4*d.* or 1*s.* 6*d.* It was treated as a fact that these men were employed to keep order and turn out people who made a disturbance. Mr. Waddy, in opening the respondents' case, said there were disturbances at the Liberal meetings, at those in favour of Messrs. Collings and West; that their voices were drowned and the meeting broke up, that shouts of "the cow" were raised, and it became impossible to obtain a hearing. Upon that Mr. Waddy said some of the friends of Messrs. Collings and West determined to put a stop to this disturbance. Accordingly Gunn had money given him sometimes by one man and sometimes by another to enable him to bring to the meetings a number of men to keep order. Mr. Collings in his examination in chief spoke as to meetings having been disturbed, and cries directed at him about the cow and three acres, and also as to having seen persons who were making this disturbance turned out. A person named Nash, the secretary to the Central Committee of the Liberal Association in Ipswich, also stated that he understood means were to be taken to maintain order at the meetings, and that Gunn attended them for that purpose. When Robert Norton was called, however, he started an entirely different explanation, namely, that Gunn and his assistants were employed solely to defend him, and that Norton paid for their services out of his own pocket. Norton was a workman at 3*l.* a week. Norton, a workman at 3*l.* a week, stated that he was unpopular in Ipswich, and it was rumoured he was a marked man, that his brother Henry had been knocked about at previous meetings, and had engaged Gunn to provide men for his own and his brother's protection. Norton said he had sent money to Gunn at different times in an envelope by his brother Henry, but did not tell him what was in the envelope, wishing, he said, to set a trap for the men who had marked him, so that they might fall into the trap and get well recompensed, and if he had told his brother he might have talked about it and the other men got to know about it, and not fall into the trap. He says he sent 6*l.* in all to Gunn. Gunn, who is called as a witness, says he has been employed at previous elections to keep order, and that at this last election, in addition to 5*l.* or 6*l.* from Norton, he received 7*l.* or 8*l.* from a stranger, not an Ipswich man, for the purpose of keeping order at all the meetings. It is useless to trace further back rubbish of this kind. It is ubundantly clear that the man is not telling the truth, and I am satisfied there was a secret fund—whence and from whom procured I know not—for promoting the election of Messrs. West and

Collings, of the existence of which neither they nor Mr. Jennings had any idea; that this fund was under the control of Robert Norton—whether alone or with others I know not—and that it was used, among other purposes which we have been unable to trace, for the purpose of paying the men employed by Gunn to keep order at the meetings of the respondents' supporters. It is obvious there is nothing more calculated to produce corruption than the existence of two funds for the purposes of one election—one open and acknowledged, dispensed by the election agent and duly accounted for in the published returns; the other kept secret, dispensed by an unscrupulous man, and not accounted for. The mere fact that such a fund was in existence is sufficiently indicative that it was to be applied to purposes which would not bear the light, and demands our most careful inquiry into the conduct of Robert Norton, and I proceed therefore to investigate the cases in which he is implicated. [Having done so his Lordship concluded:] Robert Norton had at his disposal a secret fund of unknown amount, and I am satisfied that he disposed of part of it in conjunction with William Abbott and John Stroulger in bribing voters to vote for the respondents. I next come to Garrard's case. We have not before us the text of the letters which passed between Garrard and Baxter. But taking the versions of the correspondence which have been presented to us, the case, to my mind, is too clear for argument. The promise to pay a voter's travelling expenses for him to come and vote for a particular candidate at an election has always been regarded as bribery within the 2nd section of the Act of 1854, and no subsequent statute has ever thrown the least doubt upon that doctrine. The question in *Cooper* v. *Slade* (*ubi sup.*) was whether the letter in the case did amount to such a bargain, and it was held that it did. The expressions used in this case, whichever version is taken of the letter, are far more indicative of a corrupt bargain than those in *Cooper* v. *Slade* (*ubi sup.*). To my mind Baxter's evidence was correct, and after that the respondents' chance of retaining their seats was hopeless. I now pass to the charges of illegal practices. I have already dealt with the facts of the case, and I shall merely repeat that I am satisfied that Robert Norton sent and Henry Norton took money to Henry Gunn to be employed by the latter in paying men for keeping order at the meetings which were addressed by the respondents during the ten days preceding the polling day. Now, as to the law of the case. I entertain no doubt that if a man was so obnoxious to his fellows that they could not resist to fall upon him, and do him an injury whenever they met him, even at a public meeting at which otherwise they would have behaved themselves in an orderly manner, he would not be guilty of an illegal practice if he were to pay men to protect him. But I think in such a case every sane man of the same opinions as himself would advise him to attend the meetings of the opposite parties, and not those he favoured. But if the man desired the candidates of his choice to have a fair hearing at their meetings, and employed others to put down the disturbance, the case is a very different one. The 28th section of the Act of 1883 is very wide. It states "That except promises by or in pursuance of that Act no payment shall be made by a candidate at an election, or by any agent on behalf of the candidate, or by any other person, at any time, in respect of any expense incurred on account of, or in respect of the conduct and management of such election otherwise than by or through the election agent." Mr. Waddy has contended that the words "on account of" were qualified to "in respect of," and that the sentence should read, "expenses incurred on account of the conduct and management of the election or in respect of the conduct and management of the election." I cannot accede to this view, but I will pass by it for one moment. Mr. Waddy next contended that expenses incurred on account of the conduct or management of an election could only apply to the election agent; and, secondly, that the section did not affect the payment by persons other than the election agent. This view is at once disposed of by the proviso which excepts from the operation of the section any sums legally incurred by himself, which shows that but for the proviso all expenses incurred by any person whatever in respect of the conduct or management of the election would be within the section. The exceptions are—first, because they are small; secondly, legal; thirdly, incurred by the party paying them himself; fourthly, not repaid to him. All expenses paid on account of the conduct or management of the election, no matter by whom incurred, are within the section. It is impossible to give to the words "incurred on account of or in respect of the conduct or management of the election" one sense when incurred by the agent himself, and another sense when incurred by someone else; and the only consistent interpretation is that those expenses which have been incurred by the election agent himself, and have been returned by him as incurred in respect of and on account of the conduct and management of the election are equally within the 28th section, whether incurred by the election agent or another person. If the expenses incurred by A. B. are such that if incurred by the election agent they would have been illegal, or if incurred by the election agent they would have been legal, then also they are within the section, and payment of them by A. B. is an illegal practice unless they are (1) small, (2) legal, (3) paid out of his own money, and (4) not repaid to him. Robert Norton sent money to Gunn to pay roughs to keep order. Such a payment must have been returned by him as part of the expenses of the election. It is incurred by him to enable the arguments of the candidates to reach the ears of the audience, which they would not have done if the meeting was disturbed or broken up by violence. It is as much his expense as the printing and distributing a written address. By sect. 17, no person may for the purpose of promoting the return of a candidate be employed for payment for any purpose except within the first and third schedule of the Act. These expenses fall within the section, and are not excepted by the proviso. I agree with Mr. Waddy in his denunciation of tyranny, which it was quite refreshing to listen to, and if a person knows that he was personally so unpopular that his presence excites a tumult, the question is if he is justified in going to a meeting. That is not the case we have to deal with. It is monstrous that those who cannot possibly understand the arguments of the speaker,

should prevent those who can, but the Legislature says that must not be put down by violence. It is a practice which would soon culminate in levying black mail on candidates and their supporters. In my judgment there could be no objection to the employment of unpaid volunteers on this account, and where disturbances are apprehended it might be a wise proceeding to have them sworn in as special constables. But I must deprecate in the strongest possible manner so unmanly a proceeding as to pay roughs to keep them quiet, and allow meetings to be held. To come back to the case before us, Robert Norton furnished a portion at least of the money used by Gunn out of some fund over which he had the control, and Henry Norton carried this portion to Gunn. This money was to be paid to Gunn, who distributed it amongst the roughs. Green, whose proceedings in trying to keep order were so distorted and exaggerated by Mr. Waddy's vivid imagination, was well aware of the practice, and on an emergency gave the roughs money to attend two meetings, besides treating them on numerous occasions. In my judgment, though in different degrees, these persons had both been guilty of an illegal practice. As to Mr. Nash, I am of opinion that the contract with him was a contract for and a payment of a legal expense within part 3 of the first schedule, and was not, as was contended by Mr. Matthews, substantially the employment of Nash's clerks. I also think that Mr. Noyes had nothing to do with any corrupt or illegal practice. As to the respondents themselves, I am satisfied that both of them and their election agent did take all reasonable means to avoid corrupt and illegal practices, and sincerely desired that the election should be pure. The law, however, makes them responsible for corrupt acts by their agents, Garrard and Robert Norton, and for illegal acts by Robert Norton and Henry Norton, and consequently the election must be declared void. As to the prevalence of corrupt or illegal practices, whatever I may suspect—and I refer here to the statement made by Mr. West and Mr. Collings as to their belief that corrupt practices had extensively prevailed at the last election—there is nothing proved before us which would justify me in saying that we have reason to believe that corrupt or illegal practices had prevailed extensively at the last election.

Solicitors for the petitioners, *Josselyn* and *Sons*.

Solicitors for the respondents, *F. B. Jennings*.

BARROW.

March 17, 18, 19, 20, 22, 23, *and* 24, 1886.

(Before FIELD and DAY, JJ.)

SCHNEIDER *v.* DUNCAN. (*a*)

Parliamentary election—Illegal employment—Payment, what is—Refreshments—Corrupt and Illegal Practices Prevention Act 1883—*Sects.* 17 *and* 64.

D. and his agents gave gratuitous refreshment to certain persons styled "workers" at a parliamentary election at which D. was a candidate.

Held, that this was an illegal employment within sect. 17 *of the Act above named, and rendered the election of D. void.*

THIS was the petition of Mr. H. W. Schneider, the Conservative candidate for Barrow at the election of 1885, against the return of Mr. David Duncan. The petition contained the usual allegations, but the principal question in the case was whether or no it was an illegal practice, under the Parliamentary Election (Corrupt and Illegal Practices) Act 1883, to provide refreshments for "workers" at the election free of charge.

Sect. 17 of the Act provides that no person shall, for the purpose of promoting or procuring the election of a candidate at any election, be engaged or employed for payment or promise of payment for any purpose or in any capacity whatever, except for any purposes or in any capacities mentioned in the first or second part of the first schedule to the Act, &c., and in sub-sect. 2, subject to such exceptions as may be allowed in pursuance of the Act, if any person is engaged or employed in contravention of this section either before, during, or after an election, the person engaging or employing him shall be guilty of an illegal employment, and the person so engaged or employed shall be guilty of an illegal employment if he knew that he was engaged or employed contrary to law.

It appeared from the evidence that upon the suggestion of his "consulting committee," and acting under the advice of his agent Mr. Garnett, Mr. Duncan provided refreshments in various forms for a number of "workers" at the election, and it appeared further that a principal part of the duties of these workers was to bring up voters to the poll.

Henry Matthews, Q.C., *Murphy*, Q.C., and *Graham* for the petitioner.—The giving of refreshments is a contravention of sect. 17. It is immaterial whether money or refreshments are offered as remuneration to workers, and there is evidence to show that in this case refreshments were given to persons who were not in any true sense "workers." The sole question is whether these refreshments were given with the view of influencing the election. In any case the employment of "fetchers up," as persons who are employed to hurry voters to the poll are called, is a dangerous custom.

S. Pope, Q.C., *Kennedy*, Q.C., *Coward* and *Duncan*, for the sitting member.—The real question is one of motive. We never made any concealment of the fact that refreshments were to be provided, but they were only provided to voters, and it is impossible to hold that the provisions made for voters were corrupt unless they were made with a corrupt motive, and with the object of inducing and influencing voters.

A. B. Kelly for the Director of Public Prosecutions.

FIELD, J. (after reviewing the facts as above).—The principal question here is concerned with the provision of refreshments, and I may say at once that I have had great difficulty in making up my mind whether it is not my duty to say that this comes within the definition of a corrupt practice. Under circumstances which have been laid before us at great length there was a meeting called at the Central Hall, and a discussion took place between Mr. Duncan and his supporters, or

(*a*) Reported by J. E. VINCENT, Esq., Barrister-at-Law.

some of his supporters, upon the question whether refreshments should or should not be provided to workers and other persons who might be ready to render assistance on the polling day. The result of the discussion was that the persons who left the hall on that day certainly left it under the impression and with the assurance that they would be provided with refreshments. It is said that Mr. Schneider was described as stingy and penurious, but what would the voters generally have said if, after the assurance which they received at the Central Hall, Mr. Duncan had not provided any refreshments? They would have said, in effect, that he was guilty of a breach of faith, and a breach of contract. Now the essential meaning of a contract is in reality a very simple matter, and it is easy for a contract to be entered into without any definite stipulation in writing, or any express statement in words. Under the circumstances of the present case I am driven to the conclusion that there was on this occasion an employment of these men, and that it was an employment for payment within the meaning of sect. 64, which provides that the expression "payment" shall include any pecuniary or other reward; and that the expressions "pecuniary reward" and "money" shall be taken to include any office, place, or employment, and any valuable security or other equivalent for money and any valuable consideration. I am therefore compelled to come to the conclusion that it will be our duty to report to the Speaker of the House of Commons that there have been illegal payments and illegal employments by the sitting member and his agents. It has been argued that the evidence shows that this practice was corrupt on the part of Mr. Duncan and his agent, but I am unable to come to that conclusion. There seems to have been no secrecy about the thing; it was done in a perfectly open manner, and Mr. Schneider's own canvassers went regularly into Mr. Duncan's committee-rooms in order to see what was being done. Now we must not impute crime to a man if his conduct is such that a less serious construction may reasonably and consistently be placed upon it, and for this reason I cannot under the circumstances come to the conclusion that the conduct of either Mr. Duncan or Mr. Garnett was corrupt in the sense understood by the statute.

DAY, J.—It is unnecessary for me to review the evidence further, and I have only to add that, in my opinion, the evidence shows clearly that for the purpose of promoting the election of Mr. Duncan, persons were employed for payment in ways other than those which are provided by the Act. Such an employment is an illegal employment, and the payments made in consideration for it are illegal payments. It is impossible, therefore, to avoid the conclusion that there have been illegal practices on the part of the sitting member and his agent which necessarily render his election void.

Order accordingly.

Solicitors for the petitioner, *Dawes* and *Son*.

Solicitors for the respondent, *Warriner*, for *Garnett*, Barrow

NORWICH.

March 17 *and* 24, 1886.

(Before DENMAN and CAVE, JJ.)

BIRKBECK AND OTHERS *v.* BULLARD. (*a*)

Parliamentary election—Bribery—Single case—Election void—Agency—Evidence of—Candidature, what is—Treating, what is—Bribery—Discretion of court—Costs.

A single case of bribery by an agent renders an election void.

A circular letter addressed by a candidate to his constituents must not be interpreted with the same strictness as a commercial document.

Where a meeting is held or other expenses are incurred with the object of inducing a person to become a candidate at an election, the question whether the costs of the meeting and other expenses are "election expenses" is one which must be answered in relation to the particular circumstances of the case.

Treating is not the entertainment of equals by equals, but of an inferior by a superior with the object of securing the goodwill of the inferior (per Cave, J.).

Where the petitioner makes out a primâ facie case of agency, it must be accepted unless rebutted by the respondent.

In a case where bribery is proved the court has no power to report, under sect. 22, *that the offence is of a trivial nature and ought not to void the election.*

An overloaded petition will be visited with costs, even if it is successful.

THIS was the petition of Henry Birkbeck and others against the return of Mr. Harry Bullard for the city of Norwich at the General Election of 1885. The petition alleged corrupt practices by the candidate's agents and other persons on his behalf, the said corrupt practices being bribery, treating, undue influence, and procuring personation, and also illegal practices of various kinds, the principal illegal practice alleged being a false return of election expenses.

A question of some importance arose under the following circumstances. Mr. Bullard was unwilling to stand as a candidate, and on Aug. 12 a meeting was held with the object of inducing him to stand. The meeting was successful in its object, but the expenses thereof were not returned as election expenses.

Arthur Charles, Q.C., *R. T. Reid*, Q.C., and the Hon. *Mark Napier* for the petitioners.

Gully, Q.C., *Blofield*, and *Denman* for the respondent.

Sills for the Director of Public Prosecutions.

The facts and arguments sufficiently appear in the judgment of the court.

DENMAN, J.—It is now my duty to give judgment. The petition charged a great many electoral offences, of corrupt and illegal practices, arising both under the Act of 1868 and of 1883, against a great many persons. I think it right at the outset to say that this petition, especially when coupled with the particulars, has gathered together a great many more charges than there was any reasonable ground for making, and a great many charges of which it is enough to say

(*a*) Reported by J. E. VINCENT, Esq., Barrister-at-Law.

that they seemed to have been made upon no foundation at all, or upon no sufficient foundation. In the particulars delivered I find no less than fifty-two cases of bribery, sixty-six cases of treating, two of undue influence, of which last we had no proof given. Of the cases of bribery, very few were relied upon seriously by Mr. Charles, except with reference to one sweeping charge of bribery—the allegation that a great many people were bribed by the acts connected with the transactions of the 12th Oct. There were no less than sixty-six charges of treating, of most of which we had either no evidence at all, or evidence of a very unreliable character. With regard to illegal practices we had charges laid under every section of the Corrupt Practices Act, as to some of which no particulars have been given, and where particulars have been given very small proof has been brought forward. No elected candidate could look upon such a petition otherwise than as a very serious attack on his seat. When we come to the evidence in the case, the charges seriously relied upon by the learned counsel were charges of bribery by agents of the candidate, of treating by agents, of payment of moneys in respect of the conduct and management of the election by the agents of the candidate otherwise than through his election agent, charges of a false declaration by the election agent as to expenses, of unlawful use of committee-rooms, of an improper description of certain clerks and messengers, of payments illegally made for certain newspapers—these are all the charges in the petition on which there has been serious reliance for the purpose of showing that the election was void. I will first deal with the charges of bribery, as being the most serious charges in any petition where they are made at all; and first, I will take the allegation of the bribing of Charles Wigger by Walter Banham by giving him 2*s.* or 2*s.* 6*d.* on the election day in the neighbourhood of the polling booth. It was hardly contested by Mr. Gully that if the evidence was relied upon this case would be fatal to the respondent's seat. Having very carefully read more than once every piece of the evidence, I am sorry to say that I have come to the conclusion that this case is made out, and that there is evidence, which we should have no right to disbelieve, of bribery by an agent. That being so, we shall be bound upon that to report that this was a void election. Walter Crane was a man who at the time was endeavouring to secure purity of election, and he swore positively that he saw—he could not say 2*s.* or 2*s.* 6*d.*, but a coin of that kind—pass from the hands of Banham to Wigger, and what was far more important, said he overheard a conversation as to its being "on the quiet," so that if that was not true he would be guilty of the most wicked and deliberate perjury. If this was a case of murder they were dealing with, a jury, after being properly addressed by the judge, who found a verdict of not guilty, would return a wrong verdict and contrary to the fact. It has been looked upon, and justly, as a very hard thing towards a candidate that his election should be void by reason of an act such as this. But looking at the dicta laid down in the books on the subject, and looking at them anxious to see if there is any escape from the conclusion, I cannot but feel that this act was a serious one as regarded its effect upon the election. Lord Blackburn—one of the most learned judges that ever lived—has laid it down that where there was but one isolated act of bribery proved in an election petition, there the court ought to be more particular in going upon that evidence, and shrink more from holding that the election was void. My view of that is, that the court ought to be more particular in seeing that agency is established. On the other hand, we have the strongest expressions by our predecessors that if an act of bribery by an agent was once clearly made out, the election was voided, though it was a single case and it was clear that he candidate took steps to prevent it. That view was clearly laid down by Sir Henry Keating, and the law holds that purity of election is more important than the success of any particular person in his candidature. There remains the question whether Banham was in fact an agent. Upon that I fear the evidence was too clear for doubt. Upon the point Banham was a good witness, and he admitted that he was in the committee-room, that he had cards given to him, and we know now the nature of those cards—cards to be used on the polling day to enable persons to go round soliciting votes. We have evidence which we cannot resist, that he was a person taking an active part in the election, though he was probably not a requisitionist, not being a voter. The fact that he was not a voter really makes no difference, or if anything makes the thing stronger, as it shows his anxiety to take part in the election, while we know that on the polling day he was spending his time in canvassing voters. That being so, I have come most reluctantly to the conclusion that this election must be voided, and that we shall have to report so. I now turn to the question whether the transactions in connection with the meeting of the 12th Oct. were acts of bribery or not. It was said that bribery was committed by the employment of a large number of voters under cover of keeping order, but really to influence votes. What was the real character of this transaction? I think that the previous history of elections in Norwich had extremely little to do with this matter, and, if anything, I should think it would be more likely to have an effect the other way than that suggested. I will say at once that I think Colonel Bignold, Alderman Patteson, and Mr. Bullard gave a perfectly true account of their intentions, and I see no reason for doubting a word in all that these gentlemen said. The constituency, or at all events the Conservative portion of the constituency, looked upon Mr. Bullard as a man whom it was desirable if possible to get to stand, and as a man who had filled high civic offices, and had done his duty in them in a spirited manner. Mr. Bullard was unwilling to stand. It is clear that he was very unwilling indeed, and this requisition was resolved on. It was placed in the hands of persons of some influence, many of them voters and some not. These persons were paid, as was admitted by Mr. Charles, a not unreasonable sum for their services, and a great many signatures were obtained. Under these circumstances the meeting of the 12th Oct. was held, and with regard to the evidence of Mr. Watson and Mr. Burgess, without in the least disbelieving them, I believe Mr. Bullard's account of it as a jocular conversation with political opponents. If

I were acting as a juryman, as a judge of fact, I should believe that Mr. Bullard had not made up his mind to stand when he went to that meeting on the 12th Oct. With regard to the expenses of that meeting, I do not think Mr. Mallett's account an unreasonable one. There were a number of men paid half-a-crown or 3*s.* to attend the meeting. If that was done to influence their votes in the sense of inducing them to vote for a particular candidate then chosen, then that might be bribery. But if it was a not unreasonable payment for their services at a time when no candidate was in the field, then it would be a stretch of the Act and of the law to say that that was bribery. The number of men was large, but some of them were non-voters—in fact, most of those called as witnesses were. If it was true that the men were not really there to keep order, then there might be a question about it as to whether it was done colourably. But there was no pretence for that. Something has been said about the number (200) being large, but we must look at the size of the meeting, 5000 or 6000, and the great probability of disturbance, and the disgrace which Colonel Bignold felt that would be. Nor do I think the refreshments of which we have heard were corruptly given. I have, then, come to the conclusion that that part of the case failed, the part of the case that was the most important, and perhaps looked upon as more important even than the case of Banham. The next matter was the treating, and for the purposes of agency Mr. Charles has laid great stress upon the circular by Mr. Bullard of the 20th Nov. to those who signed the requisition. The extent to which Mr. Charles wished to use that letter was that those who signed the requisition and received the letter, and felt inclined to assist Mr. Bullard, and went off bribing and treating, constituted a case of treating by an agent by which the election would be void. That depends partly upon the language of the letter, and partly upon the sense anyone would put upon a letter written under such circumstances, whether it was really to be looked upon as giving authority to such an extent. It asked the recipients to enter heartily into the contest. Was that more than asking them to try and obtain by fair means the votes of their friends? Certainly not more than that. But did it go so far as to authorise them to act as agents in the sense of doing everything that agents do; or was it something between that and what was constantly done by a candidate—making a bare request to people to give him their vote and interest? Now, although I think it would be wiser not to use such language, I, on the whole, come to the conclusion that this letter alone is not sufficient ground for saying that if any person acting upon it went and did a number of illegal acts he would at once become an agent of the candidate in respect of that. Upon the question of agency we require evidence of a person being, to a certain extent, within the authority of those who were conducting the election, and that he was helping in the conduct of the election. There is nothing more difficult in the world than to define agency, but I think it would require more than this mere letter to make the candidate liable for any imprudent or illegal act done by the person receiving it. Though it would be well to abstain from such language, which might be construed to mean more than was ever intended, it could hardly be looked upon as an authoritative act to such an extent that it alone made all persons who received it agents. With regard to the case cited —the *Blackburn case* (20 L. T. Rep. N. S. 826; 1 O'M. & H. 202)—the circular there was sent to certain select persons having some exceptional influence. I am not sure, however, that I can agree with my learned brother's view in that case, as I do not think we can look at such a document in the same strict light as we would ordinarily in a commercial case, where it would be said that the document must be construed by the judge, and not left to the jury. [His Lordship then disposed of some cases of alleged treating.] The only charge of illegal practice was the payment by Corrick, the fourth of the placards for which he paid being a thoroughly electioneering placard; but this was done against the wish of the election agent, and although the sum was considerable in amount, I think we are justified, this being the first election under the Act, in excusing it under sect. 22. It was said that the meeting at the Agricultural Hall was part of the conduct and management of the election, and that therefore no payment should be made in connection with it except through the election agent, and as that would bring the expenses beyond the maximum, the whole thing was illegal. Mr. Charles made out the strongest case for that view that could be made, but looking at the clauses in the statute I do not think that result followed. We have the 63rd section defining a candidate as one who after the date of dissolution, or after the vacancy had arisen, is "declared by himself or others to be a candidate." In the *Youghal case* (21 L. T. Rep. N. S. 307; 1 O'M. & H. 294) the acts were a corrupt practice, but where there was no intention of doing anything wrong, as bribery or treating, but simply an act which becomes illegal if done after the election began, I do not consider there is anything in the Act which goes so far as to say that the candidate is to be liable for such an act done before he was a candidate. After he becomes one, sect. 28 provides that all expenses incurred in the conduct or management of the election shall not be paid except through the election agent, but the expenses of this meeting were really not expenses incurred in respect of the conduct and management of the election of a candidate, but in order to induce a particular person to become a candidate, and, in my judgment, the two things are totally distinct. Therefore, until Mr. Bullard had become a candidate, namely, until he had consented, we cannot hold that he came within sect. 63. I can quite conceive a case in which, if anything was unfairly done under pretence of getting up a meeting in order to obtain a candidate, whilst it was known that the candidate had privately consented, I should say that the acts were colourable, and would come within the meaning of the statute. But I do not think that was so in this case. The case that has been quoted (the *Bristol case*, 23 L. T. Rep. N. S. 188; L. Rep. 5 C. P. 503), where persons were bribed to select one of three candidates, is quite distinguishable from this, as there was there very foul conduct by the agents of the candidate. We must then report that this election is void by reason of the act of bribery by Banham, Banham being an agent of

the respondent. I hope we shall also agree to report that, as regards the candidate himself and his election agent, there is not the slightest ground for imputing to them any desire of doing anything wrong. On the contrary, I have come to the strongest opinion that Mr. Bullard was firmly resolved, as far as in him lay, to have a pure election. With regard to the costs, it has been a most overloaded case—I might say that it has been on the part of the petitioners an oppressive case. There have been thrown at the head of this gentleman nearly one hundred charges, as to most of which they have wholly failed to give any evidence, or to substantiate by evidence. That being so, it would only be right, and we shall only be following our predecessors by saying that this was a case in which, though they were successful, the petitioners should not be entitled to their costs.

CAVE, J. concurred. He made the following additional observations:—On the subject of treating I should like to make some general observations. Treating, within the meaning of the Act, does not in my judgment apply to the case where social equals treat each other, being merely one form of hospitality. Treating for the purposes of the Act applies to treating by superiors to secure the goodwill of another, and that would not apply where it was in return for small services, as in case of a railway guard or a man's own servants. It must have a reference to some election, and must be for the purpose of influencing the vote of the person treated. With reference to the *Daily Standard*, its gratuitous delivery was suspicious, but appeared to be an honest distribution of surplus copies, which does not fall within any section of the Act. Passing to the matter of agency, the persons who instructed Mr. Gully to say there were no canvassers employed should not have done so. When Mr. Charles asked for the canvass-books he was told there were none. But though there were no canvass books there were canvass-cards, and this distinction was of course not intended to be made, as the columns for stating for whom the person voted were not necessary parts of a canvass-book, and in fact were only needed when the canvasser had to report to others, which he had not to do in this case when the canvass was made on the polling day. These canvass-cards were very important, as some of them did contain, and all ought to contain, the names of those who canvassed. Banham admitted that he canvassed, and in the course of the day went into the committee-room, which a canvasser would ordinarily do, and no attempt was made to get him to deny that. The street lists would contain, or ought to contain, the names of the canvassers, by which the petitioners could have proved if Banham had been one, and when the lists were called for under the name of canvass-books, they were not produced. The petitioners have made out a *primâ facie* case, and it has not been denied, as it easily could have been if it was open to denial. I can, therefore, only conclude that Banham was an agent of the respondent, who was responsible for his acts. As to Atkinson and Nightingale, I agree with my learned brother that they would not be made agents by the circular. But they were taking an active part in the election, and to some extent legally. There was *primâ facie* evidence of agency, and it would have been perfectly easy for the respondent to deny it if it could be denied. The respondents, however, did not call these two persons, and they would not have had their evidence at all if it had not been for their being called to show cause why they should not be reported. Now, sect. 22 relieves the candidates from responsibility for certain forms of corruption and illegal practices. But we could not make a report to that effect if we found the respondent guilty of bribery by his agents, and even if that were not so I should feel a doubt whether I ought to make such a report under sect. 22, unless the persons implicated were called by the respondent. It is noticeable that sect. 22 provides no relief in cases of bribery, though it applies to cases of undue influence, treating, and illegal practices. Where there is corrupt practice by bribery, the Legislature in this extremely recent Act has refused to give the power to the judge, which it has conferred upon him in regard to other offences.

DENMAN, J.—I agree with my learned brother in his observations about sect. 22.

Solicitors for the petitioner, *Bavin* and *Daynes*.
Solicitor for the respondent, *Emerson*.

KENNINGTON.

April 5 and 6, 1886.

(Before FIELD and DAY, JJ.)

CROSSMAN AND OTHERS *v.* GENT DAVIS. (*a*)

Parliamentary election—Registration expenses—Starting a newspaper—Not an election expense—Unfounded petition—Costs of Public Prosecutor.

Expenses incurred by a candidate as a subscription to registration expenses need not be returned as election expenses.

A candidate at the general election of 1885 *established a newspaper in Aug.* 1885, *which ceased to appear in Jan.* 1886.

Held, that losses incurred in connection therewith need not be returned as election expenses.

Where a petition is utterly unfounded the costs of the Public Prosecutor will be ordered to be paid by the petitioner.

To call the respondent and his agents as the sole witnesses in support of a petition, and to treat them as hostile witnesses, is not the proper way to conduct a petition.

THIS was the petition of Mr. Crossman and others against the return of Mr. R. Gent Davis for the Kennington Division of Lambeth at the general election of 1885. The petition contained the usual allegations, but the petitioners relied upon the fact that the respondent had subscribed a sum of 20*l.* towards the expenses of registration and had established a newspaper, styled the *South London Standard*, in which his claims were advocated. Neither the subscription towards registration nor the expenses of the newspaper had been returned as election expenses.

Gully, Q.C. (with him *S. Pope*, Q.C. and *Asquith*) for the petitioners, called the respondent and his agent, Mr. Martin, in order to elicit the above facts, and having treated them as hostile witnesses, said—I contend that the registration expenses ought to have been returned as election

(*a*) Reported by J. E. VINCENT, Esq., Barrister-at-Law.

expenses within sect. 8 of the Corrupt and Illegal Practices Prevention Act 1883. The newspaper was clearly established only for the purpose of promoting the respondent's claims. The losses upon it were 800*l.*, and were clearly an expense incurred on account of the conduct or management of an election within the spirit of sect. 28. They were not so returned. The returned expenses of the candidate were 47*l.* below the maximum limit of 560*l.*, so that if these expenses are added it appears that the expenses were largely in excess of the maximum.

H. Matthews, Q.C., *Mattinson*, and *Macaskie*, for the respondent, were not called upon.

Bullock for the Public Prosecutor.

THE COURT dismissed the petition with costs, the petitioner being condemned to pay the costs incurred by the Public Prosecutor on the ground that, as the petition was utterly unfounded, the public ought not to bear the burden of the necessary presence of the Public Prosecutor or his representative.

FIELD, J.—I consider it desirable to add that in my opinion it is not a proper mode of conducting an election petition to call the respondent and his agent, and to treat them as hostile witnesses.

Petition dismissed with costs.

Solicitors for the petitioners, *Brixham* and *Co.*
Solicitor for the respondent, *John Graham.*

HOUSE OF LORDS.

Feb. 8, 9, *and March* 8, 1886.

(Before Lords HALSBURY, WATSON, BRAMWELL, and FITZGERALD.)

ACTON LOCAL BOARD *v.* LEWSEY. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *s.* 150 *—Paving of streets—Recovery of expenses from owner.*

An urban sanitary authority gave notice, under sect. 150 *of the Public Health Act* 1875, *to the owner of property abutting on a street to pave part of it, and by the notice specified the manner in which the paving was to be done. The owner failed to comply with the notice, and the sanitary authority proceeded to do the work, but did not do it exactly in accordance with the terms of the notice, finding that a cheaper pavement would be sufficient.*

Held (affirming the judgment of the court below on this point), that the departure from the terms of the notice did not prevent the sanitary authority from recovering from the owner his proportion of the expenses of the paving.

THIS was an appeal from a judgment of the Court of Appeal (Brett, M.R., Cotton and Lindley, L.JJ.) reversing, upon the main question in the case, a decision of the Divisional Court (Mathew and Day, JJ.) affirming a decision of the judge of the Brentford County Court upon a special case stated by him.

The appellants were the urban sanitary authority for the district of Acton, and the respondent was the owner of property in the district. The appellants gave notice under sect. 150 of the Public Health Act 1875 (38 & 39 Vict. c. 55) requiring the respondent to pave part of a certain road upon which his property abutted. The notice specified in detail the work to be done, and in particular required a concrete foundation to be laid, and that the work should be done in accordance with certain plans and sections therein mentioned, to the satisfaction of the board.

The respondent did not do the work, and the appellants accordingly did it themselves in accordance with the terms of the notice, except that they did not put down a concrete foundation, as it appeared, on making the excavations, that the foundations were good, and that the concrete would be an unnecessary expense.

This action was then brought in the County Court to recover the proportion of the expense due from the respondent.

The principal question raised was whether the place was within the jurisdiction of the Local Board, and on this point the Court of Appeal reversed the courts below, but all these courts were unanimous in holding that the omission to comply strictly with the words of their own notice did not disentitle the local board to recover the proportion of the expenses due from the adjacent owners and occupiers.

The local board appealed to the House of Lords upon the main question.

A. Charles, Q.C. and *Pollard* appeared for the appellants.

The respondent, in person, contended that, if he were wrong on the main question, the appellants nevertheless could not recover, as they had not complied with the notice, and the words of the section should be read strictly.

At the conclusion of the arguments their Lordships took time to consider their judgment.

March 8.—Their Lordships gave judgment as follows:—

Lord HALSBURY [after stating that, in his opinion, the judgment of the Court of Appeal should be reversed upon the main question, his Lordship continued as follows:]—The only remaining question is one which, assuming Mr. Lewsey's liability to do what the local board ordered, turns upon whether the local board adopted the proper procedure for the purpose of enforcing that liability. Now the power given to the local board is to call upon the adjacent owner to pave, and to pave to their satisfaction. It would, I think, be a very unreasonable exercise of this power by the local board if they were simply to call upon the adjacent owner to pave, and leave him without guidance or direction as to what paving would be satisfactory to them. When the owner refuses or neglects to pave in pursuance of the requirements of the local board, an obligation is cast upon that body to cause the work to be done, and to charge the owners with the cost. It would, I think, be an abuse of the power so conferred, if the local board did not procure the work (and it must of course be substantially the same work) to be done as cheaply as possible. If it were otherwise the local board would have to protect itself by calling upon adjacent owners to do expensive paving in order to ensure that it should be satisfactory paving, and if no discretion in the execution of the work were to be implied, they must, under penalty of forfeiting all right to recover for the expense of

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

paving at all, insist upon every item of expenditure, although in the progress of the work it might turn out, as in this case, that a portion of it might be useless expense. Such a construction of the statute appears to me unreasonable, and therefore not to be adopted, unless no other is possible. I think the judgment of the Court of Appeal should be reversed, and the respondent should pay the appellants' costs both here and below.

Lord Bramwell.—My Lords: I also agree in what has been said by Lord Halsbury on the main question. As to the other point, it has been sufficiently dealt with; but I desire to add that upon the point which occurred to me (and was not taken till it was taken here by me), namely, that the board had no right to order the way in which the work should be done, I still have sufficient doubt to recommend local boards, when they do give orders that work shall be done, not to prescribe the mode in which it shall be done, but to content themselves with saying that if done in a particular way it will be satisfactory to them.

Lords Watson and Fitzgerald concurred.

Order appealed from reversed with a declaration. Respondent to pay the appellants' costs. Cause remitted to the Queen's Bench Division.

Solicitor for the appellants, *A. Hemsley.*

Solicitors for the respondent, *Sandom, Kersey,* and *Knight.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Thursday, Feb. 18, 1886.

(Before Denman and Smith, JJ.)

The Devonport Election Petition; Pascoe and others *v.* Puleston and another. (*a*)

Election petition—Withdrawal of petition—Practice—Costs—Higher scale—Order LXV., rr. 8 *and* 9*—Costs of the Director of Public Prosecutions—The Parliamentary Elections Act* 1868 (31 *&* 32 *Vict. c.* 125), *s.* 41*—The Corrupt and Illegal Practices Act* 1883 (46 *&* 47 *Vict. c.* 51).

The 43*rd section of the Corrupt and Illegal Practices Prevention Act* 1883 *applies only to the costs of the Director of Public Prosecutions at the trial of the petition, and when the petition is withdrawn, the court has no power, under the* 41*st section of the Parliamentary Elections Act* 1861, *to order the preliminary costs of the Director of Public Prosecutions, and the costs of the inquiries made by him to be paid by the parties.*

Under the 44*th section of the Corrupt and Illegal Practices Prevention Act* 1883 (46 *&* 47 *Vict. c.* 51), *the costs of an election petition will usually be allowed on the higher scale in accordance with the old practice under the* 41*st section of the Parliamentary Elections Act* 1868 (31 *&* 32 *Vict. c.* 125)

This was an application for leave to withdraw an election petition presented by Joseph Thomas Pascoe and three other petitioners questioning the return of John Henry Puleston and George Edward Price, as members of Parliament for the borough of Devonport, upon allegations that they by themselves and by their agents had, and each of them, or one of them, by himself and by his agent, had been guilty of bribery and corrupt practices at the election for the said borough.

On the 4th Jan., the respondents applied for particulars of the allegations brought by the petitioner, and, on the application coming before the judge at chambers, on the 13th Jan., it was announced, on the part of the petitioners, that it was intended to apply for leave to withdraw the petition, which application was made on the 11th Feb., and adjourned for further affidavits.

Terrell, for the petitioners, now again applied for leave to withdraw the petition.

The court having ordered the petition to be withdrawn,

Littler, Q.C. (with him *R. S. Wright*), for the respondents, asked for costs on the higher scale, and referred to the Parliamentary Elections Act 1868 (31 & 32 Vict. c. 125), s. 41, the Corrupt and Illegal Practices Prevention Act 1883 (46 & 47 Vict. c. 51), s. 441, and Order LXV., rr. 8 and 9.

Terrell, contra.

Denman, J.—I am of opinion that costs ought to be allowed on the higher scale as between solicitor and client, in the same way as they would be allowed in any action, cause, or matter in the High Court on the higher scale as between solicitor and client. According to the present rule on the subject, which is rule 9 of Order LXV., "the fees set forth in the column headed 'higher scale' in Appendix N may be allowed, either generally in any cause or matter, or as to the costs of any particular application made, or business done, in any cause or matter, if on special grounds arising out of the nature and importance, or the difficulty or urgency of the case the court or a judge shall at the trial or hearing or further consideration of the cause or matter, or at the hearing of any application therein, whether the cause or matter shall or shall not be brought to trial or hearing or to further consideration (as the case may be), so order." It is true that it is a matter of discretion, but in cases in which there are special grounds arising out of the nature and importance or the difficulty or urgency of the case, it would seem to be proper to allow such costs. I think also that we ought to some extent to be guided by the old practice under the Act of 1868 (31 & 32 Vict. c. 125, s. 41), not indeed that that practice would be in any way conclusive, but I think that we ought to pay some regard to it, for I think that we should be wrong if we considered that it was the intention of the Legislature in the alteration which they made in this matter in the Corrupt and Illegal Practices Prevention Act 1883 (46 & 47 Vict. c. 51) to depart very largely from that which had been the settled practice under the Act of 1868. The 41st section of the Parliamentary Elections Act 1868 (31 & 32 Vict. c. 125) provided that "all costs, charges, and expenses of and incidental to the presentation of a petition under this Act, and to the proceedings consequent thereon, with the exception of such

(*a*) Reported by Joseph Smith, Esq., Barrister-at-Law.

costs, charges, and expenses as are by this Act otherwise provided for, shall be defrayed by the parties to the petition in such manner and in such proportions as the court or judge may determine, regard being had to the disallowance of any costs, charges, or expenses, which may in the opinion of the court or judge, have been caused by vexatious conduct, unfounded allegations, or unfounded objections on the part either of the petitioner or the respondent, and regard being had to the discouragement of any needless expense by throwing the burden of defraying the same on the parties by whom it has been caused, whether such parties are or are not on the whole successful," and that "the costs may be taxed in the prescribed manner, but according to the same principles as costs between attorney and client are taxed in a suit in the High Court of Chancery, and such costs may be recovered in the same manner as the costs of an action at law, or in such other manner as may be prescribed." Now, there can be no doubt that under the provisions of that section costs might have been allowed on the higher or on the lower scale in the Court of Chancery, but the universal practice was to allow them on what was known as the higher scale in the Court of Chancery. I believe that that was done in accordance with the same principle which we find in the newest rule upon the subject—viz., on special grounds arising out of the nature and importance or the difficulty or urgency of the case, an election petition being business which in its nature requires a great deal of inconvenient and unusual attention on the part of a solicitor, since it is of a kind in which he is necessarily very seldom engaged, and further entails the examination of novel documents. It is, moreover, of great importance, as is shown by the duty of dealing with it being cast upon two judges of the High Court, and clearly involves great interests. Taking into account therefore the difficulty with which it is accompanied, it was not, I think, unreasonable that under the former Act the practice should prevail of allowing costs on the higher scale in the Court of Chancery. The 44th section of the recent Act the Corrupt and Illegal Practices Prevention Act 1883 (46 & 47 Vict. c. 51) has, however, introduced an alteration in the law. Now, I think that the last clause of the 3rd subsection of that section is our guide to what the Legislature intended. "The taxing officer," it provides, "shall not allow any costs, charges, or expenses on a higher scale than would be allowed in any action, cause, or matter in the High Court on the higher scale, as between solicitor and client." It having been the practice, therefore, in these matters to allow costs on the higher Chancery scale, the effect of this is clearly to limit the taxing officer to some extent, for costs are not to be allowed now on a higher scale than would be allowed in an action in the High Court on the higher scale. That is to say, the costs are to be somewhat less. I do not see that the alteration goes any further than this. I do not say that we have not the power to lower the scale on which the costs are to be allowed, even perhaps to the County Court scale, but I do not see, more especially in a case such as the present, where an important election petition has been presented alleging every conceivable electoral crime against the respondents, how the discretion vested in us could be more wisely exercised than by adhering to the old practice as modified by the 3rd subsection of the 44th section of the last Act.

SMITH, J.—I think that this application ought to be allowed. The section dealing with the costs of an election petition is the 44th section of the Corrupt and Illegal Practices Act 1883, which, by the 3rd sub-section, provides that "the rules and regulations of the Supreme Court of Judicature with respect to costs to be allowed in actions, causes, and matters in the High Court shall on principle, and so far as practicable, apply to the costs of petitions and other proceedings under the Parliamentary Elections Act 1868 and under this Act, and the taxing officer shall not allow any costs, charges, or expenses on a higher scale than would be allowed in any action, cause, or matter in the High Court on the higher scale as between solicitor and client." We clearly, then, have to inquire first what are the rules and regulations of the Supreme Court of Judicature with respect to costs to be allowed in actions, causes, or matters in the High Court, and when they are to be allowed on the higher scale. The 9th rule of Order LXV. tells us this: "The fees," it says, "set forth in the column headed "higher scale" in Appendix N. may be allowed, either generally in any cause or matter, or as to the costs of any particular application made, or business done, in any cause or matter, if, on special grounds arising out of the nature or importance, or the difficulty or urgency of the case, the court or a judge shall, at the trial or hearing, or further consideration of the cause or matter, or at the hearing of any application therein, whether the cause or matter shall or shall not be brought to trial or hearing, or to further consideration (as the case may be) so order, or if the taxing officer, under directions given to him for that purpose by the court or a judge, shall think that such allowance ought to be so made upon such special grounds as aforesaid." In this election petition a charge was made against the respondents that they had personally and by their agents been guilty of bribery and corrupt practices at the election. Surely a charge such as this entailing such serious consequences as such a charge does would justify a solicitor in taking special precautions for the defence of his client, and, that being so, I think he ought to be entitled to special costs. The respondents ought therefore, I think, to be allowed to tax their costs on the higher scale.

Wormald, for the Public Prosecutor, applied for the costs incurred in defraying the expenses of the Director of Public Prosecutions. The 43rd section of the Corrupt and Illegal Practices Prevention Act 1883 orders the Director of Public Prosecutions, either by himself or by his assistant or representative, to attend at the trial, and provides that it shall be his duty to obey any directions given to him by the election court with respect to the summoning and examination of any witnesses to give evidence on such trial, and without any direction from the election court, if it appears that any person is able to give material evidence as to the subject of the trial to cause such person to attend the trial, and various other duties are imposed on him by the first seven subsections of the section; and by the 8th sub-section

it is provided (a) that the court may order the costs to be paid by the parties to the petition, or such of them as the court may direct. It is submitted that the court has power under this provision to order the petitioners under the circumstances of this case to pay the costs of the Director of Public Prosecutions. [Denman, J.—Does the section deal with any expenses incurred before the trial of the petition? Does it not deal with the trial only?] The court has power over all the costs consequent on the presentation of the petition. The 65th section of the Act of 1883 incorporates the Act of 1868, and by the 41st section of the Act of 1868 (31 & 32 Vict. c. 125), "all costs, charges, and expenses of and incidental to the presentation of a petition under this Act, and to the proceedings consequent thereon, with the exception of such costs, charges, and expenses as are by this Act otherwise provided for, shall be defrayed by the parties to the petition in such manner and in such proportions as the court or judge may determine, regard being had to the disallowance of any costs, charges, or expenses which may, in the opinion of the court or judge, have been caused by vexatious conduct, unfounded allegations, or unfounded objections on the part either of the petitioner or the respondent, and regard being had to the discouragement of any needless expense by throwing the burden of defraying the same on the parties by whom it has been caused, whether such parties are or are not on the whole successful." [Denman, J.—Does not that refer to the costs of presenting a petition under the Act of 1868? The end of the 41st section provides that the costs may be recovered in the same manner as the costs of an action at law. Does not that mean in the same way as between the parties to an action at law?] The Director of Public Prosecutions cannot, it is true, be said to be a party to the petition. [Denman, J.—Are the costs for which you are applying specifically dealt with by any statute?] They are not anywhere expressly mentioned, but it is submitted that they come within the general words of the 41st section of the Act of 1868. Denman, J.—I am of opinion that these are not "costs incurred in defraying the expenses of the Director of Public Prosecutions under this section" within the meaning of the 43rd section of the Act of 1873. That section I think deals only with costs incurred on the trial of an election petition, and, that being so, we have in my judgment no power to make the order applied for.

Solicitor for the petitioners, *G. Edgar Mew.*

Solicitors for the respondents, *Soames, Edwards,* and *Jones.*

Solicitors for the Director of Public Prosecutions, *Hare* and *Co.*, agents for the Solicitor to the Treasury.

(a) The 8th sub-section of the 43rd section of the Corrupt and Illegal Practices Prevention Act 1883 (46 & 47 Vict. c. 51) is as follows: (8) The costs incurred in defraying the expenses of the Director of Public Prosecutions under this section, including the remuneration of his representative, shall, in the first instance, be paid by the Commissioners of Her Majesty's Treasury, so far as they are not in the case of any prosecution paid by the defendant shall be deemed to be expenses of the election court; but if by any reasonable cause it seems just to the court so to, the court shall order all or part of the said costs to be repaid to the Commissioners of Her Majesty's Treasury by the parties to the petition, or such of them as the court may direct.

Tuesday, April 6, 1886.

(Before Denman and Wills, JJ.)

The Easton Estate and Mining Company (apps.) *v.* The Western Waggon and Property Company (resps.). (a)

Railway—Rolling stock protected from distraint—Rolling stock being in a "work"—Meaning of "work"—The Railway Rolling Stock Protection Act 1872 (35 *&* 36 *Vict. c.* 50), *ss.* 2 *and* 3.

A locomotive engine, which was hired by a railway contractor from the respondents, was seized under a distress for rent due from the contractor to the appellants.

At the time the engine was seized it was standing in a shed which the contractor rented from the appellant, and which was connected by a siding with the railway.

Held, that the engine was rolling stock in a "work" within the meaning of sect. 3 *of the Railway Rolling Stock Protection Act* 1872, *and was therefore not liable to distress for rent payable by the tenant of the work.*

The word "work" in sect. 3 *means any establishment or place, used for the purpose of trade or manufacture, which is connected with a line of railway by sidings along which the rolling stock may be propelled.*

Case stated under 42 & 43 Vict. c. 49.

At a petty sessions holden at Towcester in the county of Northampton, on the 22nd Sept. 1885, a complaint was preferred by the Western Waggon and Property Company Limited (hereinafter called the respondents) against the Easton Estate and Mining Company (hereinafter called the appellants) under sect. 3 of the Act 35 & 36 Vict. c. 50, complaining that the appellants on the 27th May 1885, at the parish of Towcester in the said county, did distrain and seize for rent due to the said company from Messrs. Watson, Smith, and Watson, an engine named "Gavin," numbered M. 88 and bearing the owner-plate of the Western Waggon and Property Company Limited, the same being protected from distress for rent by virtue of the said Act 35 & 36 Vict. c. 50 (the Railway Rolling Stock Protection Act 1872). The justices ordered the appellants to restore to the respondents the said engine and to pay to the respondents the sum of 14*l.* 14*s.* 9*d.* for costs.

The appellants are the sub-lessees of a certain mining estate called the Easton Mining Estate at Towcester, immediately adjoining the Northampton and Banbury Junction Railway. A portion of the said estate is connected at Towcester with the said railway by means of a branch line of railway, in connection with which are certain sidings, and upon or near which are situated an engine-shed, tank, coal-stage, weigh-bridge, and office, with a strip of ground used as a wharf, adjoining the Northampton and Banbury Junction Railway.

The said branch railway, sidings, engine-shed, tank, coal-stage, weigh-bridge, office, and strip of land used as a wharf are situate on the said mining estate.

Between May 1884 and the 27th May 1885 Messrs. Watson, Smith, and Watson, railway contractors (hereinafter called the contractors), were engaged in making a new line of railway from Towcester to Olney.

(a) Reported by H. D. Bonsey, Esq., Barrister-at-Law.

In the month of October 1884 the contractors entered into an agreement to become tenants to the appellants of the said sidings, engine-shed, tank, coal-stage, weigh-bridge, and office, and also of a wayleave over the branch railway.

On the 1st Dec. 1884 the contractors hired from the respondents the said locomotive engine named "Gavin" for two years from the 8th Dec. 1884, at a certain rent payable quarterly.

On the 27th May 1885 the appellants distrained the said engine for arrears of rent then due to them from the contractors, and at the time of the distress the engine was in the said engine-shed, of which the contractors were tenants to the appellants, standing on the metals of the siding, which ran into the shed. The engine-shed is a brick building with doors and locks, and was used throughout by the contractors for keeping the engine in as a protection against the weather; and also for stores and repairs to the said engine and other engines of the said contractors, parts of which, when taken to pieces for the purpose of repairs, were kept or stored therein. The contractors also used the said strip of land between the Northampton and Banbury Junction Railway and the sidings for the purpose of storing railway plant.

It was contended on the part of the appellants that the Railway Rolling Stock Protection Act 1872 did not apply to protect the engine in question from distress on the following grounds: 1. That the engine-shed was not a "work" within the meaning of sect. 3 of 35 & 36 Vict. c. 50. 2. That the contractors were not tenants of a "work" within the meaning of the said section of the said Act. 3. That the protection from distress afforded by the said Act did not extend to such a case as the present so as to protect the said engine from distress.

It was contended on the part of the respondents that the engine was in a "work" within sect. 8 of 35 & 36 Vict. c. 50, at the time the distress was made, and that it was not protected from distress by the said Act.

So far as the questions raised were questions of fact for the justices, they found that the engine-shed was a "work" at the time of the distress, and that the contractors were tenants of a work.

The questions for the opinion of the court were: 1. Whether, when the distress was made, the engine was in a work within the meaning of 35 & 36 Vict. c. 50, s. 3. 2. Whether the contractors were tenants of a work within the meaning of 35 & 36 Vict. c. 50, s. 3. 3. Whether the protection from distress afforded by the said Act extends to such a case as this so as to protect the engine from distress.

If the court should answer the above questions in the affirmative, the order to stand; but if the court should answer in the negative, the complaint to be dismissed.

By 35 & 36 Vict. c. 50, "An Act to protect the railway rolling stock from distraint when on hire," it is enacted as follows:

Sect. 2. In this Act "rolling stock" includes waggons, trucks, carriages of all kinds, and locomotive engines used on railways:

"Rent" includes royalty or other reservation in the nature of rent:

"Work" includes any colliery, quarry, mine, manufactory, warehouse, wharf, pier, or jetty, in or on which is any railway siding:

"Tenant" includes a lessee, sub-lessee, or other person having an interest in a work under a lease or agreement, or by use and occupation, or being otherwise liable to pay rent in respect of a work.

"Person" includes a body corporate:

"Court of summary jurisdiction" means any justices of the peace, metropolitan police magistrate, stipendiary magistrate, sheriff, sheriff substitute, or other magistrate or officer, by whatever name called, who is capable of exercising jurisdiction in summary proceedings for the recovery of penalties.

Sect. 3. Rolling stock being in a work shall not be liable to distress for rent payable by a tenant of the work if such rolling stock is not the actual property of such tenant, and has upon it a distinguishing metal plate affixed to a conspicuous part thereof, or a distinguishing brand or other mark conspicuously impressed or made thereon, sufficiently indicating the actual owner thereof.

C. H. Anderson, Q.C. for the appellants.—The Railway Rolling Stock Protection Act does not apply to a case of this kind; the engine-shed is not a work within the meaning of sect. 3. The word "work" is defined in sect. 2, and the engine-shed does not come within that definition. The object of the Act was to prevent the rolling stock used by a railway company from being taken under a distress. It would obviously be a great public inconvenience if the rolling stock of railway companies was liable to be seized. In this case the engine was not being used by a railway company; the engine formed no part of the rolling stock of a railway.

E. R. Moon for the respondents.—The words of the Act are wide enough to include a case of this kind; the engine-shed is a work within the meaning of the Act. The siding runs into the shed, and it may be said to be within the words of the definition of the word "work" in sect. 2. The contractor not only rented the shed, but the strip of land in the immediate vicinity; and it may all be said to be a work of which the engine-shed formed a part. There are no words in the Act to support the narrow construction which the appellants endeavour to put upon it.

Denman, J.—Notwithstanding some doubt which was instilled into my mind by the ingenious argument of Mr. Anderson, I think that the respondents here are entitled to succeed. I must own that I was impressed at first with the comments that Mr. Anderson made upon the language of the Act; and it would not have been an impossible view to take of the Act that the Act was intended to be confined to such rolling stock as is used on railways which are worked by railway companies, so that the public and the companies might be prevented from incurring the enormous inconvenience which would be incurred if there were a power of distress in respect of rolling stock used in that way. But I do not on consideration think that we can so restrict the Act. The Act is a general Act intended to protect railway rolling stock from distraint; and I apprehend that the two general objects of the Legislature may probably be considered to have been to prevent the injustice and mischief which would take place if, for a default in payment of rent in respect of land, there could be a power on the part of the landlord to do such an infinite mischief to the person who was engaged in the use of engines and carriages working upon railways as would be done by selling them up for default in a payment of rent. I also think the Legislature had in its mind the great injustice that would be done to persons letting such

valuable property as this upon hire, if, when such things are on hire and are being used for the purpose of the trade or business of a particular company or of a particular individual, they could be seized in consequence of a default in payment of rent. I think both those objects were probably in the intention of the Legislature when this Act was passed; and we know as a matter of fact that an enormous proportion of the rolling stock which rolls along the lines, and which stands upon the sidings and works in conjunction and connection with the main lines in the kingdom, is rolling stock which is on hire, and which is let to private adventurers carrying on different concerns, such as collieries and other similar works. I think therefore it would be impossible to contemplate that the Legislature was intending to restrict the application of this Act in such a narrow way as that which Mr. Anderson contends. We must therefore look upon the Act as being large enough to include all railway stock—all rolling stock let on hire which is used upon railways of any description and which comes within the other definitions of this Act. The clause which is relied upon by the respondents is the third: "Rolling stock being in a work shall not be liable to distress for rent payable by a tenant of the work, if such rolling stock is not the actual property of such tenant, and has upon it a distinguishing metal plate affixed to a conspicuous part thereof, or a distinguishing brand," and so on, "indicating the actual owner thereof." At the time the engine was seized it was standing in an engine-shed which was on a siding, which siding was connected with a private line, which was the property of the appellants, and connected with a public railway in the immediate neighbourhood. In the month of Oct. 1884 the contractors entered into an agreement to become tenants of the said appellants of the said sidings, engine-shed, tank, coal-stage, weigh-bridge, and office upon certain terms. So that there can be no doubt upon the statement in the case that this was a matter in respect of which the respondents were tenants of the appellants. It is stated in the case itself. When the engine was seized it was actually standing in the shed. The shed itself is described as a shed in which a good deal of work was done by the contractors, who were contractors for making the line at a certain distance from the particular shed, and it was used throughout by the contractors for keeping the engine in as a protection against the weather, and also for stores and repairs to the engine and other engines of the contractors, parts of which when taken to pieces for the purpose of repairs were kept or stored therein, and portions of the contractors' engines were also kept therein. The contractors also used the said strip of ground between the Northampton and Banbury Junction Railway Company's lines and the sidings for the purpose of storing railway plant. It was contended that this engine was not in a work within the meaning of the Act. The interpretation clause says: "A work includes any colliery, quarry, mine, manufactory, warehouse, wharf, pier, or jetty, in or on which is any railway siding." Now I do not decide the case, and I do not think it ought to be decided, upon the ground that this work affirmatively comes within the interpretation clause, stating that the word "work" shall include any of those things. There has been a contention to that effect—that it may be a portion of the wharf, and so come within it. I do not decide that it is not so. I do not intend to base my judgment upon that one way or the other, but I do think that this interpretation clause is not exclusive of the true definition, whatever it may be, of the word "work" as used in sect. 3. I think we have still to put our own construction upon the word "work;" and that we must do so in this case without resorting at all to the interpretation clause. We may look to the interpretation clause to see what kind of thing they dealt with by it in order to guide us to a true conception of what the things are which are intended to be dealt with by clause 3; but I do not think that a clause which merely says "a work" shall include those things prevents us from deciding or authorises us to decide that no works which are not included in that interpretation clause are works within any other clause in the Act. We generally find, when railway works are spoken of, they are spoken of as "railway works" in the plural and not in the singular, as "a work." But is this engine-shed within the meaning of this Act "a work?" I think it is. I think that the engine in question on the occasion when it was seized was in "a work" within the meaning of this Act. This engine-shed is a work in which is a railway siding, and it is a work which is on a railway siding; it is a shed into which the engine would run by going along the siding, and there it would rest, or there it would be placed for the purpose for which it used to go there according to the statement in the case, namely, to be repaired, and into a work, into a shed in which other works were carried on for the purpose of enabling engines to be used upon the siding or upon the branch within which the siding was connected. Now that, I think, shows that this was rolling stock in a work within the meaning of sect. 3, and being rolling stock within a work it was not liable to be seized for distress for rent payable by a tenant of the work. I have already said, I think, the respondent was a tenant of this work, and therefore I think the decision of the magistrates was right, and that the appeal ought to be dismissed.

Wills, J.—I am of the same opinion. The first question which arises is, whether this is rolling stock within the meaning of this Act at all. I think it is, because rolling stock includes locomotive engines used on railways. It seems at the particular time when this distraint took place the engine in question was in a particular use upon that which is called a branch line in the railway. I see nothing in the Act to limit the word "railway." The magistrates have found that this is a branch railway, and it therefore seems to me to answer the term "railway." If so, this was a locomotive used on a railway, and therefore it comes within the definition clause of rolling stock. I think there is no reason to doubt, upon the facts stated and the findings of the magistrates, that the persons who were distrained upon were tenants of the strip of land that was used in connection with, and was in immediate contiguity to, those pieces of land which are called sidings in the case; and I think it is clear that the magistrates, in using the word

"siding," and the parties when they used the word "siding" in their correspondence, did not mean merely the piece of land upon which the metals stood, but that which in a business and commercial sense would be called a siding, which would be the land in immediate contiguity to it. Then was that piece of land a work as occupied? I think it was. It is not very easy to say exactly what is meant by "a work." The difficulty arises from the fact of its not being a word known to the law—it is a mere word of art—not being a word in popular use in the sense in which it is used in the Act. When you see the things that by the interpretation clause the word "work" is to include, I think it becomes apparent that "work" is used as applying to any establishment or place used for the purpose of trade or manufacture, and which is connected with a line of railway by sidings along which this rolling stock may be propelled. If so, I think this answers to the definition of "work." It is also possible to support it upon the narrower application of the terms, and to say that this shed is, under the circumstances, within the Act as being a warehouse; but I confess I rather myself take the broader view, and think the whole bit of land taken by the contractors was a work within the meaning of this Act. Now, to the limited extent to which it is legitimate to speculate upon the object and purview of an Act of Parliament, it is very satisfactory to think that such a decision carries out what seems to be the tolerably obvious meaning of the Act of Parliament. It is not without significance, and it is worth remarking, that in the very same session of Parliament another Act was passed which, like this one, was apparently based upon the notion that there was an injustice which required to be remedied in making the goods of A. pay for the debt of B. In the very same session of Parliament the Lodgers' Protection Act passed, and in both of these Acts one sees the Legislature thought that the time was come when a stop should be put to a very unjust institution of this country, which existed from time immemorial, by which the property of A., being upon the land occupied by B., could be made liable to pay B.'s debt to the landlord. Everybody knows that a very large proportion of the rolling stock in the country belongs to waggon companies and companies of that nature, who supply this rolling stock in very large quantities to different persons and to different railways. The result of that necessarily would be that, into any premises which were connected with railways by sidings, the property of these waggon companies all over the kingdom would be liable to go; and of course from time to time it must happen that at a critical time they would be upon the premises of some insolvent man who could not pay his rent. It seems to me, without looking beyond the Act itself, it is evident the intention of the Legislature was to put a stop to that. Now this is precisely such a case. This is a case in which the company, who were the owners of this locomotive, a very costly and valuable article, the hire of which amounted to 279*l.* 10*s.* per annum, had let it to the contractors, who were unable to pay their rent, and the result of that would be, unless this Act of Parliament applied, that the owners of this engine might pay the contractors' rent. It seems to me to be precisely the class of case in which this Act was intended to operate. For these reasons I think the magistrates were right, and that this appeal must be dismissed.

Solicitors for the appellants, *Robinson* and *Wilkin*.

Solicitors for the respondents, *Bolton*, *Robbins*, *Busk*, and *Co*.

Monday, April 5, 1886.

(Before MATHEW and SMITH, JJ.)

REG. *v.* THE LORD MAYOR OF LONDON. (*a*)

Husband and wife—Libel—Criminal proceedings by wife against husband—Married Women's Property Acts 1870, 1882, 1884 (33 *&* 34 *Vict. c.* 93; 45 *&* 46 *Vict. c.* 75; 47 *&* 48 *Vict. c.* 14).

The Married Women's Property Acts do not enable a married woman to take criminal proceedings against her husband for defamatory libel.

THIS was a rule calling upon the Lord Mayor of London and Alfred G. Vance to show cause why the Lord Mayor should not proceed to hear and determine the matter of an application by Emma Vance, otherwise Stevens, for a summons against the said Alfred G. Vance for a defamatory libel alleged to have been published by him of and concerning the applicant.

On the 25th Nov. 1885 Emma Vance laid an information and complaint before the Lord Mayor upon an application for a summons against Alfred G. Vance for

That he, the said Alfred G. Vance, did maliciously publish of her, the said Emma Vance, the following defamatory libel in the *Daily Telegraph* of the 14th Nov. 1885, viz.: "Mr. Alfred G. Vance, comedian and vocalist, in answer to an advertisement that appeared in last Tuesday's issue of this paper, informs his friends and the public that the person advertising is in no way related to himself or family;" meaning thereby that she, the said Emma Vance, was not his wife, and disparaging her in her reputation as a married, respectable woman, and tending to bring her into ridicule and contempt as a person who had lived with the said Alfred G. Vance under the pretence that she was his wife, whereas she was his mistress and in no way related to him.

At the time of the publication of this alleged libel Emma Vance was, and still is, the wife of Alfred G. Vance.

Emma Vance tendered herself before the Lord Mayor to prove the publication of the alleged libel; the Lord Mayor refused to grant a summons, upon the ground that Emma Vance was the wife of Alfred G. Vance, and could not, under the circumstances, prosecute or give evidence against her husband.

W. Baugh Allen (*Poland* with him), for the Lord Mayor, showed cause.—A wife may in some cases maintain criminal proceedings against her husband. Her person is protected by the common law and her property by the Married Women's Property Act 1882. Before the Act of 1882 neither party was allowed to give evidence in any criminal proceedings taken against the other, except (1) where a wife prosecuted her husband for personal violence against herself, or a husband his wife; or (2) apparently in cases of high treason; and (3) under certain special statutes, as the Master and Servants Act, and the recent Explosives Acts. The Evidence Amendment Act 1855 (16 & 17 Vict. c. 83) expressly excepted

(*a*) Reported by DUNLOP HILL, Esq., Barrister-at-Law.

criminal proceedings from the operation of the Act: (see Montague Lush on Husband and Wife, p. 425.) In *Reeve* v. *Wood* (5 B. & S. 366) the evidence of the wife of a person summoned for neglecting and refusing to maintain her, whereby she became chargeable to the parish, was held to be inadmissible. Crompton, J. said, "in early times an exception was made to the general rule that a wife is not an admissible witness against her husband, namely, in the case of personal wrongs inflicted by him upon her. That arose partly from the mischief which would have followed from her exclusion, partly from necessity, and partly from the consideration that she was in reality the prosecuting party." It cannot be said that libel amounts to personal violence within the exception to the rule. Sect. 12 of the Married Women's Property Act 1882 (45 & 46 Vict. c. 75) does not apply, as the remedies and redress by way of criminal proceedings there given to a married woman are only for the protection and security of her own separate property.

Crispe in support of the rule.—The separate property of the wife is affected by the libel. An injury has been done to her reputation in her profession. The court has jurisdiction to restrain the publication of any document tending to the destruction of property, whether consisting of money or of professional reputation by which property is acquired:

Dixon v. *Holden*, 20 L. T. Rep. N. S. 359; L. Rep. 7 Eq. 488.

[MATHEW, J.—That case has been distinctly overruled by the Court of Appeal in *Prudential Assurance Company* v. *Knott*, 31 L. T. Rep. N. S. 866; L. Rep. 10 Ch. App. 142.] In *Phillips* v. *Barnet* (34 L. T. Rep. N. S. 177; 1 Q. B. Div. 438) Blackburn, J. says: "There can be no doubt that, if a wife receives bodily injury from the hands of her husband, he is liable to criminal proceedings for a felony or misdemeanour as the case may be; and in the case of an ordinary assault it is quite clear that the wife has a right for her protection to obtain articles of the peace against her husband, and upon this and upon other occasions she is in law a separate person." It is conceded that no cases can be found of criminal proceedings taken by a wife against her husband, except those for personal injury. [*Montague Lush* as *amicus curiæ*.—In *Summers* v. *City Bank* (31 L. T. Rep. N. S. 268; L. Rep. 9 C. P. 580) Brett, J. suggested that proceedings by a married woman for a libel upon her in her trade or calling would be proceedings for the protection of her separate estate. As sect. 12 of the Act of 1882 provided that a wife might take criminal proceedings against all persons, including her husband, for the protection of her separate property, it would seem to follow that she could take criminal proceedings for libel against her husband for a libel affecting her credit and reputation in her trade or business.]

Cur. adv. vult.

The judgment of the Court (Mathew and Smith, JJ.) was delivered by

SMITH, J.—We are of opinion that this rule should be discharged. It cannot be doubted that by the law of England, before the passing of the Married Women's Property Acts 1870, 1882, and 1884 (33 & 34 Vict. c. 93, 45 & 46 Vict. c. 75, and 47 & 48 Vict. c. 14), except in the cases hereinafter mentioned, a husband or wife could not take criminal proceedings against each other. From the earliest time it has been held that a *feme covert* was not guilty of felony in stealing her husband's goods, the reason being that husband and wife were considered but as one person in law: (see 1 Hale P. C. 514.) Upon the same principle it was held that a husband could not grant lands to a wife, for the maxim of the law was "that a husband and wife are one person" (*Firebrass* v. *Pennant*, 2 Wils. 254); and per Lush and Field, JJ. in *Phillips* v. *Barnet* (34 L. T. Rep. N. S. 177; 1 Q. B. Div. 440, 441). It was also the law of England, before the passing of the Married Women's Property Acts, that a husband and wife in a criminal case (except as hereinafter mentioned and in cases of high treason) could not give evidence for or against each other; and, until the passing of the 16 & 17 Vict. c. 83, could not have given evidence for or against each other, even in a civil suit. There were, however, exceptions recognised by the law to the above rule. The question for our determination is, whether the present case, which is that of a wife seeking to prosecute her husband for a defamatory libel, comes within the exception or not. We are of opinion that the exceptions are confined to those cases in which personal injuries have been effected by violence or coercion by the husband upon the wife, or wife upon the husband: (see Phillips on Evidence, 10th edit., p. 83.) It is upon this ground that it has been held that a husband and wife, as the case may be, can prosecute and give evidence against each other in cases of batteries, assaults, and other personal injury. This, as it appears to us, is the law as laid down in *Reeve* v. *Wood* (5 B. & S. 364). Upon this principle it is that the two cases of abduction, *Reg.* v. *Yore* (1 Jebb & Symes, 563) and *Reg.* v. *Wakefield* (2 Lew. C. C. 279) would seem to have been decided; for, as pointed out by Crompton, J. in *Reeve* v. *Wood* (5 B. & S. 364), there might well have been considered to have been what was equivalent to an actual personal injury to the woman herself in those cases. The following passage in the judgment of Blackburn, J. in the case of *Phillips* v. *Barnet* is very apposite to the matter in hand. The learned judge there says: "There can be no doubt that if a wife receives bodily injury from the hands of her husband he is liable to criminal proceedings for a felony or a misdemeanour, as the case may be; and in the case of an ordinary assault it is quite clear that the wife has a right for her protection to obtain articles of the peace against her husband." In our judgment the exception only extends to the class of cases where bodily injury has been received by the wife or husband, as the case may be. No case has been cited at the bar, nor are we aware of any, in which the exception has ever been extended beyond that above enunciated; and it is worthy of remark that, if the law be as was contended by the applicant, no trace of authority to support her position can be adduced in her behalf. It was then argued, however, that even if the present case does not come within the exception as the law stood before the passing of the Married Women's Property Act 1870, yet it comes within the existing Act of 1882, and that by virtue of the provisions of that Act she was now enabled to prosecute her husband for a libel

upon her reputation and credit. It was said that by sect. 12 of the Act of 1882 it was enacted that every woman, whether married before or after the passing of the Act, should have against her husband the same remedies and redress by way of criminal proceedings "for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*;" and that the present criminal proceeding against her husband for libel was for the protection and security of her separate property, she being a vocalist. It was argued before us that, it having been stated by Brett, J. during the argument in the case of *Summers* v. *City Bank* (*sup.*), under sect. 11 of the Act of 1870, that a wife could sue her husband for a libel upon her in her trade, that therefore it necessarily followed that she could criminally prosecute him in a case like the present. It seems to us that the argument is wholly fallacious. First, we would point out that under sect. 12 of the Act of 1882, which is the Act now in force (it was equally so under sect. 11 of the Act of 1870), proceedings, whether civil or criminal, can only be taken by wife against husband for the protection and security of her own separate estate. How can criminal proceedings for a personal libel be said to be for the protection and security of her own separate property? Libel on an individual is, and always has been, regarded as both a civil injury and a criminal offence. The person libelled may pursue his remedy for damages or prefer an indictment; he may both sue for damages and indict. It is ranked amongst criminal offences because of its supposed tendency to arouse angry passions, provoke revenge, and thus endanger the public peace: (see per Lush, J., *Reg.* v. *Holbrook*, 39 L. T. Rep. N. S. 530; 4 Q. B. Div. 46.) How can a prosecution for a libel, which is criminal only because of the tendency above pointed out be said to be for the protection and security of the separate estate? It seems to us impossible to so hold, even if it may hereafter be held (upon which we give no opinion) that an action for libel in a case like the present can be maintained by a wife against a husband. It seems to us, moreover, looking at the complaint made, that it would be impossible to hold the separate estate, as contemplated by the statute, was ever here in jeopardy. What was damaged, if anything, was the fair fame of the applicant, and that, in our judgment, is not separate estate. We are of opinion, for the reasons above stated, that neither as the law stood prior to 1870, nor since, can a wife criminally prosecute a husband or give evidence against him upon a prosecution for a personal libel upon herself. We therefore discharge this rule, with costs.

Solicitor for applicant, *Heritage*.
Solicitor for respondent, *The City Solicitor*.

Friday, April 9, 1886.

(Before DENMAN and SMITH, JJ.)

SHINGLER *v.* SMITH. (*a*)

Bastardy order—Notice of appeal—Grounds thereof—Court of summary jurisdiction—Bastardy Act 1844 (7 *&* 8 *Vict. c.* 101), *s.* 4—*Summary Jurisdiction Act* 1879 (42 *&* 43 *Vict. c.* 49) *ss.* 31, 32, 54—*Summary Jurisdiction Act* 1884 (47 *&* 48 *Vict. c.* 43), *ss.* 4, 6, 7.

In an appeal from an order of a court of summary jurisdiction, in a matter of bastardy, the appellant's notice of appeal must state the grounds of such appeal under the 31*st section of the Summary Jurisdiction Act* 1879 (42 *&* 43 *Vict. c.* 49), *the repeal of the* 32*nd section of that Act by the* 4*th section of the Summary Jurisdiction Act of* 1884 (47 *&* 48 *Vict. c.* 43), *having taken away the alternative mode of proceeding under the* 4*th section of the Bastardy Act* 1844 (7 *&* 8 *Vict. c.* 101).

THIS was a special case stated by the Recorder of Birmingham in a matter of bastardy.

CASE.

1. This was an appeal to the Court of Quarter Sessions for the Borough of Birmingham, from an order in bastardy made by Thomas Clement Sneyd Kynnersley, Esq., Stipendiary Magistrate for the said borough, sitting in petty sessions, against the above named appellant on the 29th June 1885.

2. At the hearing before the magistrate on the 29th June 1885, directly after the order was made, the solicitor for the appellant gave verbal notice of appeal against the order to the respondent.

3. On the following day a written notice of appeal against the order was served upon the respondent.

The following is a copy thereof:

To Ann Louisa Smith.—Take notice that Herbert Leigh Shingler intends at the General Quarter Sessions of the Peace for the Borough of Birmingham, to be holden after the period of fourteen days next after the making of the order hereinafter mentioned, to appeal against an order of affiliation made this day by Thomas Clement Sneyd Kynnersley, Esq., Justice of the Peace, in respect of your illegitimate male child. Dated Monday, 29th June 1885. R. A. DALE and SON, of 12, Bennett's-hill, Birmingham, Solicitors for Mr. Shingler.

The said notice of appeal was served on Ann Louisa Smith only, and no notice whatever of any grounds of appeal was either served or given.

4. On the 2nd July 1885 the appellant entered into recognisances with a surety to appear and try the said appeal at the next practicable general quarter sessions of the peace for the said borough, and to pay such costs as he might be then ordered to pay, and on the 3rd July notice thereof in writing was served upon the respondent.

5. On the above facts being proved, counsel for the respondent objected that the notice of appeal was bad and insufficient in point of law, on the ground that it did not comply with the provisions of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) s. 31, sub-sect. 2, and he cited the Summary Jurisdiction Act 1884 (47 & 48 Vict. c. 43) ss. 4, 6, and 7, and contended that the bastardy orders in question were orders of a court of summary jurisdiction, made in pursuance of the Summary Jurisdiction Acts.

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

6. Counsel for the appellant admitted that the provisions of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49), s. 31, sub-sect. 2, had not been complied with, but he contended that such compliance was not necessary, and that orders in bastardy were orders made in pursuance of 7 & 8 Vict. c. 101, and not in pursuance of the Summary Jurisdiction Acts, and that the effect of the Summary Jurisdiction Act 1884 was to leave the right of appeal granted by 7 & 8 Vict. c. 101, s. 4, in existence, but freed from any conditions as to notice of appeal or recognisances, and that therefore the appellant had the right to prosecute his appeal without giving any notice of appeal. He quoted 7 & 8 Vict. c. 101, ss. 1, 4; 11 & 12 Vict. c. 43, s. 35; 42 & 43 Vict. c. 49, s. 54; *Reg.* v. *The Justices of Montgomeryshire* (51 L. J. 95, M. C.); and 47 & 48 Vict. c. 43 (as to repeal of part of sect. 4 of 7 & 8 Vict. c. 101, and of 8 & 9 Vict. c. 10, s. 3), and with regard to 47 & 48 Vict. c. 43, s. 7, he argued that even if the order was made by a court of summary jurisdiction within the meaning of that section, it was not made in pursuance of the Summary Jurisdiction Acts.

7. I was of opinion that the contention of the counsel for the appellant was right, and I allowed the case to proceed; and after hearing evidence, I quashed the order appealed against, on the ground that the evidence of the mother was not corroborated in a material particular by other testimony to my satisfaction.

The question for the opinion of the court is:

Whether under the above circumstances it was necessary for the appellant to observe the procedure as to notice and grounds of appeal prescribed by the Summary Jurisdiction Act 1879, sect. 31?

If the court shall be of opinion in the negative, the order of the court of quarter sessions is to stand.

If the court shall be of opinion in the affirmative, the order of the court of quarter sessions is to be quashed.

The following Acts of Parliament were cited, and are material to the decision:

The Bastardy Act 1884 (7 & 8 Vict. c. 101):

Sect. 4. And be it enacted that . . . . if within twenty-four hours after the adjudication and making of any order on the putative father as aforesaid such putative father give notice of appeal to the mother of the bastard child, and also within seven days give sufficient security by recognisance or otherwise for the payment of costs to the satisfaction of some one justice of the peace, it shall be lawful for such putative father to appeal to the general quarter sessions of the peace.

The Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49):

Sect. 31. Where any person is authorised by this Act or by any future Act to appeal from the conviction or order of a court of summary jurisdiction to a court of general or quarter sessions, he may appeal to such court, subject to the conditions and regulations following:

(2.) The appellant shall within the prescribed time, or if no time is prescribed, within seven days after the day on which the said decision of the court was given, give notice of appeal by serving on the other party and on the clerk of the said court of summary jurisdiction notice in writing of his intention to appeal, and of the general grounds of such appeal.

Sect. 32. Where any person is authorised by any past Act to appeal from the conviction or order of a court of summary jurisdiction to a court of general or quarter sessions, he may appeal to such court, subject to the conditions and regulations contained in this Act with respect to an appeal to a court of general or quarter sessions: Provided, that where any such appeal is in accordance with the conditions and regulations prescribed by the Act authorising the appeal, so far as the same is unrepealed, such appeal shall not be deemed invalid by reason only that it is not in accordance with the conditions and regulations contained in this Act.

Sect. 54. This Act shall apply . . . . to an appeal from an order in any matter of bastardy.

The 4th section of the Summary Jurisdiction Act 1884 (47 & 48 Vict. c. 43) repealed the 32nd section of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) down to the words "in accordance with the conditions and regulations contained in this Act."

D'Eyncourt in support of the appeal from the Court of Quarter Sessions.—The decision of the recorder was wrong, and should be set aside. Having regard to the provisions of the Summary Jurisdiction Act 1884, this affiliation order is an order of a court of summary jurisdiction; it is therefore governed by the 31st section of the Summary Jurisdiction Act 1879, which directs that the general grounds of appeal shall be stated in the notice. The option of appealing under the Summary Jurisdiction Act 1879, or under the Bastardy Act 1844, as given by sect. 32 of the Summary Jurisdiction Act 1879, is taken away by sect. 4 of the Summary Jurisdiction Act 1884. Hence the appellant should have complied with sect. 31 of the Summary Jurisdiction Act 1879, and as his notice of appeal gives no grounds it is bad. It is submitted that the very object of the Act of 1884 was to do away with the optional proceedings which the court in *Reg.* v. *The Justices of Montgomeryshire* (51 L. J. 95, M. C.) held to be given by sect. 32 of the Summary Jurisdiction Act 1879. This is borne out by the fact that the preamble to the Summary Jurisdiction Act 1884 states the object of the Act to be to make provision for uniformity of proceedings before courts of summary jurisdiction. [He was here stopped by the Court.]

Abrahams, for the putative father, *contra*.—It was not necessary to observe the procedure as to notice prescribed by sect. 31 of the Summary Jurisdiction Act 1879. The language of that section is permissive, and therefore imposes no absolute obligation on an appellant to comply with its requirements. The appellant has complied with the Bastardy Act 1844, which, as it has never been repealed, still regulates the procedure in bastardy appeals. Moreover, as evidence was heard on appeal, and the learned judge on the facts decided against the mother, the right to raise the present objection has been waived.

D'Eyncourt was not called upon to reply.

DENMAN, J.—As to the last point raised by counsel, I think it is perfectly clear that this is solely a question of the construction of the Acts and the jurisdiction given by them, and that it was not a point intended by the learned recorder to be laid before us. The sole question is, whether at the present time, that is, since the last enactment on this subject, a person who has had an order of affiliation made against him is right in giving a notice of appeal from that order without stating any grounds of appeal. That was the state of the law under 7 & 8 Vict. c. 101, s. 4, and the next statute on the subject, 8 & 9 Vict. c. 10, appears to have made no alteration so far as that is concerned. The next statute relating to the

question of bastardy is the 12 & 13 Vict. c. 43; but it has no application to this case. Then came the Summary Jurisdiction Act of 1879 (42 & 43 Vict. c. 49), s. 32, where the very question of bastardy appeals was before the Legislature, and the Legislature appears there to have taken a course which certainly had the effect, as was decided in *Reg.* v. *Justices of Montgomeryshire* (51 L. J. 95, M. C.), of giving an appellant the option of prosecuting his appeal under that Act or under the previous Act of 7 & 8 Vict. c. 101. That was obviously a most inconvenient thing, and not the kind of thing which the Legislature, if it acted wisely, would allow to continue. It having been decided, as I have already said, in the case of *Reg.* v. *Justices of Montgomeryshire* that, on the construction of the existing statutes, this option was allowable, the Legislature in the Summary Jurisdiction Act 1884 (47 & 48 Vict. c. 43) deliberately repealed the 32nd section of the previous Act which had given the optional appeal proceedings. Nothing could have been more reasonable than that the Legislature should put a stop to these optional proceedings, and hence in the schedule the very clause which had given the double proceeding is repealed. The result of this was to do away with different modes of procedure and to bring everything into a state of uniformity. That the Act intended to do this is perfectly clear, for the very object of the Act is to produce uniformity, it being, in the words of the preamble, "expedient to provide for uniformity of procedure in all such cases," that is, on appeals from courts of summary jurisdiction to courts of quarter sessions. What would become of uniformity if it were competent to an appellant to maintain that he still retained an optional mode of proceeding under the earlier Act? I do not think such a contention is open to anyone after this last-mentioned Act of Parliament. If the previous procedure is not actually repealed, it is certainly impliedly repealed, and I think it was intended that there should be uniformity in this respect, that in all bastardy cases the appellant shall in his notice of appeal state his reasons for appealing. In this case no reasons have been stated, and consequently I think we must find in favour of the respondent, and the result will therefore be that the order of the Court of Quarter Sessions must be quashed.

DAY, J. concurred.

Solicitor for the putative father, *Harvey Samuel.*

Solicitors for the mother, *Kingsford, Dorman,* and *Co.*

CROWN CASES RESERVED.

Saturday, May 15, 1886.

(Before Lord COLERIDGE, C.J., Lord ESHER, M.R., BOWEN, L.J., FIELD and MANISTY, JJ.)

REG. *v.* BURTON. (*a*)

False pretences—False statement by lodger—Food supplied subsequently—Reasonable inference for jury.

Prisoner went to the house of prosecutrix and requested to be taken in as a lodger. After having lodged with her for a day or two, he stated that he had come from another lodging where he had left some of his clothes, and requested to be furnished with board as well as lodging, for which he promised to pay. The prosecutrix, believing his statement as to his clothes, agreed to supply him and did supply him with meat and drink as a boarder. A few days after the prisoner decamped without paying for his accommodation. At the trial of an indictment for obtaining goods by false pretences the jury were directed that they must be satisfied that the pretence was false; that it was acted on by the prosecutrix in supplying the articles in question; and that it was made by the prisoner with intent to defraud. The jury having found a verdict of guilty, the question was reserved for this court, whether upon the facts the prisoner was entitled to an acquittal:

Held, that the direction was substantially accurate; that upon the evidence the jury might fairly infer that the prosecutrix had acted on what she believed; and that from the facts stated it was to be inferred that the jury meant she so acted because she believed to be true the statement of the prisoner which was in fact false.

THE prisoner, James Burton, alias James Bullen, alias James Penrose, was tried at the Quarter Sessions for the county of Hereford, holden on Monday, the 5th April 1886, upon an indictment which charged him with having, on the 1st Feb. 1886, obtained from Mary Ann Stinton certain food, lodging, and apples, with intent to defraud.

The following facts were proved:—On the 1st Feb. 1886 the prisoner came to the house of Mary Ann Stinton, at Brimfield, in the county of Hereford, and requested to be taken in as a lodger. Mrs. Stinton consented. After the prisoner had been in the house a short time he falsely stated to Mrs. Stinton that he had come directly from the house of one Mrs. Evans, of Tenbury, and that he had left clothes there, and at the time of making this statement requested to be provided with board as well as lodging, promising to pay a larger price for the accommodation than would be paid by an ordinary working man. Mrs. Stinton, knowing the Mrs. Evans to whom the prisoner referred, and believing his statements that he had come thence and had clothes there, agreed to supply him, and did supply him, with meat and drink to the value of 7*s.* 6*d.* as a boarder.

No definite rent or agreed payment for board was ever stipulated for between the prisoner and Mrs. Stinton, but the latter trusted to being paid on Saturday the 6th Feb., being the end of the week of the prisoner's arrival, her reasonable charges for the period ending on that day, and did not therefore demand any payment from the prisoner before he quitted her house as next after mentioned.

On Thursday, the 4th Feb., the prisoner decamped from Mrs. Stinton's house without notice, and without paying for the accommodation he had had, and was not afterwards heard of by her until she found him in custody on other charges.

The prisoner was not defended by counsel, but he cross-examined the witnesses and addressed the jury with the view of showing that his false statements as to having been at Mrs. Evans' and having clothes there were not acted upon by Mrs.

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

Stinton in supplying him with his board and lodging.

In summing up, the learned Chairman told the jury that the prisoner could not, on the indictment they were trying, be convicted of obtaining lodging by false pretences, but that they must dismiss that part of the charge from their minds, and that, so far as regarded the meat and drink, they must be satisfied of three things: first, that the pretence was false; secondly, that it was acted on by the prosecutrix in supplying the articles in question; and, thirdly, that it was made by the prisoner with intent to defraud; and that, if they were not satisfied of all three, they must acquit the prisoner. And he advised them especially to direct their minds to the arguments and statements of the prisoner upon the second question.

The jury found the prisoner guilty, and he was sentenced. But the learned Chairman, having some doubts as to whether he was not bound, in consequence of the case of *Reg.* v. *Gardner* (27 L. T. Rep. O. S. 144; 25 L. J. 100, M. C.), and notwithstanding the remarks on that case in *Reg.* v. *Martin* (15 L. T. Rep. N. S. 541; L. Rep. 1 Cr. Cas. Res. 56), to direct an acquittal, reserved for the opinion of the Court for the Consideration of Crown Cases Reserved the question whether, upon the facts above stated, he was so bound.

No one appeared in support of or against the conviction.

Lord COLERIDGE, C.J.—I am of opinion that this conviction should be affirmed. The statement of the case is not perhaps altogether satisfactory, because it is consistent with the statements here that the meat and drink were not procured by means of the false pretence. I may very broadly lay down what is essential to constitute the offence of obtaining goods by false pretences. First, the statement upon which the goods are obtained must be untrue; next, the prisoner must have known at the time he made the statement that it was untrue; and, thirdly, the goods must have been obtained by reason of that false statement. If these three things concur I have always understood that they are enough to make out a case of false pretences. Here it is stated that the prisoner was received as a lodger without his making any false pretence whatever; but it is also stated that, after he had been so received, he falsely stated he had left some clothes at Mrs. Evans', and that he was prepared to pay rather more for the accommodation than would be paid by an ordinary working man; and the case finds that, the prosecutrix knowing the Mrs. Evans to whom the prisoner referred, and believing his statements that he had come thence and had clothes there, agreed to supply him, and did supply him, with meat and drink. Then the prisoner departed and never paid her. It seems to me that the case was left to the jury with a substantially accurate direction on the part of the learned chairman, and the jury having found that the prosecutrix did supply the prisoner with goods, and that she believed the statement he made, which was false, it is to be inferred that the jury meant that she so acted because she believed that statement, which was false, to be true; and, therefore, I am of opinion that all the things concurred which are necessary to constitute the offence with which the prisoner was charged, and that he was rightly convicted.

The other learned Judges concurred.

Conviction affirmed.

Saturday, May 15, 1886.

(Before Lord COLERIDGE, C.J., Lord ESHER, M.R., BOWEN, L.J., FIELD and MANISTY, JJ.)

REG. *v.* THE INHABITANTS OF THE DISTRICT OF LORDSMERE. (*a*)

Highway—Indictment for non-repair—Wall supporting highway out of repair—Liability to repair ratione tenuræ not pleaded—Rejection of evidence of repairs by individuals—Reception of evidence of previous conviction of defendants for non-repair of another highway.

Where a highway is supported by a wall, and such wall becomes dangerous by reason of non-repair, the inhabitants of the place in which such highway is situate, if liable to repair the highway, can be convicted upon an indictment for non-repair, it being a question for the jury whether the wall forms part of the highway or not.

Evidence of repairs to a highway by the owners of the adjoining lands is inadmissible upon an indictment against the inhabitants of the place in which such highway is situate, unless liability on the part of such owners to repair the highway in question, ratione tenuræ, has been specially pleaded.

Evidence of a previous conviction of the inhabitants of a particular district in a parish for the non-repair of one of the highways in such district is admissible to prove that the district is liable by immemorial custom to repair all the highways within its limits, for the repair of which the inhabitants of the whole common law parish would otherwise be primâ facie liable.

CASE reserved by the Chairman of the Court of Quarter Sessions of the Peace in and for the West Riding of the county of York for the consideration of the Court of Crown Cases Reserved under 11 & 12 Vict. c. 78, the facts stated in which were the following:—

1. The defendants were tried at the West Riding Quarter Sessions, held in Oct. 1885, on an indictment for the non-repair of a certain wall, described in the indictment as extending for the distance of 329 yards upon or by the south side of and forming part of a highway lying and being within the district of Lordsmere, in the parish or township of Saddleworth, in the west riding of the county of York. The indictment charged that from time immemorial the defendants had repaired the said highway, and further that from time immemorial the defendants had repaired the highways within the said district, and that the said highway was ruinous and out of repair, and that the defendants ought to repair it. Two of the inhabitants, on behalf of all the inhabitants of the district of Lordsmere, pleaded (1) not guilty, and two other inhabitants on behalf of all the inhabitants of the district of Lordsmere (except those of a portion of the district known as the lower division of Lordsmere) pleaded (2) that the highway in question lay within a district known as the lower division of Lordsmere, the

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

inhabitants whereof had immemorially repaired such and so many of the common highways situate in the said lower division of Lordsmere as would otherwise be repairable by the inhabitants at large of the said parish of Saddleworth The replication traversed specifically the allegations contained in the special plea.

2. It was proved at the trial that the highway throughout the 329 yards of its length runs along a steep hill side sloping towards the south. That the highway on the south side stands about five feet above the level of the land abutting on the road, and is on that side supported by the wall which below the level of the surface of the highway supports or retains the highway, and above the level forms a parapet or fence.

3. There was no evidence to show when and by whom the wall had been built; but it was proved that the highway being constructed along the slope of a steep hill side would have slipped away without the retaining wall or some such support, and that the wall above and below the level of the highway was one continuous structure from top to bottom.

4. There was evidence that, at points within the length of 329 yards, the wall below the level of the highway was bulging and dangerous, and that above that level, at various points, it had fallen into disrepair. And that whereas its original height above the level was about three feet six inches, it had fallen in many places to within a short distance of the surface of the highway, and that there was a danger of passengers falling over the bank, particularly at night.

The parts of the highway between, but exclusive of the fences and the metalled part of the highway and the footpath, were admitted to be in a good state of repair, and it was also admitted by one of the witnesses for the prosecution that there was nothing wrong except the fence wall; that the retaining wall was in fair condition, and nothing to fear from it so far as the road or footway was concerned.

It was proved that the wall had been on a few occasions repaired by the surveyors of highways; but it was not shown that any portion of the fence had ever been repaired, except at a time when the portion of the retaining wall immediately beneath it had been strengthened or rebuilt.

5. Counsel for the defendants were proceeding to cross-examine a witness for the prosecution, as to repairs to the wall of the highway alleged to have been done at various points not within the limits of the 329 yards, or adjacent to the limits, by a landowner or landowners, and they alleged that they were prepared with evidence to prove such repairs.

[Such cross-examination was deemed irrelevant, and the learned Chairman refused to admit the same.]

6. The assistant-overseer for the parish of Saddleworth, called as a witness on behalf of the prosecution, produced vestry-books containing the minutes of meetings therein described as vestries or meetings of the churchwardens, surveyors of the highways, inhabitants, and lay-payers of the township of Quick and parish of Saddleworth, which books were put in and ruled to be evidence.

In the year 1798 it appeared from the said books that seven persons were nominated for appointment as surveyors of highways, for the district of Lordsmere, in respect of subdivisions of the district of Lordsmere.

From the books it also appeared that, on the 25th March 1836, at a vestry meeting, twenty gentlemen were appointed as a board of surveyors for the district of Lordsmere, under sect. 18 of 5 & 6 Will. 4, c. 50. Minutes were also read respecting the election of surveyors in 1836, 1857, and 1869, from which it appeared that surveyors had from time to time been variously appointed for the district of Lordsmere, and for the three subdivisions of upper, middle, and lower divisions of Lordsmere, into which the district of Lordsmere became divided.

7. It was proved by the production of certified copies of the indictment and conviction that in the year 1849 the inhabitants of the district of Lordsmere were indicted for the non-repair of a highway within such district. The defendants to the indictment of 1849 pleaded not guilty, and were thereupon tried and convicted.

8. At the close of the case for the prosecution it was submitted by counsel for the defendants that there was no evidence that the district of Lordsmere was a district liable by immemorial custom to repair the highways within its limits, and that so far as there was any evidence to discharge the common law liability of the parish it tended to fix the obligation to repair the highway in question upon the lower division of Lordsmere; and it was further submitted on behalf of the defendants that the verdict of guilty on the indictment of 1849 not having been pleaded was not evidence of the liability of the defendants, and did not operate as an estoppel for two reasons: first, because, although the record might have been conclusive against them upon the plea of not guilty, yet that such was not the case where there was a special plea charging that the burden of repair lay upon the inhabitants of a particular district; and secondly, because the conviction had not been pleaded by way of estoppel in the replication.

9. After hearing counsel for the prosecution and counsel for the defendants in reply on the points raised, the Court of Quarter Sessions considered that the indictment and conviction of 1849, although not operating as an estoppel under the circumstances, were evidence against the defendants of their liability to repair the highway, but left it to the jury to determine such liability.

10. Counsel for the defendants further contended that the fence wall did not form part of the highway, and that, even if the defendants were liable to keep the wall in repair, the remedy by indictment was not, under the circumstances, available against them. The learned Chairman submitted the case to the jury, who were directed to consider, first, whether the wall formed part of the highway; secondly, whether the wall was out of repair; and thirdly, whether such wall was repairable by the defendants. The jury found the defendants guilty, and the following questions were reserved for the consideration of this court: 1. Was the cross-examination as to repairs referred to in the 5th paragraph of the case rightly stopped and the evidence rejected? 2. Would an indictment lie for the non-repair of the fence wall under the circumstances stated? 3. Was there evidence on the whole case upon which the jury

could in point of law find the verdict which in point of fact they did find? And the opinion of the court was prayed whether the defendants were rightly convicted.

No one appeared in support of or against the conviction.

Lord COLERIDGE, C.J. (after adverting to the fact of counsel not having been instructed in the case, and expressing the opinion of the court that where a judge reserves a case for the opinion of a constitutional court such as this, brought together at considerable inconvenience to the course of justice in other courts, counsel ought to be instructed to assist the court in arriving at a right judgment) said:—There are three points raised in this case for our determination. In the first place, this was an indictment against the inhabitants of a division of a parish for the non-repair of a highway, and in the course of the trial counsel for the defendants was about to cross-examine one of the witnesses for the prosecution in order to show that certain individuals had repaired other parts of the wall in question, and that therefore the inhabitants at large of the division were not bound to repair any of the wall. It is not stated that the evidence sought to be proved was evidence which went to show that the individuals to which it pointed had repaired, if they had done so, the road by reason of their having been under an obligation to do so *ratione tenuræ*. But it is common knowledge in these courts that, in order to set up on behalf of the public, or the inhabitants of a district *primâ facie* liable to repair the highways within the district, the liability of persons to repair a particular highway *ratione tenuræ*, such liability must be specially pleaded to the indictment. No such liability was here pleaded, nor is it even suggested that the evidence sought to be put in would have proved such a liability. The evidence, if it had been received, would probably only have proved that, as a matter of fact, certain individuals had done repairs purely for their own convenience, and without in the least degree relieving the inhabitants at large from their common law liability. Whether that was so or not the evidence was rejected, and in my opinion properly rejected, because there was no plea whatever justifying its being admitted. The second point raised in the case is, whether an indictment which had been presented many years ago, and upon which a verdict of guilty had been found, was or was not evidence in the case. The learned chairman rightly ruled that it was not an estoppel, but was evidence, and I think it was very cogent evidence indeed, and was rightly admitted. As to the third point, this was a highway upon the slope of a hill which had to be supported by means of a wall, and which could not have been carried along the side of the hill so as to be flat and level without the support of the wall, and the question argued as a matter of law before the quarter sessions was, that the wall was no part of the highway. Now, that was no question of law at all, but purely a question of fact, which was very properly left to the jury. The jury found that the wall formed part of the highway, for they found the defendants guilty; and the learned chairman submits to us the question whether that was a finding to which they could properly come. I am clearly of opinion that it was a finding to which they could properly come. Now those are the three questions reserved for our opinion; and we are all of opinion that the learned chairman was perfectly right in his direction on all the three points, and that the jury have found rightly on all the points submitted to them; and that therefore this conviction must be affirmed.

The MASTER of the ROLLS, BOWEN, L.J., FIELD and MANISTY, JJ. concurred.

Conviction affirmed.

Saturday, May 15, 1886.

(Before Lord COLERIDGE, C.J., Lord ESHER, M.R., BOWEN, L.J., FIELD and MANISTY, JJ.)

REG. *v.* LATIMER. (*a*)

Malicious wounding—Accidental wounding of one person in attempting to wound another—Malice—Intention—24 & 25 Vict. c. 100, *s.* 20.

An offence is committed within sect. 20 *of* 24 *&* 25 *Vict. c.* 100, *if anyone, unlawfully intending to wound another, accidentally wounds a person other than the person he intended to wound, in the execution of such unlawful intention. Under sect.* 20 *it is sufficient to prove general malice, malice against the person wounded not being essential in the commission of an offence thereunder.*

Reg. *v.* Pembliton (*L. Rep.* 2 *Cr. Cas. Res.* 119) *explained.*

CASE stated by the learned Recorder for the borough of Devonport as follows:—

The prisoner was tried at the April Quarter Sessions for the borough of Devonport on the 10th April 1886.

The prisoner was indicted for unlawfully and maliciously wounding Ellen Rolston. There was a second count charging him with a common assault.

The evidence showed that the prosecutrix, Ellen Rolston, kept a public-house in Devonport; that on Sunday, the 14th Feb. 1886, the prisoner, who was a soldier, and a man named Horace Chapple were in the public-house, and a quarrel took place, and eventually the prisoner was knocked down by the man Horace Chapple. The prisoner subsequently went out into a yard at the back of the house. In about five minutes the prisoner came back hastily through the room in which Chapple was still sitting having in his hand his belt which he had taken off. As the prisoner passed he aimed a blow with his belt at the said Horace Chapple, and struck him slightly, the belt bounded off and struck the prosecutrix, who was standing talking to the said Horace Chapple, in the face, cutting her face open and wounding her severely.

At the close of the case the learned Recorder left these questions to the jury: 1. Was the blow struck at Chapple in self-defence to get through the room, or unlawfully and maliciously? 2. Did the blow so struck in fact wound Ellen Rolston? 3. Was the striking Ellen Rolston purely accidental, or was it such a consequence as the prisoner should have expected to follow from the blow he aimed at Chapple?

The jury found: 1. That the blow was unlawful and malicious. 2. That the blow did in fact wound Ellen Rolston. 3. That the striking Ellen

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

Rolston was purely accidental, and not such a consequence of the blow as the prisoner ought to have expected.

Upon these findings the learned Recorder directed a verdict of guilty to be entered to the first count, but respited judgment and admitted the prisoner to bail to come up for judgment at the next sessions.

The question for the consideration of the court was, whether upon the facts and the findings of the jury the prisoner was rightly convicted of the offence for which he was indicted.

By sect. 20 of 24 & 25 Vict. c. 100, it is enacted that,

Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of misdemeanour.

Croft for the prisoner.—The findings of the jury amount to a verdict of not guilty, for though they found that the blow was unlawful and malicious, and did in fact wound the prosecutrix, they negatived those findings by the finding that the blow was accidental. In *Reg.* v. *Pembliton* (30 L T. Rep. N. S. 405; L. Rep. 2 Cr. Cas. Res. 119; 12 Cox. C. C. 607) it was held that a jury, by finding that a stone had been thrown by the prisoner, intending to strike a person with whom he had been fighting, and not intending to break a window as he had done, had negatived the existence of malice, either actual or constructive, and a conviction for malicious injury to property was upon that ground quashed. [MANISTY, J.—Suppose here the prisoner had killed Ellen Rolston, would not he have been guilty of manslaughter?] Yes; but in this case the indictment is under a statute which requires that the blow should have been given maliciously, and intention to wound the particular person is therefore necessary. [Lord ESHER.—The indictment does not charge any specific intent, it charges that he did it unlawfully. He was doing a criminal and unlawful act which resulted in a wounding of Ellen Rolston. Was not that an unlawful wounding?] No; in the case cited the words in the statute were the same, and it was held not to be an unlawful injury. [FIELD, J.—There the indictment was that the prisoner unlawfully and maliciously injured the window of A., and the jury found that he intended to wound B., and no doubt the court would hold that the evidence did not support the indictment.] In *Reg.* v. *Faulkner* (13 Cox C. C. 550) a sailor entered a part of a vessel for the purpose of stealing rum, and accidentally fired the vessel, but he was nevertheless held not guilty of arson. [MANISTY, J.—In that case there was no evidence at all of malice.] I submit that the unlawfulness of the act was sufficient evidence of malice there. In *McPherson* v. *Daniels* (10 B. & C. 263; 2 M. & R. 251), "maliciously" has been defined as the doing a wrongful act wilfully. [Lord COLERIDGE, C.J.—Is not this case governed by the decision in *Reg.* v. *Hunt*, 1 Moo. C. C. 93?] No; for that case is inconsistent with the later case of *Reg.* v. *Hewlett* (1 F. & F. 91), where it was held that where a person strikes A., and B. interposing receives the blow, a conviction for wounding B. with intent to do grievous bodily harm cannot be sustained. I submit that this case is governed by the decision in *Reg.* v. *Pembliton*, and that the jury having negatived the existence of malice, the prisoner is entitled to an acquittal.

Helpman, for the prosecution, was not called upon.

Lord COLERIDGE, C.J.—I am of opinion that this conviction must be sustained. In the first place, it is common knowledge that, if a person has a malicious intent towards one person, and in carrying into effect that malicious intent he injures another man, he is guilty of what the law considers malice against the person so injured, because he is guilty of general malice; and is guilty if the result of his unlawful act be to injure a particular person. That would be the law if the case were *res integra*; but it is not *res integra*, because, in *Reg.* v. *Hunt*, a man in attempting to injure A., stabbed the wrong man. There, in point of fact, he had no more intention of injuring B. than a man has an intent to injure a particular person who fires down a street where a number of persons are collected, and injures a person he never heard of before. But he had an intent to do an unlawful act, and in carrying out that intent he did injure a person; and the law says that, under such circumstances, a man is guilty of maliciously wounding the person actually wounded. That would be the ordinary state of the law if it had not been for the case of *Reg.* v. *Pembliton*. But I observe that, in such an indictment, as in that case, the words of the statute carry the case against the prisoner more clearly still, because, by sect. 18 of the statute 24 & 25 Vict. c. 100, it is enacted that: "Whosoever shall unlawfully and maliciously by any means whatsoever wound . . . any person . . . . with intent . . . . to maim, disfigure, or disable any person . . . . shall be guilty of felony;" and then sect. 20 enacts that "whosoever shall unlawfully and maliciously wound . . . . any other person . . . . shall be guilty of a misdemeanour;" and be liable to certain punishments. Therefore, the language of the 18th and 20th sections are perfectly different; and it must be remembered that this is a conviction for an offence under the 20th section. Now, the Master of the Rolls has pointed out that these very sections are in substitution for and correction of the earlier statute of 9 Geo. 4, c. 31, where it was necessary that the act should have been done with intent to maim, disfigure, or disable such person, showing that the intent must have been to injure the person actually injured. Those words are left out in the later statute, and the words are "wound any other person." I cannot see that there could be any question, but for the case of *Reg.* v. *Pembliton*. Now, I think that that case was properly decided; but upon a ground which renders it clearly distinguishable from the present case. That is to say, the statute which was under discussion in *Reg.* v. *Pembliton* makes an unlawful injury to property punishable in a certain way. In that case the jury and the facts expressly negatived that there was any intent to injure any property at all; and the court held that, in a statute which created it an offence to injure property, there must be an intention to injure property in order to support an indictment under that statute. But for that case Mr. Croft is out of court, and I therefore think that this conviction should be sustained.

Lord ESHER, M.R.—I am of the same opinion. It seems to me that the case of *Reg.* v. *Pembliton* is the only case which could be cited against a

well-known principle of law. But that case shows that there was no intention to injure any property at all; therefore there was no intent to commit the crime mentioned in the Act.

Bowen, L.J.—I am also of opinion that this conviction should be affirmed. It is quite clear that this offence was committed without any malice in the mind of the prisoner, and that he had no intention of wounding Ellen Rolston. The only difficulty that arises is from *Reg.* v. *Pembliton*, which was a case under an Act of Parliament which does not deal with all malice in general, but with malice towards property; and all that case holds is, that though the prisoner would have been guilty of acting maliciously within the common law meaning of the term, still he was not guilty of acting maliciously within the meaning of a statute which requires a malicious intent to injure property. Had the prisoner meant to strike a pane of glass, and without any reasonable expectation of doing so injured a person, it might be said that the malicious intent to injure property was not enough to sustain a prosecution under this statute. But, as the jury found that the prisoner intended to wound Chapple, I am of opinion that he acted maliciously within the meaning of this statute.

Field, J.—I am also of opinion that this conviction must be affirmed. I think this a very important case and one of very wide application, and am very glad that it has come before this court, and has been carefully considered and decided so that there may be no doubt about the matter.

Manisty, J.—I do not propose to add more than a few words. The facts in this case raise an exceedingly important question, because the man Chapple, who was intended to be struck, was standing close by the woman who was wounded, and who was talking to him; and the prisoner intending to strike Chapple with the belt did strike him, but the belt bounded off and struck Ellen Rolston. It seems to me that the first and second findings of the jury justify the conviction, because they are in these terms: "The jury found that the blow was unlawful and malicious, and that it did in fact wound Ellen Rolston;" and that being so, I think that the third finding does not entitle the prisoner to an acquittal. It is true he did not intend to strike Ellen Rolston, but he did intend to strike Chapple, and in doing so wounded Ellen Rolston; therefore I think that the third finding is quite immaterial, and this conviction should be affirmed.

Conviction affirmed.

Solicitor for the prosecution, *H. Windybank*, agent for *Albert Gard*, Devonport.

Solicitor for the prisoner, *Jas. Gilbard*, Devonport.

Supreme Court of Judicature.

COURT OF APPEAL.

Aug. 3 *and* 4, 1886.

(Before Lord Esher, M.R., Bowen and Fry, L.JJ.)

East London Waterworks Company *v.* Vestry of St. Matthew, Bethnal Green. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Waterworks—Right of company to place stop-valves in footway—"Reinstatement" of footway—Waterworks Clauses Act 1847 (10 *&* 11 *Vict. c.* 17), *ss.* 28, 32—*Metropolis Water Act* 1852 (15 *&* 16 *Vict. c.* 84), *s.* 26—*Metropolis Water Act* 1871 (34 & 35 *Vict. c.* 113), *ss.* 17, 24.

By special Acts, which incorporate the provisions of the Waterworks Clauses Act 1847 (10 *&* 11 *Vict. c.* 17), *ss.* 28-34, *"with respect to the breaking up of streets," the East London Waterworks Company are empowered to supply water in a district which includes the parish of St. Matthew, Bethnal Green.*

By certain "regulations" made by the company under the Metropolis Water Act 1871 (34 *&* 35 *Vict. c.* 113) *it was provided that every communication pipe for the conveyance of water to be supplied by the company into any premises should have at or near its point of entrance into the premises, and if desired by the consumer within the premises, a sound, suitable stop-valve, of the screw-down kind, with an area of waterway not less than that of a half-inch pipe, and not greater than that of the communication pipe, and if placed in the ground the stop-valve should be protected by a proper cover and guard-box.*

Held, that the waterworks company were entitled to place stop-valves, protected by guard-boxes, in the public footway.

Judgment of Mathew and Smith, JJ. affirmed.

Appeal by the defendants from the judgment of Mathew and Smith JJ., on a special case stated in an action brought for removing and interfering with the covers or guard-boxes protecting stop-valves laid down by the plaintiffs in the streets in the defendants' parish.

The special case is printed in the report of the case in the court below (*ante*, p. 86; 54 L. T. Rep. N. S. 180).

Sect. 28 of the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17), on which the judgment of the Court of Appeal mainly turned, is as follows:

The undertakers, under such superintendence as is hereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, conduits, service-pipes, and other works and engines, and from time to time repair, alter, or remove the same, and for the purposes aforesaid remove and use all earth and materials in and under such streets and bridges, and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district included within the said limits, doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers.

(*a*) Reported by P. B. Hutchins, Esq., Barrister-at-Law.

Sect. 26 of the Metropolis Water Act 1852 (15 & 16 Vict. c. 84), sects. 17 and 24 of the Metropolis Water Act 1871 (34 & 35 Vict. c. 113), and the 12th regulation made by the company under those Acts will be found set out in the special case.

Finlay, Q.C. and *T. Beven*, for the defendants, in support of the appeal.—The waterworks company had no statutory authority to lay down these stop-valves and guard-boxes, and therefore the vestry were justified in removing them. The company cannot justify under the 12th regulation, for that regulation is not "necessary or expedient" within the meaning of 15 & 16 Vict. c. 84, s. 26, and consequently is *ultra vires*. It is true that by 34 & 35 Vict. c. 113, s. 24, the regulations shall "be binding upon and be observed by all parties;" but this does not affect the vestry, for the regulations apply only as between the company and the consumer. The vestry are not included in the phrase "all parties." The company cannot justify under the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17), for by sect. 32 they are to "reinstate and make good the road or pavement;" this they have failed to do by reason of the insertion of the guard-boxes. When the pavement close to the guard-boxes wears down, which must happen in the course of time, the guard-boxes will become dangerous, and will be a nuisance.

Sir *Richard Webster*, A.G. (*R. S. Wright* with him) for the plaintiffs.—There is no finding in the special case which justifies the contention that what has been done is likely to cause a nuisance. The 12th regulation is necessary and expedient, and by 34 & 35 Vict. c. 113, s. 24, is binding upon "all parties." These words are wide enough to include the vestry, and cannot be read in the limited sense of parties to a contract, for there is no contract. The reinstatement of the pavement is sufficient to satisfy the requirements of 10 & 11 Vict. c. 17, s. 32, and what has been done by the company is reasonably necessary for supplying water to the inhabitants within the meaning of sect. 28 of that Act. The following cases were cited:

Coverdale v. *Charlton*, 40 L. T. Rep. N. S. 88; 4 Q. B. Div. 104;
Kent v. *Worthing Local Board*, 48 L. T. Rep. N. S. 362; 10 Q. B. Div. 118;
Moore v. *Lambeth Waterworks Company*, 55 L. J. 304, Q. B.;
Wandsworth Board of Works v. *United Kingdom Telephone Company*, 51 L. T. Rep. N. S. 148; 13 Q. B. Div. 904.

Finlay, Q.C., replied.

Lord Esher, M.R.—I am of opinion that this appeal ought to be dismissed. What has been done by the defendants can cause no injury to anyone, and there was no reasonable ground for taking proceedings against them; but what we have to decide is whether they were legally justified in doing what they have done. The Legislature thinks that a supply of water is a good thing for the public, and has accordingly made provision for furnishing such supply. Formerly the water supply was intermittent. Now there is a constant supply, and appliances for turning off the water in the main must exist, and must come up to the surface. The difficulty to be got over is the liability to waste of the water where the supply is constant. Accordingly, by the Metropolis Water Act 1852 (15 & 16 Vict. c. 84), sect. 26, it provided that the companies may "make such regulations as shall be necessary or expedient for the purpose of preventing the waste or misuse of water." The word "regulations" there must mean rules and orders which are to be carried into effect. The same section provides that the regulations are to be made "with the approval of the Board of Trade." This proviso was inserted in order to protect individuals. Then the use of the words "and therein, amongst other things, to prescribe the size, nature, and strength of the pipes," &c., shows that the particular things specified are merely named as instances of what may be done. In 1871 it was made compulsory on the waterworks companies to make regulations, for by sect. 17 of the Metropolis Water Act 1871 (34 & 35 Vict. c. 113), "Every company shall . . . make regulations for the purposes for which regulations may be made under the authority of sect. 26 of the Metropolis Water Act 1852." Now, therefore, they are bound to make regulations. Then sect. 24 provides that the regulations, shall "be binding upon and be observed by all parties." That I think means not only the persons whose houses are supplied with water, but may include the authority who have to water the street, or who may have to use the water for any other purposes, so that the provisions of the section are binding on everyone. Then it goes on to provide that the regulations "shall be sufficient warrant for all persons acting under the same," that is, all persons doing such works as are necessary for providing and regulating the supply of water. The power to do such works is conferred by sect. 28 of the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17). The waterworks company in making regulations is controlled by a public authority, that is, by the Board of Trade, and that authority has confirmed the regulations under which the stop-valves have been laid down. For these reasons I have come to the conclusion that the judgment of the Divisional Court ought to be affirmed.

Bowen, L.J.—The waterworks company have put down stop-valves and covers in the street, and the vestry complain that they have no authority to do so. It is not disputed that, if this is so, the proper persons to interfere are the vestry; so the question is, whether the waterworks company were acting within the scope of their authority in laying down these stop-valves and covers. The source of the company's power is sect. 28 of the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17), and if they cannot justify under that section they cannot justify under any regulations which they may have made. The question therefore turns on the construction of sect. 28. It has been contended that the company has no power to break the surface of the street; that contention is untenable on the words of the section. It is true that they must not cause a nuisance; that is apparent from sect. 32 of the same Act, for the surface is not reinstated if it is left in such a state as to cause a nuisance. In the present case, however there is no nuisance. Then it is contended that the surface may be broken only for the purpose of works under, not of works on, the surface. This depends on sect. 32, and I think that section means, not that every inch of the surface must be placed exactly as it was before,

but that the surface must be reinstated substantially. From 1847 down to 1871 only an intermittent supply of water was provided. During this period the Metropolis Water Act 1852 (15 & 16 Vict. c. 84) was passed, which contains provisions in sect. 26 enabling the companies to make regulations. The group of sections in which sect. 26 occurs contains provisions for preventing misuse of water. Sects. 23 and 24 are directed to that object, and so is sect. 25, which provides for cutting off the water in certain cases. That section is intended to regulate the relations between the company and their customers, and in the same way I think sect. 26 is intended *primâ facie* to regulate the conduct of the company and their customers, though I do not say that its provisions might not go outside that object, for perhaps they might be applied so as to prevent other persons from interfering with the apparatus used for the purpose of the water supply. By the Metropolis Water Act 1871 (34 & 35 Vict. c. 113) a new system was introduced in consequence of which new works have become necessary or expedient, and new regulations are required, which are provided for by sects. 17 and 24. Under sect. 26 of the Act of 1852 the regulations applied only to waste and misuse of the water, but the new system applies to undue consumption and contamination also. *Primâ facie* the regulations under the Act of 1871 would apply as between the company and their customers, though they might under certain circumstances affect other persons in the same way as I have pointed out with regard to regulations under the Act of 1852. If the company had nothing but the regulations to rely upon their position would be a feeble one, for they have to justify their entry on the street, which cannot be justified by regulations. They are compelled, therefore, to go back to sect. 28 of the Act of 1847. That is the source of their power to do what they have done, though the history of the case and the regulations throw light on the question whether what has been done was necessary. I am of opinion that the 28th section of the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17) affords a statutory protection to works which have since become necessary, and therefore, although I do not rest my judgment on exactly the same grounds as the learned judges who heard the case in the court below, I have come to the conclusion that their decision is right, and ought to be affirmed.

FRY, L.J.—I also am of opinion that this appeal fails. The most important enactment is sect. 28 of the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17), which empowers the company to execute certain specified works, "and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants." These words, in my opinion, are not to be read narrowly, but must be taken to include everything that is reasonably necessary in relation to the supply, and everything which is necessary for the execution of the works is necessary for the supply of water. The Act of 1871 has provided for a constant supply, and therefore all acts which are necessary for the purpose of maintaining a constant supply are now within the powers of the company. I can see no great distinction between necessary and expedient. Here the company deem these stop-cocks and guard-boxes necessary, which seems to me not unreasonable; therefore the laying of stop-cocks and guard-boxes is included in "acts which the undertakers . . . . deem necessary for supplying water" within the meaning of sect. 28 of the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17). It is contended that only underground works are permitted, and not works on the surface of the ground. It is true that anything which interfered with the reinstatement of the surface would be beyond the powers of the company; but I cannot see that what has been done here is inconsistent with the reinstatement of the surface according to the fair construction of sect. 32. This conclusion is fortified by the terms of the Metropolis Water Act 1852 (15 & 16 Vict. c. 84). There were two classes of persons who might waste the water—first, the consumers; and secondly, the road authority, who might possibly act wastefully in watering the roads; and I do not think that sect. 26 of that Act was directed against consumers only. In the same manner it seems difficult to say that the power to make regulations under the Metropolis Water Act 1871 (34 & 35 Vict. c. 113) is confined to regulations directed against consumers. The words of sect. 24 are "shall . . . . be binding upon and be observed by all parties," and it is difficult to say that these words are not wide enough to include all persons. But, however this may be, I am of opinion that by the Act of 1847, read with the Act of 1871, the company had the right to lay down these stop-valves and guard-boxes, and therefore the vestry were not justified in interfering with them, and the judgment ought to be affirmed.

Appeal dismissed.

Solicitors for plaintiffs, *Birchams.*
Solicitor for defendants, *Robert Voss.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Monday, April 19, 1886.

(Before MATHEW and SMITH, JJ.)

FLINTHAM AND OTHERS (pets.) v. ROXBOROUGH (resp.). (a)

Municipal election—Qualification to be elected town councillor—Being on burgess roll but without qualification—Municipal Corporations Act 1882 (45 & 46 *Vict. c.* 50), *s.* 11, *sub-sect.* 3, *and s.* 51.

By sub-sect. 3 *of sect.* 11 *of the Municipal Corporations Act* 1882 "*every person shall be qualified to be elected and to be a councillor who is, at the time of election, 'qualified to elect' to the office of councillor. . . .*"

By sub-sect. 1 *of sect.* 51 "*at an election of councillors a person shall be entitled to subscribe a nomination paper, and to demand and receive a voting paper, and to vote, if he is enrolled in the burgess roll. . . .*"

The expression "qualified to elect" in sub-sect. 3 *of sect.* 11 *is not equivalent to and does not mean the same as the expression "entitled to vote" in sub-sect.* 1 *of sect.* 51.

The mere fact that a person is enrolled in the burgess roll and so "entitled to vote" at a

(a) Reported by F. A. CRAILSHEIM, Esq., Barrister-at-Law.

municipal election, does not of itself make him a person "qualified to elect" and so "qualified to be elected" a councillor under sub-sect. 3 of sect. 11 of the Municipal Corporations Act 1882.

1. THIS was a petition under the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50) against the return of the respondent to the office of town councillor of the borough of Aldeburgh, which was tried before the commissioner to whom the trial of the said petition was assigned, on the 23rd and 24th March 1886.

2. The election was held on the 2nd Nov. 1885, when the respondent was declared to be elected.

3. The petition alleged that the respondent was not at the time of the election qualified to be elected to the office of town councillor of the said borough, on the ground that he was not entitled to be enrolled as a burgess of the said borough, by reason of his not having complied with the requirements of sect. 9, sub-sect. 2, clauses *b*, *c*, *d*, and *e* of the Municipal Corporations Act 1882, and that he was not resident beyond seven miles but within fifteen miles of the said borough, or entered in the separate non-resident list directed by the said Act to be made, and prayed that the election might be declared void.

4. The facts, so far as they are material to the present case, are as follows:—

(*a*.) The borough is not divided into wards.

(*b*.) The respondent was and had been since the month of Oct. 1880, the owner of a house in the borough called Norfolk Cottage.

(*c*.) The respondent was enrolled as a burgess in the burgess roll in force at the time of the election, in respect of the said house as qualifying property.

(*d*.) The respondent was not before, or at, or after the time of the election, entitled to be enrolled as a burgess, as required by sect. 11, sub-sect. 2 of the said Act.

(*e*.) The respondent was not on July 15, 1885, nor had he been during the whole of the then last preceding twelve months, in the occupation, joint or several, of the said house, as required by sect. 9, sub-sect. 2, of the said Act.

(*f*.) The respondent had not during the whole of those twelve months resided in the borough or within seven miles thereof, as required by sect. 9, sub-sect. 2, of the said Act.

(*g*.) The respondent was not before, or at, or after the time of the election, resident beyond seven miles, but within fifteen miles, of the borough, nor was he entered in the separate non-resident list directed by the said Act to be made as respectively required by sect. 11, sub-sect. 2, of the said Act.

(*h*.) The respondent had not succeeded to the said property by descent, marriage, marriage settlement, devise, or promotion to a benefice or office within the provisions of sect. 33, sub-sect. 1, of the said Act.

(*i*.) The respondent was not a person prohibited by law from doing any Act in the 51st section of the said Act mentioned, within the meaning of sub-sect. 3 of the last-named section.

(*k*.) The respondent was not qualified to be elected a councillor, unless he was so qualified under the provisions of sub-sect. 3 of the 11th section of the Act, by reason only of his being enrolled as a burgess in the burgess roll, and not being prohibited by law from doing any Act in the 51st section of the said Act mentioned.

5. The petitioners insisted that the respondent was not so qualified, and that he was not entitled to be elected a councillor, relying especially on sect. 11, sub-sect. 2, and on sect. 41, sub-sect. 2, of the Act. The respondent insisted that he was not prohibited by law from voting within the meaning of sect. 51, sub-sect. 3, and that being enrolled as a burgess in the burgess roll he was entitled to demand and to receive a voting paper, and to vote by virtue of the 1st sub-section of sect. 51; that he was therefore a person who was at the time of election qualified to elect to the office of councillor within the meaning of the said sub-sect. 3 of the said 11th section, and that for this reason he was qualified to be elected a councillor within the meaning of the said 3rd sub-section.

6. At the conclusion of the trial the commissioner determined, subject to the opinion of the High Court of Justice on the question of law which was now submitted to their consideration, that the election was void, but at the request of the respondent and by consent of the parties, he postponed the granting of his certificate until the question now submitted to the consideration of the High Court had been determined.

7. The question for the consideration of the High Court was whether or not the respondent, by reason only of his being enrolled in the burgess roll, and not being a person prohibited by law from doing any act in the said 51st section mentioned, was at the time of the election a person qualified to elect to the office of councillor, and therefore qualified to be elected a councillor within the meaning of the 3rd sub-section of the 11th section.

If the court should determine in the affirmative, the commissioner's certificate will be that the respondent is duly elected; if in the negative, that the respondent is not duly elected, and that the election is void.

By sect. 11 of the Municipal Corporations Act 1882 it is enacted that—

(1.) The councillors shall be fit persons selected by the burgesses.

(2.) A person shall not be qualified to be elected to be a councillor, unless he (*a*) is enrolled and is entitled to be enrolled as a burgess; or (*b*) being entitled to be so enrolled in all respects, except that of residence, is resident beyond seven miles, but within fifteen miles of the borough, and is entered in the separate non-resident list directed by the Act to be made; and (*c*) in either of those cases, is seised or possessed of real or personal property, or both, to the value or amount, in the case of a borough having four or more wards, of 1000*l*., or in the case of any other borough, of 500*l*., or is rated to the poor rate in the borough, in the case of a borough having four or more wards, on the annual value of 30*l*., and in the case of any other borough, of 15*l*.

(3.) Provided that every person shall be qualified to be elected and to be a councillor who is, at the time of election, qualified to elect to the office of councillor; which last-mentioned qualification for being elected shall be alternative for and shall not repeal or take away any other qualification.

By sect. 51:

At an election of councillors, a person shall be entitled to subscribe a nomination paper, and to demand and receive a voting paper, and to vote, if he is enrolled in the burgess roll, or, in the case of a ward election, the ward roll, and not otherwise. Nothing in this section shall entitle any person to do any act therein mentioned who is prohibited by law from doing it, or relieve him from any penalty to which he may be liable for doing it.

Arthur Charles, Q.C. (with him *C. C. Scott* and *S. Day*), for the respondent, showed cause.—The respondent is "entitled to vote" from the mere fact of being on the burgess roll, under sect. 51 of the Act:

Stowe v. *Joliffe*, 30 L. T. Rep. N. S. 795; L. Rep. 9 C. P. 734.

Being "qualified to elect" is the fact of being on the burgess roll, and not being prohibited by law from voting. The respondent was on the burgess roll, and was not prohibited by law from voting, and therefore it is submitted that he was duly elected. 43 Vict. c. 17 was passed expressly to render being on the burgess roll sufficient, without inquiring into the qualification to be on the list. He also referred to

Middleton v. *Simpson*, 42 L. T. Rep. N. S. 55; 5 C. P. Div. 183.

J. Fox for the petitioners.—In *Middleton* v. *Simpson* (42 L. T. Rep. N. S. 55; 5 C. P. Div. 183) it was held that, to be eligible for the office of town councillor, a candidate must be "entitled to be" on the burgess roll as well as "on" the roll, and that the burgess roll containing his name was not conclusive evidence that he was "entitled to be on" the roll. The intention of the Act 43 Vict. c. 17 was purely to abolish the necessity for the property qualification which previously existed. It is admitted that the respondent was "entitled to vote," but it is contended that he was not "qualified to elect," and "qualified to elect" does not mean "entitled to vote," otherwise there would be nothing in the Act to prevent a woman or a mayor becoming a town councillor under sect. 63 of the Act. To be qualified to elect must mean qualified within the provisions of sect. 9 of the Act, and with the qualifications therein contained it has been found that the respondent has not complied. The election was therefore void.

Charles, Q.C., in reply.

MATHEW, J.—I am of opinion that our answer to the question asked us in this case must be in the negative, and that the respondent has not been duly elected. I think that the section has been correctly interpreted by counsel for the petitioners. It was argued on behalf of the respondent that, under sect. 51 of the Act, a person being entitled to vote if he is enrolled in the burgess roll, provided he is not prohibited by law from voting, is a person qualified to elect within the meaning of the section. Mr. Charles' argument is that, if he is entitled to vote by reason of his being enrolled in the burgess roll, he is a person qualified to elect within sub-sect. 3 of sect. 11 of the Municipal Corporations Act 1882, which says that "every person shall be qualified to be elected and to be a councillor who is, at the time of election, qualified to elect to the office of councillor; which last-mentioned qualification for being elected shall be alternative for, and shall not repeal or take away any other qualification." What "qualified to elect" there means is shown by sect. 9, which for this purpose must be read together with sect. 11. Sect. 9 contains a statement of the qualification of a burgess, and enacts that "every person so qualified"—that is, as provided in the previous part of the section—"shall be entitled to be enrolled as a burgess, unless he . . . is disentitled under any Act of Parliament." Sect. 11 applies to the qualification of councillors, and it enacts that "a person shall not be qualified to be elected or to be a councillor, unless he is enrolled and entitled to be enrolled as a burgess; or, being entitled to be so enrolled in all respects except that of residence, is resident beyond seven miles, but within fifteen miles of the borough, and is entered in the separate non-resident list directed by this Act to be made; and, in either of these cases, is seised or possessed of real or personal property, or both, to the value or amount, in the case of a borough having four or more wards, of 1000*l.*, and in the case of any other borough, of 500*l.*, or is rated to the poor rate in the borough, in the case of a borough having four or more wards, on the annual value of 30*l.*, and in the case of any other borough, of 15*l.*" Then comes the proviso that "every person shall be qualified to be elected and to be a councillor who is, at the time of election, qualified to elect to the office of councillor, which last-mentioned qualification for being elected shall be alternative for and shall not repeal or take away any other qualification." Thus we have a uniform qualification for burgesses and councillors in the first place, and there are added, in the case of councillors, certain other qualifications. It is admitted that the respondent does not come up to some of the qualifications, as to residence, &c., required by sect. 9, but it is argued that the fact of his being enrolled on the burgess roll is sufficient to qualify him to be elected under sub-sect. 2 (*a*) of sect. 11. I think, however, that this qualification is twofold, namely, "being enrolled" and being "entitled to be enrolled," and it is admitted that he was not so entitled. It is then contended by Mr. Charles that the fact of his being on the burgess roll is stated in sect. 51 to be sufficient to "entitle him to vote" at an election of councillors, and, that being so, must mean that he is "qualified to vote." But we must consider whether that is the correct construction of the words in the proviso (sub-sect. 3) of sect. 11, where being "qualified to elect" is declared to be a sufficient qualification for being "qualified to be elected." When we refer back to 43 Vict. c. 17 we find that this sub-section also appears in that Act, which was repealed by the Act of 1882. The Act of 1880 is entitled "an Act to abolish the property qualification for members of municipal corporations and local governing bodies." The sole object of that Act was to take away the disability of every elector who was qualified to vote as an elector, but not possessed of the necessary property. Now sub-sect. 1 of sect. 1 of that Act finds its way into the Act of 1882, and must be taken to bear the same signification as in the earlier Act. It merely relieves town councillors from such disability, but does not affect the qualifications for being on the burgess roll as given by sect. 9. This limited construction is supported too by sect. 41 of the Act of 1882, which imposes a penalty on unqualified persons acting in a corporate office. Sub-sect. 1 of this section enacts that "If any person acts in a corporate office without having made the declaration by this Act required, or without being qualified at the time of making the declaration, or after ceasing to be qualified, or after becoming disqualified, he shall for each offence be liable to a fine not exceeding 50*l.*, recoverable by action." And by sub-sect. 2 "a person being in fact

enrolled in the burgess roll shall not be liable to a fine for acting in a corporate office on the ground only that he was not entitled to be enrolled therein." Apparently, in default of these sub-sections, a person might appear on the burgess roll, but notwithstanding be subject to a penalty. Again, as has been pointed out, sect. 63 enacts that "for all purposes connected with and having reference to the right to vote at municipal elections, words in this Act importing the masculine gender include women." Clearly this refers to sections entitling persons to vote, but it cannot apply to those imposing qualifications for being elected as town councillors or mayors. The effect of that section clearly is to exclude women from acting under the Act, except for purposes connected with and having reference to the right to vote at municipal elections. I do not think that the Legislature meant that the words "qualified to elect" were to be equivalent to "entitled to vote," and I am of opinion that the respondent was not duly elected. This petition must therefore be allowed.

Smith, J.—I am of the same opinion. The point is really a very short one, and the question is, whether the words "qualified to elect" in sub-sect. 3 of sect. 11 of the Municipal Corporations Act 1882 have the same meaning as the words "entitled to vote" in sub-sect. 1 of sect. 51 of that Act. It is difficult off-hand to say that they do not, generally speaking, mean the same thing, but, after having heard the argument for the petitioner, I am clearly of opinion that these phrases are not synonymous so far as this statute is concerned. To discover the meaning of "qualified to elect," sects. 9 and 11 of the Act must be read together. Sect. 9 applies to the qualification to be put on the burgess roll; sect. 11 to the qualifications to be entitled to become a town councillor; and, apart from sub-sect. 3 of sect. 11, which is taken practically from the Act of 1880 (43 Vict. c. 17), the qualification to be a councillor is a much heavier one than that which entitles a person to be a burgess merely. The qualifications to be enrolled as a burgess are stated in sect. 9, amongst others being provisions as to residence and payment of the poor rate, which, it is found, had not been here complied with by the respondent. If sect. 9 stood alone, the proviso, sub-sect. 3 of sect. 11, could refer only to the qualifications therein contained, and there would be no difficulty. But Mr. Charles says that, by sub-sect. 1 of sect. 51, the fact of being on the burgess roll is stated to entitle a man to vote, that that is equivalent to making him qualified to elect, and that being qualified to elect is, by the aforesaid proviso, a qualification for being elected. But that is to say that "qualified to elect" does not necessarily mean possessed of the proper qualifications under sect. 9, because, by sect. 51, "at an election of councillors, a person shall be entitled to vote if he is enrolled in the burgess roll;" and therefore he says that, though the respondent had not the proper qualification, yet, simply because he happened to be on the burgess roll, he is entitled to vote, and so qualified to elect. I do not think that that is the meaning of sect. 51. In my opinion that section only refers to the qualifications of persons entitled to vote, and not of persons entitled to be elected town councillors. There must be some distinction between the words "qualified to elect" and "entitled to vote" in these several sections, else sect. 51 would override all the qualifications laid down in sect. 9. I agree with Mr. Fox that sect. 63 bears out the distinction; women, though entitled to vote, are not to be qualified to hold a corporate office, "for all purposes connected with the right to vote at municipal elections in this Act, words importing the masculine gender include women." By the terms of this section women are expressly limited to the exercise of a right to vote, as distinct from being qualified to elect. Sect. 41 shows that the Act contemplated the possibility of a person being on the burgess roll without being entitled, but, by its very provisions as to penalties and relief, it shows that the fact of his being on the roll is not sufficient to exempt him from such penalties, or to entitle him to such relief without this express provision. In the same way, I do not think the mere fact of his being on the burgess roll would *ipso facto* qualify him to be elected as a councillor when there was evidence that he was not, in fact, entitled to be so enrolled, and therefore I am of opinion that the respondent in this case was not duly elected.

Petition allowed.

Solicitors for the petitioners, *Parker, Garrett, and Parker.*

Solicitors for the respondent, *Stretton, Hilliard and Co.*

Saturday, March 20, 1886.

(Before Mathew and Smith, JJ.)

Reg. on the prosecution of Hammans *v.* The Justices of the Borough of Andover. (*a*)

Licensing law—Licensed premises—Conviction of occupier — Record of conviction on licence — Owner's right of appeal—The Licensing Act 1872 (35 *&* 36 *Vict. c.* 94), *s.* 52.

Where a tenant of licensed premises has been convicted of permitting drunkenness on his premises, and the justices, under the 13th section of the Licensing Act 1874 (37 *&* 38 *Vict. c.* 49), *direct the conviction to be indorsed on the licence, the owner of the premises is not a "person aggrieved," within the meaning of the 52nd section of the Licensing Act* 1872 (35 *&* 36 *Vict. c.* 94), *so as to be entitled to appeal against the conviction.*

Notice of appeal was subsequently given by the owner of the licensed premises, who was not a party to the proceedings at the petty sessions, and on the appeal it was held by the Court of Quarter Sessions that, as the owner was a person whose pecuniary interest in the premises was immediately affected by the conviction, he was a "person aggrieved," within the meaning of the 52nd section of the Act of 1872.

Held, on case stated, that the owner of the premises was not a "person aggrieved," within the meaning of the section, and that the section therefore gave him no locus standi for the purpose of appealing against the record of the conviction on the licence.

This was a case stated by the learned Recorder of the borough of Andover at the general quarter sessions of the peace, held on the 7th July 1885, Turner Poulter Clarke, Charles Walter Kellow, and William Bracher, three of the justices of the

(*a*) Reported by Joseph Smith, Esq., Barrister-at-Law.

borough of Andover, being the appellants therein, and Henry Hammans the respondent.

The case was as follows:—

1. At the petty sessions for the borough of Andover, held on the 4th May 1885, before the appellants, hereinafter called "the justices," one Samuel Garner, the landlord of the Pelican inn, Andover, hereinafter called the "licensee," was, upon his confession, convicted before the justices of having unlawfully permitted drunkenness in the Pelican inn on the 18th April 1885, and was adjudged by them to pay the sum of thirty shillings by way of fine and nine shillings for costs, and under sect. 13 of the Licensing Act 1874 the justices decided that the said conviction should be indorsed on the licence which he (the licensee) held for the Pelican inn.

2. After this conviction and record, on the 4th May 1885, Henry Hammans the respondent, who was not a party to the proceedings at the petty sessions mentioned in the first paragraph, but who is the owner of the Pelican inn and ex-mayor of Andover, from whom the licensee directly leases it, and who is a brewer carrying on business within the borough of Andover, and is hereinafter called the "owner," gave to the justices notice of appeal therefrom to the next general quarter sessions of the peace for the borough of Andover as a person feeling aggrieved by the said order or conviction, and stating the following as the grounds of his appeal: (1.) That the conviction was unjust to the owner; (2.) That the owner did not know that the licensee had unlawfully used the Pelican inn; (3.) That the offence of the licensee was a first offence; (4.) That the offence was sufficiently punished by the fine then imposed on the licensee, and that there was no necessity or occasion to record the conviction or order on the licence.

3. The appeal mentioned in the 2nd paragraph was heard by me on the 7th July 1885 at the general quarter sessions for the borough of Andover. After the notice of the appeal had been admitted, counsel for the justices objected to my hearing the appeal, on the following grounds: (1.) That the owner not having been a party to the original proceedings, had no *locus standi* before me, and that his remedy, if any, was under the 56th section of the Licensing Act 1872; (2.) That the owner was not an aggrieved person within the meaning of the 52nd section of the Licensing Act 1872, he not being immediately affected by the indorsemont of the conviction upon the licence; (3.) That the licence being the absolute property of the licensee the conviction and indorsement did not entail loss upon the owner. And he quoted in support of his objections the following cases:

Woller and Wife v. *Knott*, 1 Ex. Div. 265;
Reg. v. *The Justices of Middlesex*, 3 B. & A. 938.

After hearing counsel for the owner, who relied on the following cases:

Garrard v. *The Justices of Middlesex*, 12 Q. B. Div. 620, 628;
Newton v. *The Justices of the West Riding of Yorkshire*, 52 L. J. 99, M. C.;

I held that, if the owner proved that he was a person whose pecuniary interest in the Pelican inn was immediately affected by the conviction and order mentioned in the 1st paragraph, he was an aggrieved person within the 52nd section of the Licensing Act 1872.

4. The owner then gave evidence that the Pelican inn was worth about 1000*l.*, provided that the licence had no conviction indorsed upon it, and that the loss of the licence would make a difference in the value of it of from 300*l.* to 400*l.* The rent of it without the licence would be from 12*l.* to 15*l.* or perhaps 16*l.* a year. His counsel also called Mr. Reuben Cross, a brewer of Andover, who stated that he would not give so much for the Pelican inn by 200*l.* if the licence had the conviction indorsed upon it, and that the licence would have to go to the next tenant with a black mark upon it, but no evidence was given to show that the justices had wrongly convicted the licensee, or that the sentence was excessive upon him.

5. The counsel for the justices having stated that he had no evidence as to value to offer in reply, I held that the owner was a person aggrieved by the conviction and order of the justices, mentioned in the 1st paragraph, within the meaning of the 52nd section of the Licensing Act 1872, and I allowed the appeal of the owner by ordering the indorsement of the conviction upon the licence to be struck out, but upon the application of the counsel for the justices, I granted this case for the opinion of the Queen's Bench Division of the High Court of Justice.

The question for the opinion of the court is: Is the owner, under the circumstances above mentioned, a person aggrieved within the meaning of the 52nd section of the Licensing Act 1872? If the court shall be of opinion that the owner is not such an aggrieved person, then my judgment ordering the indorsement upon the licence to be struck out is to be quashed; otherwise it shall be confirmed.

Addison, Q.C. (with him *Knowles*) for the justices. — This being a criminal prosecution against the tenant of the premises, under the Licensing Act 1872 (35 & 36 Vict. c. 94), s. 13 (*a*), and the indorsement on the licence being, by the 13th section of the Licensing Act 1874 (37 & 38 Vict. c. 49), part of the sentence for the offence, the owner of the premises can have no *locus standi* for the purposes of appealing against the indorsement unless it is specifically given him by statute. The only right of appeal given by the statute is that given by the 52nd section of the Act of 1872 (*b*), and it is submitted that the

(*a*) The Licensing Act 1872 (35 & 36 Vict. c. 94) enacts as follows, s. 13: If any licensed person permits drunkenness, or any violent, quarrelsome, or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty not exceeding for the first offence ten pounds, and not exceeding for the second and any subsequent offence twenty pounds.

(*b*) Sect. 52. If any person feels aggrieved by any order or conviction made by a court of summary jurisdiction, the person so aggrieved may appeal therefrom subject to the conditions and regulations following: (1) The appeal shall be made to the next court of quarter sessions for the county or place in which the cause of appeal has arisen holden not less than fifteen days after the decision of the court from which the appeal is made. (2) The appellant shall, within seven days after the cause of action has arisen, give notice to the other party and to the court of summary jurisdiction of his intention to appeal, and of the ground thereof. (3) The appellant, immediately after such notice, shall enter into a recognisance before a justice of the peace, with two sufficient sureties, conditioned personally to try such appeal, and to abide the judgment of the court thereon, and to pay such costs as may be awarded by the court, or shall give

owner of the premises is not a "person aggrieved" within the meaning of that section. Further, the 56th section of the Act of 1872 (*a*) gives in detail the various grounds which according to the intention of the Legislature are to give an owner a *locus standi* for appealing against convictions affecting his licence, and it is not conceivable that the Legislature should introduce into the Act one section rigidly limiting his right of appeal, and should have intended to include him under the general words "any person aggrieved by any order or conviction" used in another section, and so give him the right of appeal in all cases.

Warry for the owner.—The words of the Act are sufficiently wide to include the owner of the premises. The words "if any person feels aggrieved by any order or conviction made by a court of summary jurisdiction the person so aggrieved may appeal therefrom," allow the court no option, as it is found as a fact in the case that the owner of the premises is "a person aggrieved." The words were construed in *Rex* v. *The Justices of Middlesex* (3 B. & A. 938), where it was held that a "person who shall think himself aggrieved" meant a person immediately aggrieved, as by refusal of a licence to himself, by fine, &c., and not one who is consequentially aggrieved, as for instance the occupier of neighbouring licensed premises. In this case the owner of the premises comes within the description there given, as the licence of his premises was affected. Again, in *Garrett and others* v. *The Licensing Justices of Middlesex* (12 Q. B. Div. 620) it was held that mortgagees were "persons aggrieved," because their pecuniary interest in the premises was immediately affected. That case is binding on the court, the owner of these premises being virtually interested in the same way, and the decision in *Newton* v. *The Justices of the West Riding* (52 L. J. 99, M. C.) is also in favour of the owner's right to appeal. [Smith, J.—There the parties aggrieved had a right to appear at the original proceedings. What *locus standi* had the owner here when this charge was preferred against the tenant?] The fact of his having no *locus standi* at the original proceedings is no reason why he should not appeal under the power given by the section. [Mathew, J.—The point raised here was really never discussed in that case.] It is submitted that that case covers the point raised here. The interest of the owner was clearly prominently in the mind of the Legislature at the time the Act was passed, and the 50th section in terms recognises his interest in the licence. Further, it was clearly the intention of the Act of 1874, in making the recording of the conviction on the licence more discretionary, to make a change in favour of the owner, and the 14th section of that Act specifically empowers the owner, in cases where a licensed person is convicted for the first time of certain offences and his licence forfeited, to apply to the justices for a temporary authority to carry on the same business on the same premises until the next licensing day. In *Wooler and Wife* v. *Knott* (34 L. T. Rep. N. S. 362; 1 Ex. Div. 265) the court were clearly of opinion that the indorsement of convictions upon the licence would "affect" the licence within the meaning of a covenant in the lease, and it is submitted that, where a licence is affected in such a manner, the owner is a "person aggrieved" within the meaning of the statute. The whole tendency of the legislation on the subject is such as to show that the Legislature could not have intended to leave the owner without redress in the circumstances of this case.

Mathew, J.—I am of opinion that the order of the Court of Quarter Sessions must be quashed. The owner of the premises has, in my judgment,

such other security by deposit of money or otherwise as the justice may allow. (4) Where the appellant is in custody the justice may, if he thinks fit, on the appellant entering into such recognisance or giving such other security as aforesaid, release him from custody. (5) The Court of Appeal may adjourn the appeal, and upon the hearing thereof may confirm, reverse, or modify the decision of the court of summary jurisdiction, or remit the matter to the court of summary jurisdiction, with the opinion of the Court of Appeal thereon, or make such other order in the matter as the court thinks just. The Court of Appeal may also make such other order as to costs to be paid by either party as the court thinks just.

(*a*) Sect. 56. Where any tenant of any licensed premises is convicted of an offence against this Act, and such offence is one the repetition of which may render the premises liable to be disqualified from receiving a licence for any period, it shall be the duty of the clerk of the licensing justices to serve, in manner provided by this Act, notice of every such conviction on the owner of the premises.

Where any order of a court of summary jurisdiction declaring any licensed premises to be disqualified from receiving a licence for any period has been made, the court shall cause such order to be served on the owner of such premises, where the owner is not the occupier, with the addition of a statement that the court will hold a petty sessions at a time and place therein specified, at which the owner may appear and appeal against such order on all or any of the following grounds, but on no other grounds:

(a) That notice as required by this Act, has not been served on the owner of a prior offence which on repetition renders the premises liable to be disqualified from receiving a licence at any period; or

(b) That the tenant by whom the offence was committed held under a contract made prior to the commencement of this Act; and that the owner could not legally have evicted the tenant in the interval between the commission of the offence in respect of which the disqualifying order was made and the receipt by him of the notice of the immediately preceding offence, which on repetition renders the premises liable to be disqualified from receiving a licence at any period; or

(c) That the offence in respect of which the disqualifying order was made occurred so soon after the receipt of such last-mentioned notice that the owner, notwithstanding he had legal power to evict the tenant, could not with reasonable diligence have exercised that power in the interval which occurred between the said notice and the second offence.

The Licensing Act 1874 (37 & 38 Vict. c. 49) enacts as follows:

Sect. 13. Where any licensed person is convicted of any offence against the principal Act which by such Act was to have been or might have been indorsed upon the licence, or of any offence against this Act, the court before whom the offender is brought shall cause the register of licences in which the licence of the offender is entered, or a copy of the entries therein relating to the licence of the offender, certified in manner prescribed by sect. 58 of the principal Act to be produced to the court before passing sentence, and after inspecting the entries therein in relation to the licence of the offender, or such copy thereof as aforesaid, the court shall declare as part of its sentence whether it will or will not cause the conviction for such offence to be recorded on the licence of the offender, and if it decide that such record is to be made the same shall be made accordingly. A declaration by the court that a record of an offence is to be made on a licence shall be deemed to be part of the conviction or order of the court in reference to such offence, and shall be subject accordingly to the jurisdiction of the Court of Appeal.

no right of appeal under the provisions of the 52nd section of the Act of 1872. Upon the facts, as stated in the case, it appears that the tenant of these licensed premises was, on his own confession, convicted of having unlawfully permitted drunkenness on the premises, and he was thereupon fined for the offence, and the justices directed the conviction to be indorsed on the licence which he held for the premises. There is no evidence at all to show that this conviction was in any way improper, but the owner of the premises, who was not a party to the proceedings at the petty sessions, now appears and says that the punishment is excessive as regards him, and on the ground that it affects the value of his property claims the right to appeal, and he proposes to bring his appeal under the powers of the 52nd section of the Act of 1872 (35 & 36 Vict. c. 94). This section provides that "if any person feels aggrieved by any order or conviction made by a court of summary jurisdiction, the person so aggrieved may appeal therefrom," subject to certain conditions in the section mentioned. Now it is quite clear that the owner could not appeal against the conviction, but it is said that, as the justices directed the conviction to be indorsed on the licence, that was an "order" which affected the owner, and that he is therefore a "person aggrieved" within the meaning of the section, and consequently has a right of appeal thereunder. Now, upon reading the section for the first time, it would at the first glance appear to be applicable to any person aggrieved by an order or conviction of a court of summary jurisdiction; but I have no doubt that it really only applies to a person directly aggrieved by such an order or conviction. The consequences which would follow from a contrary interpretation are so preposterous that it is impossible to adopt it. If a person indirectly affected by such an order or conviction were included within the meaning of the section, then a mortgagee of the premises might intervene and claim the right to appeal, or even a creditor of the owner, or perhaps a creditor's creditor, and it is impossible to say where a line could be drawn. But attention was called to the 31st section by which, when four convictions (whether of the same or of different licensed persons) have within five years been so recorded against premises, those premises shall during one year be disqualified for the purposes of the Act. There can be no doubt that under this section repeated conviction would affect the value of the premises, and licensed premises threatened with a repetition of a conviction are threatened with an injury to them as property. But the argument that the owner is on that account an aggrieved person within the meaning of the section is entirely disposed of if we look at the 56th section, which in my judgment refers back to the 31st section. By that section, "where any tenant of any licensed premises is convicted of an offence against this Act, and such offence is one the repetition of which may render the premises liable to be disqualified from receiving a licence for any period, it shall be the duty of the clerk of the licensing justices to serve notice of every such conviction on the owner of the premises;" and then follow provisions, showing what is to ensue when notice has been served on the owner; enabling him to take the opinion of a court of petty sessions by way of appeal against the order which prejudices his property, and certain grounds are mentioned in the section on which he may appeal. The owner has, therefore, a right to appeal against an order or conviction which is injurious to his property, but, in my opinion, his right is strictly limited to the grounds stated in the 60th section, the provisions of which I think entirely do away with the grievance under which Mr. Warry contends the owner would be labouring if allowed to appeal as an aggrieved person under the 52nd section. I do not propose to go through the cases which have been cited, because they all appear to me to be equally remote from the question we have to decide in this case; but, for the reasons I have given, I think that the order of the Court of Quarter Sessions must be quashed.

Smith, J.—The question raised in this case, is one of considerable importance. It is, what is the true interpretation of the 52nd section of the Licensing Act 1872 (35 & 36 Vict. c. 94)? The facts of the case, to state them as shortly as possible, are these. A publican was convicted at petty sessions for permitting drunkenness in his house, and was fined by the justices, who also directed that the conviction should be recorded on the licence. No one has said that the conviction was in any way improper—in fact the offender pleaded guilty—but the owner of the premises has appealed to the Court of Quarter Sessions against the order, on the ground that it is unjust to him. What has that to do with the offence? The question is, what is just to the offender, not to the owner. I pass by that ground. Secondly, he says that he did know the premises were being unlawfully used. What, again, has that to do with the offence? Thirdly, he says the offence, being a first offence, was sufficiently punished by the fine, and that the conviction ought not to have been recorded on the licence. But in what way has the owner of the premises the right to appeal? He says that he is pecuniarily interested in the premises, and that their pecuniary value is diminished by the record of the conviction on the licence, and that therefore he has a right to appeal under the 52nd section of the Act of 1872, as a person aggrieved by the conviction. Without going further than the section itself, I think that it is manifest, from the internal arrangement of it, that this is not its meaning. Let us see what persons are mentioned in the section. First, the person aggrieved must surely *primâ facie* mean the party accused and convicted. Then, in the 2nd sub-section we find that "the appellant shall within seven days after the cause of appeal has arisen give notice to the other party." Who is the other party? It is not the owner of the premises. It seems to me to mean the prosecutor, to whom the convicted defendant is to give notice. Then, in the 4th sub-section, we find that "where the appellant is in custody the justice may, if he thinks fit, on the appellant entering into such recognisance or giving such other security as aforesaid, release him from custody." This sub-section clearly only contemplates one appellant. From the internal arrangement of the section, therefore, my view is that the "person aggrieved" is the convicted defendant only. But Mr. Warry has said, on behalf of the owner of the premises, that, since the passing of the Act of 1872, owners have been looked upon in a light in which they have never been looked upon before, because by the

31st section of that Act, four convictions within five years would cause the landlord to lose the licence of the premises for a year, and evidence was given before the Court of Quarter Sessions that the record of one conviction on a licence materially diminishes its value. But the Legislature has anticipated this grievance, because the 56th section of the Act, which, in my opinion, refers back to the 31st section, deals with cases in which a repetition of the offence may render the premises liable to be disqualified, and gives the owner a *locus standi* in order that he may come in and prevent the premises from being disqualified by promising to get rid of the tenant, or on any of the other grounds mentioned in the section. That is the protection which the Act gives to the owner of the premises. Then our attention has been called to certain cases. First, in the case of *Newton* v. *The Justices of Yorkshire* (52 L. J. 99, M. C.), the owner wanted the licence transferred, because the tenant had been convicted for the first time of making an internal communication between his licensed premises and unlicensed premises, and the justices having refused to transfer it, appealed to the Court of Quarter Sessions. There the justices decided that they had no jurisdiction to hear it; but the court held, on an application for a *mandamus* to compel the justices to hear the appeal, that the owner of the premises was a person who thought himself aggrieved by an act of a justice within the meaning of the 27th section of 9 Geo. 4, c. 61, and therefore had a right of appeal. Then, in *Garrett* v. *The Licensing Justices of Marylebone, Middlesex* (12 Q. B. Div. 620), the tenant had mortgaged all his interest in the premises and the benefit of the licence, and the mortgagees applied for a renewal of the licence to the occupier, who appeared and stated that he did not wish for a renewal. The licence having been refused, the mortgagees appealed against the refusal to the Court of Quarter Sessions, which dismissed the appeal subject to a case stated, on which Lord Coleridge, C.J. and Stephen, J. held that the mortgagees were persons aggrieved within 9 Geo. 4, c. 61, s. 27, by the refusal of the justices to renew the licence, and that the mortgagees were entitled to appeal. But the vital distinction between those cases and the present is that, in this case, we are dealing with a man who never had a *locus standi* at all, whereas in both those cases the appellants were parties to the original proceedings. I think that, if we allowed the owner of the premises in this case to come in under the words of the 52nd section, we should be enlarging the meaning of those words in a manner never contemplated by the Legislature. In my opinion the "person aggrieved," mentioned in that section, is a person who has a *locus standi* in the original proceedings, and the words are not intended to include any person who has not that qualification. I think, therefore, that the order of sessions must be quashed.

Order of Sessions quashed.

Solicitors for the appellant, *Stocken* and *Jupp*, for *Godwin*, Winchester.

Solicitors for the justices, *Peacock* and *Goddard*, for *Longman*, Andover.

Saturday, March 20, 1886.

(Before MATHEW and SMITH, JJ.)

WILLIAMS (app.) v. THE WALLASEY LOCAL BOARD (resps.). (a)

Local government—Line of building—"Bringing forward any house or building forming part of any street"—Land not previously built upon—The Public Health Act 1875 (38 & 39 *Vict.* c. 55), *s.* 156.

The 156th section of the Public Health Act 1875 (38 & 39 *Vict.* c. 55), *which prohibits the bringing forward of any house or building forming part of any street beyond the front wall of the house or building on either side thereof without the written consent of the urban authority, applies only to the alteration of existing buildings, and does not apply to new buildings on land never before built upon.*

THIS was a case stated by justices for the county of Chester under the statute 20 & 21 Vict. c. 43, and the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49), for the purpose of obtaining the opinion of the court on questions of law which arose before them as therein stated.

The case was, so far as is material, as follows:—

At a petty sessions holden at the Court-house, Liscard, in and for the division of Wirral in the county of Chester, on the 9th Sept. 1885, an information preferred by Arthur Salmon on behalf of the Wallasey Local Board (hereinafter called the respondents) against William Vaughan Williams (hereinafter called the appellant) under sect. 156 of the Public Health Act 1875 (38 & 39 Vict. c. 55), charging for that he the said William Vaughan Williams within six calendar months then last past, to wit on the 10th Aug. 1885 and on subsequent days, at the township of Poulton-cum-Seacombe, in the parish of Wallasey, in the county aforesaid, and within the urban sanitary district of Wallasey, and after the coming into operation of the Public Health Act 1875, unlawfully and without the consent in writing of the said urban authority did bring forward a certain house forming part of a street called Hatherley-street, and such bringing forward being beyond the front wall of the house on the south side thereof, and did continue such offence after he had received a written notice on that behalf from the said urban authority to remove the same, contrary to the form of the statute in that case made and provided, was heard and determined by us, the said parties respectively being then present, and upon such hearing the appellant was duly convicted before us of the said offence, and we adjudged him to pay a penalty of twenty-eight shillings, being a penalty of one shilling for every day during which the offence was continued after written notice in that behalf from the urban authority, and also to pay to the local board their costs in this behalf.

The appellant being dissatisfied with our determination as being erroneous in point of law, we, in compliance with his application and the provisions of the statute 20 & 21 Vict. c. 43, state the following case:

In the year 1877 one Hugh Evans, being the owner of a field on the south side of Victoria-road, Seacombe, within the district of the Local Board of Wallasey, in the county of Chester,

(a) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

submitted to the board a plan for fifty-one cottages to be built in new streets off Victoria-road, Seacombe, and according to the minute-book of the board such plan was recommended by the Works and Health Committee to the board for approval, such entry having been signed by the chairman, and on the 17th May 1877 the plan was confirmed by the board.

That on the 17th May 1877 a plan for the new streets on which the fifty-one cottages were to be built was submitted to the said committee and initialled by the chairman, but there is no record of this that has been found in the minute-book.

The new streets run southward from Victoria-road and are parallel to each other. Their width as shown upon the plain is thirty feet.

The said Hugh Evans, the owner of the field, was entitled before he had erected any buildings on the land, so far as the local authority is concerned, to erect buildings upon the said land with their front wall set forward to the lines of the streets as shown upon the plan, but he has voluntarily caused the houses which have been erected in and fronting the new streets to be set back from the line of the streets, leaving open areas inclosed by iron railings in the front of such houses, which are cottage houses.

The appellant is now proceeding with the erection of six intended new shops fronting Victoria-road upon a plot of land which was formerly part of the said field, and lies between Hatherley-street and Byerley-street, two of the new streets. The corner shops are set forward to the line of Hatherley-street and line of Byerley-street respectively.

The board have required the corner shops to be set back from Hatherley-street and Byerley-street to a line with the front of the cottage houses in those streets, and on Aug. 12, 1885, they sent the appellant a letter giving him notice that unless the said buildings were at once "set back to the proper frontage line" it was the intention of the board to institute legal proceedings to compel the same to be done.

The cottage houses in Hatherley-street are set back five feet six and a half inches from the line of the street, but have bay windows built of brick and stone, extending to within three feet six inches of the line of street.

The walls of the intended new shop now in course of erection by the appellant at the corner of Hatherley-street and Victoria-road have reached the top of the first-floor windows.

At six other corners upon the field, including two corners in Victoria-road, the corner houses have, with the consent of the said local board, so far as want of objection may be taken as consent, been built to the line of the new street notwithstanding the fact that the houses fronting those streets are set back as aforesaid, plans of such houses having first been approved by the board.

The land upon which the appellant is now building as aforesaid has never before been built upon.

It was contended on the part of the appellant that sect. 156 of the Public Health Act 1875 applies only to houses or buildings forming part of any street; that is to say, houses already built and actually existing, and that such section does not apply to an intended house or building to be erected upon land never before built upon. That the approval of the above-mentioned plan by the initials and date written thereon by the chairman on behalf of the Wallasey Local Board is a consent in writing by the urban authority to the erection of buildings up to the line of street shown in the plan, and is sufficient to satisfy the requirements of the 156th section of the said Act. That the front wall of the houses in Hatherley-street is the wall of the bay windows thereof.

It was admitted by the appellant that the said proceedings had before us were legal and regular, and that if his contention was invalid the said conviction was properly made.

We, however, being of opinion that the 156th section of the Public Health Act 1875 applies to houses and buildings in course of erection, and that the approval of the plan in manner aforesaid was not such consent in writing as is meant and provided for by the same section, gave our determination against the appellant in manner before stated.

The questions of law arising on the above statement for the opinion of this court therefore are: Whether the 156th section of the Public Health Act 1875 applies to new houses or buildings to be built or in course of erection upon land never previously built upon.

Whether the initials and date written upon the said plan by the chairman of the local board is a consent in writing sufficient to satisfy the terms of the 156th section of the said Act.

If the court should be of opinion that the said conviction was properly and legally made, and that the appellant is liable as aforesaid, then the said conviction is to stand; but if the court should be of opinion otherwise, then the said information is to be dismissed.

R. S. Wright for the appellant.—The urban authority have power under the 155th section of the Public Health Act 1875 (38 & 39 Vict. c. 55 (*a*)) to regulate the line of buildings, and the 156th section provides that buildings forming part of a street are not to be brought forward without the consent of the urban authority beyond the front wall or building on either side thereof. It is submitted that the 156th section does not apply to new buildings intended to be erected on land never before built upon; that the 155th section is clearly dealing with existing buildings only, and gives the authority to intervene and change

(*a*) The Public Health Act 1875 (38 & 39 Vict. c. 55) provides as follows:

Sect. 155. When any house or building situated in any street in an urban district, or the front thereof, has been taken down in order to be rebuilt or altered, the urban authority may prescribe the line in which any house or building, or the front thereof to be built or rebuilt in the same situation, shall be erected, and such house or building, or the front thereof, shall be erected in accordance therewith.

The urban authority shall pay or tender compensation to the owner or other person immediately interested in such house or building for any loss or damage he may sustain in consequence of his house or building being set back or forward, the amount of such compensation, in case of dispute, to be settled by arbitration in manner provided by this Act.

Sect. 156. It shall not be lawful in any urban district, without the written consent of the urban authority, to bring forward any house or building forming part of any street, or any part thereof, beyond the front wall of the house or building, on either side thereof, nor to build any addition thereto beyond the front of the house or building on either side of the same. Any person offending against this enactment shall be liable to a penalty not exceeding forty shillings for every day during which the offence is continued after written notice in this behalf from the urban authority.

the line of building in cases where houses are taken down to be rebuilt. There is no reason why the Legislature should be supposed to have violently changed the subject-matter with which they were dealing, and should have intended the 156th section to apply to land never before built upon. The language of the section which speaks of "bringing forward" buildings is not applicable to the original building, but only to the rebuilding of houses and buildings. Further, no compensation is given by the section for the violent interference with a private right which would occur in such a case as this, whereas in the 155th section such compensation is provided. There is therefore a violent presumption against an interpretation which makes the section curtail the right of the private owner to build as he chooses on his own land without providing compensation. The Lands Clauses Act nowhere contains any such arbitrary power. If this were the proper interpretation it would become a mere race between the owners of the various plots of a building estate, and the owner who succeeded in getting his building up first would be able to prescribe the line of building for the others according to his individual taste. The Metropolis Management Acts make reasonable provisions for such cases in the metropolis, (*a*) and it is not to be supposed that the Legislature intended to legislate for districts outside the metropolis in such a loose manner as would be the case if the section is interpreted in the manner contended for by the respondents. The only case against this view is that Fry, J., in *Robinson* v. *The Local Board for Barton* (46 L. T. Rep. N. S. 193; 21 Ch. Div. 621), said with respect to this section: "I think sect. 156 could not apply, and for this reason, that, although, in my judgment, the words 'bring forward any house or building' might apply as much to a new building as to an old one, yet the building so to be brought forward must be part of the street." The point, however, was not argued before him, and it is submitted that the observation is a mere *obiter dictum*, and the judgment in which it occurs was subsequently overruled (47 L. T. Rep. N. S. 286; 50 L. T. Rep. N. S. 57; 21 Ch. Div. 621; 8 App. Cas. 798).

Crump, Q.C. (with him *Synnott*) for the respondents.—This group of sections gives the local authority full power, both with respect to old and new streets and buildings. The 155th section deals with the rebuilding of old houses, the 156th section with new buildings and additions to old buildings, while the 157th treats in terms of new streets, and shows that they were then present to the mind and intention of the Legislature. Where owners were ordered under sect. 155 to put back their frontages on rebuilding compensation is provided for, but where under the 156th section they are merely prevented from bringing their new buildings or additions beyond a fixed line, thus securing uniformity and adding to the value of the buildings, no compensation is necessary. [MATHEW, J.—How can you "bring forward" a thing which does not exist?] The words "bring forward" do not necessarily mean the bringing forward of something existing, and will apply equally well to the setting forward of a new building. Otherwise the local authority would be enabled to regulate in any way the line of building in a new street. This would be contrary to the intention of the Legislature, which clearly could not have intended to give the authority power to modify the building line of old streets, and leave them wholly without powers as to new streets. Further, Fry, J. was clearly of opinion in *Robinson* v. *The Barton Local Board* (*ubi sup.*) that the section applied to new streets, and this part of his judgment was not reversed either by the Court of Appeal or the House of Lords. There is no authority for the contrary interpretation, and the court will follow the dictum of Fry, J. Otherwise it would be possible, when a whole street had been built upon with the exception of one plot, the building line being adhered to, for the owner of the vacant plot, without the consent of the authority, to bring forward his building before the line. It was the intention of the Legislature to give power to the authority, when once a building line has been formed, to interfere with the private right of ownership and insist upon uniformity.

R. S. Wright was not called upon to reply.

MATHEW, J.—I do not think that this case presents any serious difficulty, and I am of opinion that the appeal must be allowed and the conviction quashed. The section with which we have to deal is the 156th section of the Public Health Act 1875 (38 & 39 Vict. c. 55), which provides that it shall not be lawful in any urban district, without the written consent of the urban authority, to bring forward any house or building, forming part of any street, or any part thereof, beyond the front wall of the house or building on either side thereof, nor to build any addition thereto beyond the front of the house or building on either side of the same; and that any person offending against this enactment shall be liable to a penalty not exceeding forty shillings for every day during which the offence is continued after written notice on this behalf from the urban authority. Under this section the appellant has been convicted, and upon the true construction to be placed upon it depends the question whether the conviction ought to be upheld or not. Now, there is no doubt that, under this Act and similar Acts, the Legislature has seen fit to bestow upon local authorities very considerable powers. It is conceded that the persons who began to build in this street had the right to build as far back or as far forward as they liked upon their own land so long as they kept their buildings within the line sanctioned by the local authority in the plan approved by them; and it appears that, as a matter of fact, they chose to set their buildings some little distance back from that line. To the line so established the appellant did not wish to conform, and commenced to erect the buildings which are the subject of the present proceedings beyond the line of those previously erected. This proceeding not being agreeable to the local authority, it is contended that in building as he has done, without their consent, he has violated the 156th section of the Act of 1875, and is liable to a penalty for every day during which the offence is continued. What does this contention come to? As far as I can see, the result would be that the owner of the street, or the person building the first houses in a new street, would be able to prescribe the line of building for all the other owners—in fact, the

(*a*) See the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 211, and the Amendment Act 1862 (25 & 26 Vict. c. 102), s. 75.

line would not be established by the direction of the local authority, who have no power to prescribe anything of the kind, but by the caprice, perhaps, of a single owner. This would be the extraordinary result which it is said follows immediately from the words of the 156th section. On looking at the section I am clearly of opinion that this is not its meaning. I think that the structure applies to structures already erected. What is it which it is not to be lawful to bring forward? It is "any house or building forming part of any street." But it appears from the case that the land upon which the appellant is building has never been built upon before. How can it then be said that he is bringing forward "any house or building forming part of any street?" The words clearly refer to an alteration of something which existed before. I think it is impossible to place upon the words of the section the meaning contended for by the respondent, and I am therefore of opinion that the appeal must be allowed and the decision of the justices reversed.

SMITH, J.—I am of the same opinion. In this case we are not assisted by authority in construing this section, except that Fry, J. in his judgment in *Robinson* v. *The Barton Local Board* (*ubi sup.*) said that in his opinion the 156th section applied to new buildings. The point, however, was not argued before him, and I think that the judgments of Lord Selborne and Lord Blackburn in the same case when it came before the House of Lords show that they were of a contrary opinion. Lord Selborne says (8 App. Cas. 808): "The 155th section enables the urban authority to prescribe the line in which a building is to be rebuilt when it has been taken down; the 156th section is *in pari materiâ* about not advancing or bringing forward a building beyond the front wall of the building on either side;" and Lord Blackburn says (8 App. Cas. 810): "The sections which have been referred to show that when dealing with old buildings, buildings that already exist but which are about to be pulled down in order to be rebuilt, or altered, or advanced, the Legislature have provided for a building line, which is the line of the existing buildings on that side of the street. That renders it very likely indeed that the Legislature would, if they had thought of it, have passed a provision giving power to do something in a new street where there were no buildings; and that would not have been unreasonable. But the Legislature have not themselves done so, nor have the board with the sanction of the central authority made any bye-law which gives them the power." I quite agree therefore with my brother Mathew in all that he has said, and will not recapitulate it. I will only add that the Metropolis Management Amendment Act, passed in 1862 (25 & 26 Vict. c. 102), which deals with the same subject in the metropolis which this part of the Public Health Act 1875 deals with in rural districts, has in its 75th section an express provision that "no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses, in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet . . . such general line of buildings to be decided by the superintending architect of the Metropolitan Board of Works for the time being," and provision is made for the demolition of the building in case the rule is disregarded. But, although there was this provision in the earlier Act relating to the metropolis, the Legislature for some reason or other did not see fit, when they passed the Public Health Act 1875, to give the local authority any similar power, but limited them to the powers contained in the 155th and 156th sections. These sections I think apply to old buildings, and to old buildings alone, and the justices were, in my opinion, wrong in deciding that they applied to the present case. The appeal must therefore be allowed and the conviction quashed.

Appeal allowed, with costs. Leave to appeal refused.

Solicitors for the appellant, *Chester* and *Co.*

Solicitors for the respondent, *Jaques, Layton,* and *Jaques,* for *Layton* and *Steel,* Liverpool.

April 13, 14, *and* 16, 1886.

(Before DENMAN and HAWKINS, JJ.)

REAY (app.) *v.* THE MAYOR AND ALDERMEN OF GATESHEAD (resps.). (*a*)

Bye-laws—Erection of buildings without approval of plans—Continuing penalty—Validity of bye-law—Summary conviction—Period of limitation—Jervis' Act (11 *&* 12 *Vict. c.* 43), *s.* 11; 11 *&* 12 *Vict. c.* 63, *s.* 115—*Public Health Act* 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 158, 326.

On the 11*th Dec.* 1885 *an information was preferred against the appellant for that he, between the* 16*th March* 1885 *and Oct.* 1885, *had commenced the execution of works the plans of which were not in conformity with the bye-laws, and had erected such works notwithstanding the disapproval of the urban sanitary authority, and permitted the same to continue, notwithstanding written notice of such contravention of the bye-laws.*

By bye-law 5, *sect.* 9, "*If the person intending to construct new houses shall construct, or cause to be constructed, any works, or do any act, or omit to do any act, or comply with any requirements of the local board, contrary to the provisions herein contained, he shall be liable for each offence to a penalty not exceeding* 5*l., and he shall pay a further sum not exceeding* 40*s. for each and every day during which such works shall continue or remain contrary to the said provisions.*"

The justices convicted the appellant of the offence, and ordered him to pay the penalty of 5*l. and costs, and also to pay a further sum of* 5*s. per day from the* 12*th of Oct.* 1885, *being the day on which the respondents first served a notice of objection, to the* 11*th Dec.* 1885, *being the day on which the said information was laid.*

Held (*reversing the decision of the justices*), *that the conviction could not be sustained, and that the* 9*th paragraph of the* 5*th bye-law was bad, because there was no authority to inflict, by a bye-law, a continuing penalty for merely not pulling down a building actually erected and completed.*

Held, also, that the said bye-law was ultra vires, because, under sect. 115 *of the Public Health Act* 1848 (11 *&* 12 *Vict. c.* 63), *a continuing penalty is to run only for each day after written notice of the offence has been given by the local board. The section does not authorise the infliction of a continuing penalty "for each day during which*

(*a*) Reported by F. A. CRAILSHEIM, Esq., Barrister-at-Law.

the works shall continue contrary to the provisions of the bye-laws."

Held, also, that the respondents had not taken proceedings in time, and were barred by sect. 11 *of Jervis' Act* (11 & 12 *Vict. c.* 43), *because the original offence of commencing the work was not shown to have been committed within six months of the date of the information. The period of limitation mentioned in sect.* 158 *of the Public Health Act* 1875, *applies only to the case of a continuing offence.*

Marshall *v.* Smith (28 *L. T. Rep. N. S.* 538; *L. Rep.* 8 *C. P.* 416) *followed.*

This was a case stated by justices of the peace acting in and for the borough of Gateshead, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before them, as hereinafter stated.

At a petty sessions holden at the Town Hall in the said borough on the 11th Dec. 1885, an information was preferred by the town clerk of the said borough, on behalf of the urban sanitary authority (hereinafter called the respondents), against Joseph Reay (hereinafter called the appellant), for that he, the said Joseph Reay, having on the 25th Sept. 1883, pursuant to the bye-laws of the urban sanitary authority for the borough of Gateshead requiring notice and deposit of plans to be given to the said urban sanitary authority, gave notice of his intention to build eleven houses at Ash-street, Askew-road, within the said borough, and deposited the plan, section, and elevation, and block plan of the proposed buildings; and the said plans having on the 3rd Oct. 1883 been disapproved by the said urban sanitary authority, within the meaning of the bye-laws then in force, and not being in accordance therewith, and such disapproval (within one month after the said notice and deposit aforesaid) having been signified in writing to him, the appellant afterwards, to wit, on the 23rd March 1885, failed to comply with the requirements of the said urban sanitary authority, and commenced the execution of the said works and buildings, the said works and buildings and the said plans not being in conformity with the bye-laws of the said urban sanitary authority then in force, and constructed and executed such works and buildings notwithstanding such disapproval, and omitted to comply with the requirements of the said urban sanitary authority, contrary to such bye-laws, and having so constructed, erected, and built the said buildings, houses, and works, he permitted the same to continue, notwithstanding written notice of such contravention of the bye-laws, and contrary to the form of the statute in such case made and provided. And at the same petty sessions a second information was preferred by the said town clerk on behalf of the respondents against the appellant, for that he, the appellant, having on the 25th Sept. 1883, pursuant to the bye-laws of the urban sanitary authority for the borough of Gateshead requiring notice and deposit of plans to be given to the said urban sanitary authority, gave notice of his intention to build eleven houses at Ash-street, Askew-road, within the said borough, deposited the plans of sections, elevations, and block plan of the proposed buildings; and the said plans having, on the 3rd Oct. 1883, been disapproved by the said urban sanitary authority, within the meaning of the bye-laws then in force, and not being in accordance therewith, and such disapproval (within one month after such notice and deposit) having been signified in writing to him, on the 5th March 1885 the appellant deposited a further plan not in conformity with the said bye-laws or the requirements of the said urban sanitary authority, of which disapproval notice in writing was also signified within one month to the appellant. The appellant afterwards, to wit, on the 23rd day of March 1885, failed to comply with the requirements of the said urban sanitary authority, and commenced the execution of the said works and buildings, and the said plans not being in conformity with the bye-laws of the said urban sanitary authority then in force, constructed and executed such works and buildings, notwithstanding such disapproval, and omitted to comply with the requirements of the said urban sanitary authority, contrary to such bye-laws, and having so constructed, erected, and built the said buildings, houses, and works, he permitted the same to continue, notwithstanding written notice of such contravention of the bye-laws, and contrary to the form of the statute in such case made and provided.

The above informations were heard and determined by the justices, the said parties being then respectively present, and they convicted the appellant of the said offence, upon the first of the two informations, and ordered him to pay the penalty of 5*l.* and costs, and also ordered him to pay a further sum of 5*s.* per day from the 12th Oct. 1885, being the first day upon which the respondents served the notice of objection hereunto annexed, to the 11th Dec. 1885, the latter day being the day when the said informations were laid, namely, sixty days, amounting to the sum of 15*l.*, in addition to the said penalty of 5*l.*

The appellant being dissatisfied with the determination of the justices, as being erroneous in point of law, pursuant to sect. 2 of the statute 20 & 21 Vict. c. 43, duly applied to them in writing to state and sign a case setting forth the facts and the grounds of such determination as aforesaid for the opinion of the court, and duly entered into a recognisance as required by the said statute in that behalf, and the justices, in compliance with such application, stated and signed the following case.

Upon the hearing of the said informations it was proved, on the part of the respondents, and found by the justices as facts:

That the bye-laws of the said urban sanitary authority were duly made under the provisions of 21 & 22 Vict. c. 98, s. 34.

The 5th bye-law (paragraphs 1, 2, 3, 4, 5, 6, 7, and 9) under which the said informations were laid, is as follows:

Bye-law V. (1.) Every person intending to construct a house or building shall, seven days at least previous to the meeting of the local board at which the application is intended to be considered, deposit at the office of the surveyor of the local board for the time being a plan, section, and elevation of the proposed new house or building, and an application in writing for the sanction of the local board thereto.

(2.) Such application, plan, section, elevation, and specification shall be signed by the applicant, and the plan and section shall be drawn with ink upon good strong paper to a scale of one inch to eight feet.

(3.) The plan must show the extent of the ground from the front to back street, or otherwise as the case may be, and the adjoining property to the extent of at least six feet on all sides; also the thickness of the walls, the internal dimensions of the rooms, the situation of the fire-places or stoves, and the situation of the water-closet, or privy, and ash-pit, coal-house, and other erections in the yard not forming part of the main building of the house, together with all stairs and means of access to the upper rooms and cellar (if any), also the yard, gully, and drain communication therefrom to the sewer in the street, specifying its inclination.

(4.) The section must be taken through the proposed new house from back to front, and must show the following particulars:

(i.) The levels of the front and back streets.

(ii.) The heights of the several storeys or floors (which are also to be figured thereon).

(iii.) Depth of the cellars (if any).

(iv.) The height of the ground floor above the level of the street, which must in no case be less than nine inches.

(v.) The surface of the back yard, which must not be less than six inches above the back street, and must have a fall from the house to the back street.

(vi.) The thickness of the walls.

(5.) The plans and sections must be accompanied by a description of the materials of which the building is proposed to be constructed, and of the intended means of drainage.

(6.) The surveyor shall inspect any houses or buildings in progress of construction at any reasonable time that he may think fit, or that he may be required to do so by the local board; but the person laying out the work, or the builder, shall give two days' notice in writing to the surveyor before the commencement of such work, and before any foundation of new houses or buildings, or any sewers or drains, are covered up; and the like notice shall be given after the works have been completed which may have been required by the surveyor to be done in amendment of any irregularity, and before such works shall be covered up.

(7.) If, in doing any work or erecting any house or building, anything is done contrary to the rules herein contained, or anything required by those rules is omitted to be done, or if the surveyor, on surveying or inspecting any house or building, finds that the same is so far advanced that he cannot ascertain whether anything has been done contrary to such rules herein contained, or whether anything required by such rules has been omitted to be done, the surveyor shall, within twenty-four hours after such survey or inspection, give to the builder or person engaged in erecting such house or building, or in doing such work, notice in writing requiring such builder or person, within forty-eight hours from the date of such notice, to cause anything done contrary to the rules herein contained to be amended, or to do anything required to be done by such rules, but which has been omitted to be done, or to cause so much of any house or building as prevents such local surveyor from ascertaining whether anything has been done or omitted to be done as aforesaid, to be to a sufficient extent cut into, laid open, or pulled down.

(9.) The local board shall by their order approve or disapprove of proposed new houses, buildings, or other works, within the time severally specified herein for the deposit of notices thereof; but if the owner or person intending to construct any new street or erect any new house or building fail to give the notices herein required, or proceed to the execution of any of the works before the expiration of such notices, without the approval of the local board, or if any owner or person shall construct, or cause to be constructed, any works, or do any act, or omit to do any act, or comply with any requirement of the local board, contrary to the provisions herein contained, he shall be liable for each offence to a penalty not exceeding 5*l.*, and he shall pay a further sum not exceeding 40*s.* for each and every day during which such works shall continue or remain contrary to the said provisions, and the local board may, if they shall think fit, cause such work to be removed, altered, pulled down, or otherwise dealt with, as the case may require, and the expenses incurred by them in so doing shall be repaid by the offender, and be recoverable from him in a summary manner, as provided by the Public Health Act 1848.

Bye-law No. 3 is headed "With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings," and paragraph 1 thereof is as follows:

(1.) The yard space shall not be less than one-half of the entire area of the house or building and out-offices, and no building whatever shall be erected in or over such yard space, except the privy, ashpit, and coal-house in connection with the house or building, and these only in such a position as the local board shall approve. The yard space shall be left upon such portion of the ground as the local board may order.

On the 25th Sept. 1883 plans were deposited by the appellant for the erection of ten houses and a shop and wareroom over, and addition to cow byres, at Rabbit Banks Farm, Askew-road, Gateshead.

On the 3rd Oct. 1883 the said plans were disapproved by the respondents on the following grounds: It was ordered that the urban sanitary authority disapproved of the proposed new works or buildings hereinafter specified, namely, plan of eleven houses proposed to be erected on land abutting upon the road between St. Cuthbert's-road and Askew-road, and facing the pumping station of the water company, because (1.) No street plan for the laying out of this land had yet been submitted for approval, and the proposed back street was a *cul de sac.* (2.) No section of proposed main drain or of back street had been deposited. (3.) No curb had yet been laid in, nor was the width of intended footpath shown. (4.) The new streets were not yet formed. (5.) The position of the ashpits of the five easternmost houses was most objectionable. (6.) The yard spaces of the houses were less than the area required by the bye-laws of the authority.

The respondents caused written notice of the said disapproval, enumerating the said grounds of objection, to be personally served on the appellant.

On the 8th Oct. 1883 the said notice was signed by the town clerk and sealed with the corporate seal of the said sanitary authority.

On the said 3rd Oct. 1883 the appellant deposited with the borough surveyor of the respondents a street plan showing levels, scales, &c., with a view to meet the first objection raised by the respondents against the plan deposited by the appellant on the 25th Sept. 1883. Such plan, according to the bye-laws, should have been deposited on the said 25th Sept. 1883, and this further (or street) plan so deposited on the 3rd Oct. 1883 was considered by the respondents at a meeting held on the 24th Oct. 1883, and was disapproved on the following grounds: It was ordered that the urban sanitary authority disapproved of the proposed new works or buildings specified, because (1.) The back street did not provide means for a cart to turn. (2.) The back drain was so laid for several of the houses that access could not be obtained to the same except by permission of the owners and occupiers of houses through the yards of which the drain passed, and who might not themselves be inconvenienced by any stoppage. (3.) The back yards of several of the houses were far below the level of the nearest street, and no proof was given that the street could be used for ashpit or sanitary purposes in relation to this property. (4.) A building was at the time on

part of the ground, so that it was not either cleared or formed for any drains or curb to be laid. (5.) No section of the front street was given. Notice of disapproval, enumerating the foregoing grounds, was personally served on the appellant on the 29th Oct. 1883 by the respondents, and was signed and sealed in the same manner as the aforesaid notice of the 8th Oct. 1883. Although interviews had taken place between the defendant and his architect and the surveyor, nothing of particular importance was done until the 5th March 1885, when what the magistrates found was an informal plan was left by the appellant with the said surveyor, with the object of meeting some of the objections raised by the respondents, but no application in writing for the sanction of the respondents was left with this plan, as required by the 5th bye-law.

On the 16th March 1885 the said borough surveyor wrote the following letter to the appellant:—

March 16th, 1885.

Joseph Reay, Esq.—Dear Sir,—The plan for building at Askew-road was disapproved by the committee, and at a subsequent meeting it was left for me to try and arrange with you as to what is required, so that you may proceed to lay in curb and drain, and obtain the committee's sanction after; I have prepared a plan which I hope will meet the case. By it I waive the objection of want of back street, leaving you to negotiate for the use of the present one. I also waive the deficiency to a small extent of yard space, but I must claim from you an eight-foot opening through which to bring the drain, even if you build over it and make it an archway. These concessions should simplify the matter, so that the board and you should now agree. I inclose plan.—Yours faithfully, J. Bowes.

Following up this letter, it was proved that there had been conversations between the surveyor of the respondents, or his assistant, and the appellant, or his workmen, on one or two occasions when the former had visited the buildings; but it was not admitted or proved that the terms of this letter had been agreed to by the appellant, nor was any compromise proved to have been come to, and no further attempt was made by the appellant to meet the requirements of the bye-laws. Between the 16th March 1885 and October 1885 the appellant caused the houses to be erected and completed without the sanction of the respondents and contrary to the said bye-laws. It was admitted that the respondents had caused the name of the street to be put up at the end of the street, and caused the houses to be numbered.

That the appellant was on the 12th Oct. 1885 served with a notice requiring him to show cause why the said buildings should not be pulled down.

It was contended before the justices by counsel on behalf of the appellant, that the justices had no jurisdiction, as the offence (if any) had been committed more than six months before the information was laid, namely, in April 1885, when the appellant had commenced to build, and that the bye-laws made by the urban sanitary authority, providing for continuing offences, were *ultra vires*, as there was no power given to them by the Local Government Act 1858 to provide for continuing penalties, and that the Public Health Act 1875 could not make them valid if that contention was correct. That the amended plan of March 1885 had not been disapproved within one month, and that the respondents' surveyor, by his said letter and subsequent acts, had estopped the respondents from maintaining these proceedings against the appellant.

It was contended by counsel on behalf of the respondents, that by sect. 326 of the Public Health Act 1875, all bye-laws duly made under the Local Government Act 1858, although that Act was repealed by the Public Health Act 1875, if not inconsistent with the provisions of the latter Act, should be deemed to be bye-laws under the Public Health Act 1875, and that these bye-laws were not inconsistent with the latter Act.

That, under sect. 158 of the Public Health Act 1875, the offence against the bye-laws was made a continuing offence under that Act so long as it contravened the bye-laws, and that the proceedings were in time and not barred, as one year and a day from the time when the offence had been committed had not yet expired.

That the so-called amended plan of March 1885 was not a complete plan, and no application in writing for its approval had been sent in, and the respondents' surveyor had merely attempted to try to adjust matters amicably, but had done nothing which estopped proceedings being taken against the appellant.

The justices overruled the objections raised on behalf of the appellant, and held that the proceedings were brought in time, the beginning of the work being an offence, in their opinion, under the bye-laws, the continuance of the work in such a form or state as to contravene the bye-laws constituting it a continuing offence, and that the bye-laws were not inconsistent with any of the provisions of the Public Health Act 1875.

The questions of law arising on the above statement for the opinion of the court therefore are:—(1.) Whether bye-law No. 3, par. 1, was *ultra vires* or unreasonable. (2.) Whether the proceedings of the urban sanitary authority were commenced in proper time. (3.) Whether the bye-laws under which the proceedings were taken, providing for continuing penalties, were valid.

If the court should be of opinion that the said convictions were legally and properly made, then they are to stand; but if the court should be of a contrary opinion, then the said convictions are to be quashed, or such other order shall be made as to the court may seem fit.

Gainsford Bruce, Q.C. (*Strachan* with him) for the appellant.—It is submitted that the 9th paragraph of the 5th bye-law is bad as containing provisions in excess of the powers given to the local board under sect. 34 of the Local Government Act 1858 (21 & 22 Vict. c. 98). That section gives a power to inflict a reasonable penalty in the case of contravention of bye-laws, but this bye-law, in addition to imposing a penalty, does something not mentioned in the Act at all, namely, provides that the penalty shall be continuing:

Young v. *Edwards*, 11 L. T. Rep. N. S. 424; 33 L. J. 227, M. C.;
Brown v. *Holyhead Local Board*, 7 L. T. Rep. N. S. 332; 32 L. J. 25, Ex.;
Marshall v. *Smith*, 28 L. T. Rep. N. S. 538; L. Rep. 8 C. P. 416.

In *Hall* v. *Nixon* (32 L. T. Rep. N. S. 87; L. Rep. 10 Q. B. 152) Lush, J. says that "by necessary implication, a power to make a bye-law implies the power of enforcing it by pecuniary penalty;" but it is submitted that it is unreasonable that

the penalty should be a continuing penalty, and the bye-law in question is therefore *ultra vires*. The case of *Rumball* v. *Schmidt* (46 L. T. Rep. N. S. 661; 8 Q. B. Div. 603) is not against this contention, because in that case the offence was one which was treated as a continuing offence by sect. 156 of the Public Health Act 1875. It is further submitted that the conviction is bad on the ground of its being out of time. Sect. 11 of 11 & 12 Vict. c. 43 (Jervis' Act) provides that "in all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to such particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose." It does not appear on the case that any portion of the work was done within six calendar months before the information was preferred, and therefore the limitation section must prevail:

Morant v. *Taylor*, 34 L. T. Rep. N. S. 139; 45 L. J. 78, M. C.;
Coggins v. *Bennett*, 2 C. P. Div. 568.

Charles, Q.C. (*Joel* with him) for the respondents.—The offence committed by the appellant is that he has contravened the bye-law which says that plans must be deposited and approved before buildings are commenced. That offence is by sect. 158 of the Public Health Act 1875 a continuing offence. We desire to avail ourselves of that section, for, if it applies, we need not notice the original offence committed here. The real offence is the buildings being there in contravention of the bye-law. The question then turns upon whether the bye-law was duly made under sect. 158 of the Public Health Act of 1875; if it was so duly made, then the bye-law is good, for, by sect. 326 of the Act, "all bye-laws duly made under any of the Sanitary Acts by this Act repealed, and not inconsistent with any of the provisions of this Act, shall be deemed to be bye-laws under this Act." In the case of *Hall* v. *Nixon* (32 L. T. Rep. N. S. 87; L. Rep. 10 Q. B. 152), *Young* v. *Edwards* (11 L. T. Rep. N. S. 424; 33 L. J. 227, M. C.) was fully considered and clearly disapproved of. The case of *James* v. *Wyvill* (51 L. T. Rep. N. S. 237) is precisely in point. No notice by the respondents was necessary in order to turn the offence into a continuing offence, and therefore it is submitted that the information was not out of time, the offence not having come to an end. It is not an offence freshly committed from day to day; but, even if it were, *James* v. *Wyvill* would be in point. Moreover, Jervis' Act does not apply to continuing offences. It is therefore submitted that the bye-law in question is not *ultra vires*, and that, sect. 158 of the Public Health Act 1875 having made the initial offence a continuing offence, the respondents have six calendar months from the last day of the continuing offence within which to commence proceedings. They also referred to

Brown v. *Holyhead Local Board*, 7 L. T. Rep. N. S. 332; 32 L. J. 25, Ex.;
Baker v. *Mayor of Portsmouth*, 37 L. T. Rep. N. S. 822; 3 Ex. Div. 157.

Gainsford Bruce, Q.C. in reply.

Cur. adv. vult.

Denman, J.—I have felt very great difficulty in making up my mind about this case, not owing to any very serious doubt as to how it ought to be decided, although I cannot feel very confident about it, but owing to the extremely inartificial way in which the case is stated. As far as I can gather from the case so stated, its nature is as follows: The information upon which a conviction has taken place, and a penalty ordered to be paid, was one laid at the petty sessions in Gateshead, held on the 11th Dec. 1885. The information stated that the appellant Joseph Reay had as long before as the 25th Sept. 1883, pursuant to certain bye-laws, given notice that he wished to erect certain buildings, and that as long ago as the 3rd Oct. 1883, his plans, which he had sent in in accordance with the bye-laws, or intended to be in accordance with them, had been disapproved by the urban sanitary authority. It is then stated that such disapproval had been signified in writing to him; that he had failed to comply with the requirements of the bye-laws; and that afterwards, to wit on the 23rd March 1885, after two years had elapsed, he commenced the execution of the works in accordance with the plans, such plans not being in conformity with the bye-laws of the urban sanitary authority. He constructed and executed such works notwithstanding such disapproval, and he has allowed the buildings so constructed, erected, and built, to continue, notwithstanding written notice of such contravention of the bye-laws. That is the first part of the information; the other part is not material. The magistrates state that they "convicted the appellant of the said offence upon the first of the two informations, and ordered him to pay the penalty of 5*l.* and costs, and also to pay a further sum of 5*s.* per day from the 12th Oct. 1885, being the first day upon which the respondents served the notice of objection, to the 11th Dec. 1885, the latter day being the day when the said informations were laid." The case goes on to state that the bye-laws of the urban sanitary authority were duly made under the provisions of 21 & 22 Vict. c. 98, s. 34. Now, if there were nothing in this case to falsify that statement, then we should probably be bound to uphold the conviction. Therefore, if those bye-laws were correct, a great part of the argument of the appellant would altogether fail. But, as I shall show presently, there was ground for contending, on the part of the appellant, that, upon the face of the bye-laws, they were not properly and duly made in a sense which the appellant relied upon as being one which would give him a right to say that the whole proceedings were faulty. After stating that the bye-laws were duly made, which for this purpose I shall read as merely meaning that they were made in the proper form, with the proper formalities, and by the proper persons, and so forth, to make them, and with proper publication and matters of that sort, the case goes on to mention some of the bye-laws, and the 5th bye-law is the first set out. That bye-law requires persons intending to construct houses and buildings to give notice and deposit certain plans. Most of the bye-laws are the ordinary bye-laws authorised to be made by persons who have to look to the proper width of streets and the comfort of residences, sanitary arrangements and matters of that sort, and most of these are unobjectionable and in the ordinary course. Then comes the 7th section of the 5th bye-law, which provides that "If, in doing any work or erecting any house

or building, anything is done contrary to the rules herein contained, or anything required by those rules is omitted to be done, or if the surveyor, on surveying or inspecting any house or building, finds that the same is so far advanced that he cannot ascertain whether anything has been done contrary to those rules herein contained, or whether anything required by such rules has been omitted to be done, the surveyor shall, within twenty-four hours after such survey or inspection, give to the builder or person engaged in erecting such house or building, or in doing such work, notice in writing," &c. That bye-law therefore requires the surveyor within a certain time to take such steps as he may think proper. Then comes the 9th section of the 5th bye-law, which is the one upon which the main argument in this case turns, and it provides that "The local board shall by their order approve or disapprove of proposed new houses, buildings, or other works within the times severally specified herein for the deposit of notices thereof; but if the owner or person intending to construct any new street, or erect any new house or building, fail to give the notices herein required, or proceed to the execution of any of the works before the expiration of such notices, without the approval of the local board, or if any owner or person shall construct, or cause to be constructed, any works, or do any act, or omit to do any act, or comply with any requirement of the local board, contrary to the provisions herein contained, he shall be liable for each offence to a penalty not exceeding 5*l.*, and he shall pay a further sum not exceeding 40*s.* for each and every day during which such works shall continue or remain contrary to the said provisions." Then there is the 3rd bye-law, as to which we are asked whether it is a legal bye-law. It refers to yard space, ashpits, &c., and I may say at once that I see nothing in it to render it illegal. That bye-law is one, I apprehend, which it was within the power of the urban sanitary authority to make. Then, on the 25th Sept. 1883, it is in the case stated that plans were deposited, and that on the 3rd Oct. they were disapproved. Then the words of the conviction follow, and the reason of disapproval, and notice thereof was duly served on the appellant. After setting out certain interviews and conversations between the appellant and his architect and the surveyor of the body, the case goes on to state that nothing of importance was done until the 5th March 1885, when what the magistrates found to be an informal plan was left by the appellant with the surveyor, with the object of meeting some of the objections which the respondents had made; but no application in writing for the sanction of the said respondents was left with the plan, as required by the 5th bye-law. Then the correspondence is set out, and Mr. Gainsford Bruce was anxious that we should go into all these matters and send back the case to be more fully stated about them, on the ground that if we did, it would turn out that there was an estoppel made out which would prevent the body seeking a conviction here from taking advantage of what had taken place, because of something amounting to leave and licence or estoppel on the part of the surveyor. That we declined to do, and, as I think, we declined rightly, because, although the magistrates have thought it proper to set out all these matters in the case, what they ask is really a decision upon questions of law only. Then, to go on with the material dates, the case states that, between the 16th March 1885 and October of that year, the appellant caused the houses to be erected and completed without the sanction of the respondents. There is no statement as to when the houses were completed. It is to be noticed that the 16th March is more than six months before the October following, when the buildings were completed, and very considerably more than six months before the 11th Dec., when the present information and conviction took place. The case then states that the appellant was, on the 12th Oct. 1885, served with notice requiring him to show cause why the buildings should not be pulled down. It certainly was no notice to him to show cause as to anything else. They simply relied upon the absence of proper plans and the commencement to build without them, and then, the buildings having been completed, the appellant is asked to show cause why they should not be pulled down. Then the contentions of the parties are stated, and "it was contended on the part of the appellant that the justices had no jurisdiction, as the offence (if any) had been committed more than six months before the information was laid, namely, in April 1885, when the appellant had commenced to build." There is no positive statement as to when the commencement of the buildings took place, except that it must have been between March and October. Then it was further contended that "the bye-laws made by the urban sanitary authority, providing for continuing offences, were *ultra vires*." That was the main contention raised before us and argued by Mr. Gainsford Bruce, and I shall deal with that presently. There was another contention—as to time—"that the amended plan had not been disapproved within one month, and that the respondents' surveyor, by his said letter and subsequent acts, had estopped the respondents from maintaining these proceedings against the appellant." The respondents' counsel relied on sect. 326 of the Public Health Act 1875, which makes all bye-laws duly made under the repealed Acts bye-laws under the Act of 1875, if not inconsistent with the provisions of the later Act, and it was said that these bye-laws were not inconsistent with the later Act, and therefore that they carry the right to do what has been done in the present case. Then it was contended that, under sect. 158 of the Public Health Act 1875, the offence against the bye-laws was made a continuing offence under that Act so long as it contravened the bye-laws, and that the proceedings were in time and not barred, as a year and a day from the time when the offence had been committed had not yet expired. Then the magistrates say that they overruled the objections raised on behalf of the appellant, and held that the proceedings were brought in time, the beginning of the work being an offence, in their opinion, under the bye-laws, the continuance of the work in such a form or state as to contravene the bye-laws constituting it a continuing offence, and that the bye-laws were not inconsistent with any of the provisions of the Public Health Act 1875. Then, at the end of the case, three questions of law are raised: First, "Whether bye-law No. 3 was *ultra vires* or

unreasonable." I have already said that I see nothing unreasonable in that bye-law. The second question is, "Whether the proceedings of the urban sanitary authority were commenced in proper time." As to that, I shall state my view presently. The last question is, "Whether the bye-laws under which the proceedings were taken, providing for continuing penalties, were valid." Thus two serious questions of law are raised, whether the proceedings were in proper time, and whether the bye-laws under which the conviction took place, or purported to take place, were valid as far as that part is concerned which deals with the penalty of 40*s.* a day for keeping a building absolutely erected and finished and standing without pulling it down. Those being the questions before the court, we heard elaborate arguments of counsel on both sides, and several cases were cited by them. Now, first upon the question whether the 9th section of bye-law 5, upon which this conviction took place, being a bye-law made in accordance with sect. 34 of the Public Health Act 1858, is a good bye-law or not. Mr. Gainsford Bruce, in the course of his argument, cited several cases, and I shall now proceed to deal with them, because on our view of those I think this decision must mainly turn. The first case cited was that of *Young* v. *Edwards* (11 L. T. Rep. N. S. 424; 33 L. J. 227, M. C.). In that case it was held that a bye-law, precisely similar to this one, and in identical language, was bad, because it went beyond the powers given by the Local Government Act. The only difficulty in his way, in relying upon that case, is that it does not appear by the report, as given in the *Law Journal*, why that bye-law was held to be either bad or unreasonable. But, on looking at the report in the LAW TIMES, it appears that the ground upon which the bye-law was held bad was one not deciding this case at all, but that the effect of that bye-law would be to take a man's property without giving him compensation for it. There is an interlocutory observation of Bramwell, B. in that case, which is to that effect, and it is therefore impossible to discover whether the court thought at that time that the clause, so far as the penalty was concerned, was a clause *qua* penalty for keeping an existing and finished building standing, even though it might have been originally erected contrary to the bye-laws, without the formalities and without all the notices and plans that the bye-laws required. Then there was a case cited which seems to me to be really in point, namely, *Marshall* v. *Smith* (28 L. T. Rep. N. S. 538; L. Rep. 8 C. P. 416), where the words of the bye-law were also identical with these. That was a case of bye-laws made under the earlier Act, and there was a bye-law that, in case the works should continue, there should be a penalty of 40*s.* for each day; that is, for each day after notice given. Now, in that case Keating and Honyman, JJ. held that that bye-law did not authorise a penalty of 40*s.* for merely not pulling down a building which was actually completed; that the words "continuing the works" referred to a continuation of the works while going on as works, and that they did not cover the case of a building actually erected and fully completed without having gone through all the formalities in the way of plans or other matters required by the bye-laws. That decision is intelligible and not unreasonable, because in that bye-law, as in this, there was a power contained in similar cases to pull down the building if it should be contrary to the interests of the place in the judgment of the sanitary authority, in which case they had a right to pull it down within a certain time of its erection. It is not unreasonable to say, if they are entitled to pull it down and do not do so, that they have not got a right to ask for something by way of rent, as it were, or by way of penalty, because the builder has not demolished it at his own expense: they may pull down the building, or fine the builder for his original neglect either in commencing the work or in continuing it so long as the operation is actually progressing. That is a case which seems to me to be really in point, and, unless it is wrongly decided, then this part of the conviction here, namely, the part which inflicts a penalty of 40*s.* a day for merely continuing the building, is wrong on one of two grounds,—either because the bye-law is a bad bye-law if it means that, or, as was put in *Marshall* v. *Smith*, if it only means that it shall be pulled down, or that there shall be a penalty during the time in which the work is proceeding contrary to the notice, then there has been no such breach here, because the penalty is not sought for until after the work was actually completed. As to the other cases cited, none of them overrules *Marshall* v. *Smith*, nor is there one in which this particular complaint against the conviction was made. In the case of *Hall* v. *Nixon* (32 L. T. Rep. N. S. 87; L. Rep. 10 Q. B. 152) there was no such clause in the bye-law, and Quain, J. actually distinguishes the case on that ground from *Young* v. *Edwards*, in which the decision had been the other way, although not on the same grounds as those upon which the decision in *Marshall* v. *Smith* was arrived at. Then the case of *Rumball* v. *Schmidt* (46 L. T. Rep. N. S. 661; 8 Q. B. Div. 603) was also distinguished from *Marshall* v. *Smith*. That case was upon a bye-law made under a different statute, and therefore it is not in point. It was a case, no doubt, in which a penalty was held to be good after written notice, although the work had been completed before; but it was upon a different section, and therefore it cannot affect the present case. But one case cited does appear to be somewhat in conflict with *Marshall* v. *Smith*. That is the case of *James* v. *Wyvill* (51 L. T. Rep. N. S. 237), but there again this question does not seem to have been argued. That was a case under sect. 158 of the Public Health Act 1875, and *Marshall* v. *Smith* was not cited at all, and the sole argument there appears to have been whether an addition to a building could be looked upon as a new building, and it was held that, that being found by the magistrates to be the fact, the court would support the magistrates' decision on that which was really a question of fact. Therefore no case has been cited, nor can I find one, which is really in conflict with *Marshall* v. *Smith*. It was, however, argued on behalf of the respondents that, by virtue of sect. 326 of the Public Health Act 1875, this bye-law was valid, even if it had been invalid before, because that section enacts that all bye-laws duly made under the old Act shall be deemed to be bye-laws under the Act of 1875, if not inconsistent with that Act. If the magistrates were right in holding that the

bye-law was duly made merely by being right in form and made by the proper parties, then that might be the construction of sect. 326. But I agree with Mr. Gainsford Bruce that the intention of the Legislature cannot be supposed to have been as strong as to make that valid which was invalid by an Act which was the very Act in force at the time the bye-law was made. I do not think that is the effect of the Act of 1875. All it means to do, as it seems to me, is to enact that if there be a bye-law which is valid at the time it is made under a former Act, and that bye-law is not inconsistent with the provisions of the later Act, then, in that case, it shall be deemed to be a good bye-law, and it shall not be necessary to make it over again. But it seems to me it would be going too far to hold that a bye-law is duly made under the new Act, when it was not properly made under the old Act, and without jurisdiction, and to say that it is validated and made good merely by the passing of the subsequent Act, under which, if it were made, it would be a good bye-law. That, I think, would be going too far. But here, as I understand, the bye-laws were actually remade under the powers of the new Act, so that really this case becomes one of very much less importance than it would have been if there had not been new bye-laws made. All the other cases that have been cited seem to me to be decisions either on sect. 158 of the new Act, or irrelevant on other grounds. I see no reason for not acting upon the case of *Marshall* v. *Smith* (28 L. T. Rep. N. S. 538; L. Rep. 8 C. P. 416), which seems to me to make out clearly that the bye-law was bad so far as it inflicted a penalty (if it did inflict one) upon the mere continuance in its place, without being pulled down by the person who erected it, of a building which was actually completed. Then, is the conviction good at all if that is so? It appears to me that it follows from that that it is bad, because, *quâ* the continuing penalty, it is already shown to be bad if I am right. Then arises the other question under the limitation section. Now, the limitation section says that there shall be no proceedings taken, even for continuing matters, more than twelve months after the original offence. That, in my judgment, applies only to continuing matters, and it does not at all, as it appears to me, conflict with the general clause in the Act 11 & 12 Vict. c. 43, which was relied upon for the appellant as making it necessary to proceed for any act within six months of the offence committed. The only offence stated to have been committed here, except the continuing offence, is the offence either of commencing or of finishing the work, which is not shown to have been within six months before the 11th Dec. 1885, when the information was taken out. Therefore I think that that part of the case is met by the limitation clause. In point of time, the facts, as stated upon the face of the case, are that the commencement of the work was some time between the 16th March and October 1885. Then the information is not lodged until the 11th Dec., and the conviction is on that day. The information and conviction are, therefore, more than six months after the commencement of the offence. Therefore I think clearly, unless the effect of the clause is to extend the time to twelve months for all cases, the effect of the limitation section is that this is well without the six months, and therefore the conviction was without jurisdiction. Now, Mr. Charles argued to try and induce us to hold that the section which gives the twelve months extends the time within which to commence proceedings to twelve months wherever there is a continuing offence. I, however, do not think it has that effect, and I cannot see that the two statutes are not to be construed without in the least conflicting the one with the other. If you go on building after notice to desist, or often, perhaps, without notice, unlawfully, and an action is brought, or a prosecution instituted, for having built unlawfully, it must not be done except within twelve months from the commission of the original offence. That is intelligible. But if you have to proceed for the original offence itself, then proceedings must be taken within six months of the original offence, in accordance with sect. 11 of 11 & 12 Vict. c. 43. Neither of those things has been done in this case. The original offence was not committed within six months of the commencement to build, and, as to the other, either the bye-law is bad, if it means that there is to be a conviction having the effect of forcing a person himself to pull down a completed work, or if good, there has been no violation of it. For these reasons I think that the appellant ought to succeed, and that the conviction ought to be quashed.

Hawkins, J.—I also am of opinion that the appellant ought to succeed, and that the conviction ought to be quashed, but on somewhat different grounds to those stated by my brother Denman. In order to explain my view of the matter, it becomes necessary at length to read some of the sections of the various Acts of Parliament, because, without that, it would be very difficult to make oneself intelligible. I will endeavour to work the matter out, and I will proceed to do so by calling attention to the various provisions in the sections of those Acts which I think material. Now the first Act to which reference is made is the first Public Health Act (11 & 12 Vict. c. 63), which authorises the construction of local boards, and gives very stringent powers as to the management of buildings over which jurisdiction is granted. There are two sections in that Act which it is necessary to refer to, not because they have any existence at the present day, but for the purpose of explaining how the bye-laws which are in question on this occasion came into existence. The first of these sections was sect. 53 of 11 & 12 Vict. c. 63, and by it it was enacted that "fourteen days at the least before beginning to dig or laying out the foundations of or for any new house, or to rebuild any house pulled down to the extent aforesaid, the person intending so to build or rebuild shall give to the local board of health written notice thereof," together with certain other things which are there set out. Then it goes on to say: "It shall not be lawful to begin to build or rebuild any such house, or to build or construct any such privy or cesspool, until the particulars so required to be stated have been approved by the said local board; and in default of such notice, or if any such house, privy, or cesspool be built, rebuilt, or constructed as aforesaid without such approval, or in any respect contrary to the provisions of this Act, the offender shall be liable to a penalty not exceeding 50*l*., and the said local board may, if they shall think fit, cause such house, privy, or cesspool to be altered, pulled down, or otherwise

dealt with as the case may require." I need not read the rest of that section, because I think I have read sufficient to indicate what it is. It would seem there that, unless assent is given, the penalty is to be the sum of 50*l*. There is nothing at all said about a continuing offence. Then by sect. 72 it is enacted that "one month at least before any street is newly laid out notice shall be given to the local board," and then the section goes on to say "whosoever shall lay out, make, or build upon any such street otherwise than in accordance with the level and width fixed by the said local board or approved by the said general board, shall be liable for every such offence to a penalty not exceeding 20*l*. for every such day during which he shall permit or suffer such street to continue to be so improperly laid out, made, or built upon." Then the only other section which it is necessary to refer to is sect. 115, which conferred power upon the local board to make bye-laws, and to that section I think particular attention ought to be directed: "All bye-laws made by the local board of health under and for the purposes of this Act shall be in writing under their seal, and the signature of any five or more of their number, or (in the case of a corporate district) under the common seal; and the said local board may by any such bye-laws impose upon offenders against the same such reasonable penalties as they shall think fit, not exceeding the sum of 5*l*. for each offence, and in the case of a continuing offence, a further penalty of 40*s*. for each day after written notice of the offence from the local board," and so on as aforesaid. Then the rest of the section goes on to say "provided always that all such bye-laws imposing any penalty shall be so framed as to allow of the recovery of any sum less than the full amount of the penalty." Then it goes on further to say that "no bye-laws shall be enforced unless they are framed in the manner thereinbefore stated." My reason for referring particularly to this 115th section is that it clearly contemplates not only the infliction of a penalty of 5*l*. for an offence committed against the bye-laws, but it contemplates this state of things: that there may be a continuing offence, and if there be a continuing offence, a further penalty may be inflicted, not exceeding 40*s*. a day. There is another reason which will appear hereafter. The bye-law has been so framed as not to make it imperative on the magistrates to inflict a penalty of 40*s*. or of 5*l*., but it is so framed that the penalty may be mitigated under certain circumstances, if the magistrates think fit. I think I may as well state here, because it seems to me to be important to deal with this, that upon each particular day each continuing penalty is to be subject to the adjudication of the magistrate, who is to take all the circumstances into consideration before he fixes what the penalty is to be, one farthing or the full sum of 40*s*.: it requires an adjudication with reference to that each particular day. Having now pointed out what the provisions of this Act were, and having read the 53rd and 72nd sections, with reference to the matters mentioned in them and the mode in which bye-laws are to be made, and what they are permitted to do, I now proceed to refer to the second Act which has been referred to, namely 21 & 22 Vict. c. 98. By the 4th section of that Act it is thus enacted: "This Act shall be construed together with, and be deemed to form part of, the Public Health Act 1848," so that the two Acts are to be read together. Now, when I come to sect. 34 of this Act, I find this: "The 53rd and 72nd sections of the Public Health Act 1848 shall be repealed; and in lieu thereof be it enacted as follows: Every local board may make bye-laws with respect to the following matters (that is to say) (1) With respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof; (2) With respect to the structure of walls of new buildings for securing stability and the prevention of fires; (3) With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings; (4) With respect to the drainage of buildings, &c. And they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws: provided always that no such bye-law shall affect any building erected before the date of the constitution of the district." So that there, by the bye-laws authorised by this 34th section, they provide for the observance of the same in the way described in the section. Now, the effect of this was to repeal the provisions which were contained in the 53rd and 72nd section of the first Act of 1848, and to substitute for them bye-laws which the local board were authorised to make. Inasmuch as the two Acts of 1848 and 1858 are to be read together as one Act, of course it follows that the bye-laws which the local board were authorised to make under the Act of 1858 were bye-laws of a character and made with the formalities, prescribed by the 115th section of the Act of 1848, and the Act of 1848, as I have already said, provided that, in the case of a continuing offence, a further penalty of 40*s*. for each day after written notice of the offence from the local board might be inflicted. That being the state of things, the bye-laws which we are now considering were made. They are made in respect of all the matters as to which they were authorised to be made. First of all, with reference to the 3rd bye-law, which is the subject of one of the questions put to us, namely, whether that bye-law is good or bad, I propose to dispose of that at once. The bye-law runs thus: "The yard space shall not be less than one-half of the entire area of the house or building and out-offices, and no building whatever shall be erected in or over such yard space except the privy, ashpit, and coal-house in connection with the house or building, and these only in such a position as the local board shall approve. The yard space shall be left upon such portion of the ground as the local board may order." Now, I confess, after reading that bye-law, that I have heard nothing said in the course of this case that satisfied me that it is otherwise than good and reasonable. Therefore I pass on, and consider the other bye-laws which are the subject of our investigation. The first part of the 5th bye-law enacts that "every person intending to construct a house or building shall, seven days at least previous to the meeting of the local board at

which the application is intended to be considered, deposit at the office of the surveyor to the local board for the time being a plan, section, and elevation of the proposed house or building, and an application in writing for the sanction of the local board thereto." Then sub-sects. 2, 3, 4, and 5 all set out the requirements of the plans and specifications; sects. 6, 7, and 8 relate to the duties of the surveyor in the case of buildings being completed after notice is given of the application; and then comes the 9th paragraph, which has been the subject of so much discussion. That paragraph runs thus: "The local board shall by their order, approve or disapprove of proposed new houses, buildings, or other works within the times severally specified herein for the deposit of notices thereof; but if the owner or person intending to construct any new street, or erect any new house or building, fail to give the notices herein required, or proceed to the execution of any of the works before the expiration of such notices, without the approval of the local board, or if any owner or person shall construct, or cause to be constructed, any works, or do any act, or omit to do any act, or comply with any requirement of the local board, contrary to the provisions herein contained, he shall be liable for each offence to a penalty not exceeding 5*l.*, and he shall pay a further sum not exceeding 40*s.* for each and every day during which such works shall continue or remain contrary to the said provisions." That latter clause, although not argued before us or touched upon, strikes me as being a very important clause with reference to this, because it seems to me to provide what was beyond the jurisdiction of the local board to sanction at the time the bye-law was made, and I think it is also beyond their jurisdiction at the present moment. However, I need not enter into that matter until I come to the last Act—of 1875. Now, I will point out why I think that is wrong, without discussing the further questions that were argued in the course of the case. I will read these words again: "He shall pay a further sum not exceeding 40*s.* for each and every day during which such works shall continue or remain contrary to the said provisions." The effect of that is, that if the work were commenced illegally and prosecuted illegally for any number of days, according to this bye-law a penalty of 40*s.*, more or less, according to the judgment of the magistrate, would be incurred from the date of the first offence. There is no period of limitation provided, but it is a penalty to be incurred for each day during which the work shall continue. That is not a continuing penalty which is authorised by sect. 115 of the statute of 1848, and for this reason: The statute says, in the case of a continuing offence, a further penalty not exceeding the sum of 40*s.*, for each day after written notice of the offence; so that before a single continuing penalty is due, or can be sued for, there must be written notice of the offence, and it is from that time, and from that time only, that a continuing penalty commences to run. Considering this bye-law according to its language, it makes it an offence for every day that the building continues from the time that the offence was first committed. That is not authorised by sect. 115 of the Public Health Act of 1848; the section says that an offence may be committed by contravening the bye-law, by proceeding without a plan, by pursuing any course of building not allowed by the bye-laws. Then the bye-law goes on to say: "Every day that the work shall continue"—not every day that the offence shall continue; that means every day from the original offence—a penalty of 40*s.* may be incurred. That is not authorised, according to my view, by this sect. 115, and therefore in that respect it seems to me that the bye-law is bad. That, however, does not make an end of the argument; we have still to deal with the earlier part of it, and I will assume also, in the course of what I have still to say, that the objection I have just pointed out does not exist. Now, under this Act, there were several bye-laws made, and there were two cases, which my learned brother Denman has referred to, in which questions arose as to the validity of bye-laws made under the Acts of 1848 and 1858. The first case I shall refer to is the case of *Brown* v. *The Holyhead Local Board* (7 L. T. Rep. N. S. 332; 32 L. J. 25, Ex.). That was an action of trespass which was brought against the Holyhead Board of Health for pulling down a boundary wall, and it did not turn upon any question relating to penalties at all. It was an action of trespass, and the real ground of complaint was that they were endeavouring to take a man's land without giving him compensation for it. The case of *Young* v. *Edwards* (11 L. T. Rep. N. S. 424; 33 L. J. 227, M. C.) was decided in the following year (1863). In that case there is no reason given for the judgment pronounced, but I think it may be gathered that in substance it was upon the same ground as the decision in the case of *Brown* v. *The Holyhead Local Board*. In both these cases the bye-laws were held bad, and I think, upon the best consideration I can give these cases, that they were really decided upon the ground that the person who complained of them was illegally and improperly, without compensation, ordered to deal with his land in a way which was unjustifiable. That seems to be really the substance of the decisions in these two cases. I collect from them that these notices which were said to have been disregarded created the infringement of the bye-laws. It appears to me that the real reason of these cases was that in each the plaintiff was required to deal with his land in a way which was not authorised by the Act of Parliament or by the bye-laws. Bramwell, B., at 11 L. T. Rep. N. S. p. 425, says: What we have to decide in truth is, whether the 26th bye-law is good." Then, further on, in another observation, he says: "Is this bye-law, which gives the board a general power of disapproval without assigning any reason, a good bye-law under an Act of Parliament, which says that the board may make bye-laws, with power to enforce the observation of them, in respect of four particular matters? Under this bye-law the board may enforce anything." Martin, B., in the same case, says: "The substantial question is, have the justices any jurisdiction?" The substance of the bye-law was held bad, because they were proceeding to enforce that which they had no right to enforce, namely, making a man deal with his property in a way which the law did not require. In this state of things, these bye-laws which I have read were passed. The case of *Young* v. *Edwards*, which is the later of the two, was decided in 1864, and in 1866 these bye-laws were made. The next case to be considered is that of *Marshall* v. *Smith*

(28 L. T. Rep. N. S. 538; L. Rep. 8 C. P. 416), to which my brother Denman has already referred. That was decided in the year 1873, a date which it is well to bear in mind. In that case the bye-law required that the party wall should be of a certain thickness, and the building owner had made his party wall thinner than the prescribed thickness, and thereupon he was convicted under a bye-law which, after providing that the external walls of every new building should be of a certain thickness, went on to say that "any person offending against this bye-law shall be liable for each offence to a penalty not exceeding 40*s*." There were a great number of other bye-laws which were inserted in a book, and one of the bye-laws relating to continuing penalties was in these terms: "In case any offences under any of the foregoing bye-laws shall continue, the person offending shall be liable to a further penalty not exceeding 40*s*. for each day during which such offences shall continue after written notice of the offence has been given by the local board to the offender." It will be observed that in this by-law the offence is made to depend upon the giving of a written notice. It seems to me that in *Marshall* v. *Smith* the judgment of the court turned upon this, that it was not a complaint that there was no power at all given to inflict or to prescribe penalties for a continuing offence, but the great objection was that that for which the defendant was called upon to pay was not a continuing offence. The real ground upon which that case was decided, it appears to me, was not that the bye-law was one which would have been illegal if the offence had been a continuing offence or was a continuing offence, but that it was not a continuing offence in point of law. For that reason the court held that the conviction should be quashed. It is true that Honeyman, J. in his judgment says: "If the provisions of continuing penalties had followed immediately bye-law 12, there might have been some difficulty in construing it." That certainly is true to the letter, but I do not think that it is suggested in that observation that if it had been in the same clause the matter would have been in the least degree altered, because the whole judgment turned upon the question whether the non-compliance with the requirement to take the wall down was a continuing offence, or, in other words, whether the leaving it against the provisions of the bye-law was a continuing offence. The court held that the offence was the erecting a wall against the provisions of the bye-law, and that the mere doing nothing to it afterwards could not be deemed to be a continuing offence. That case has never been questioned so far as I know. On the contrary, it seems to have been recognised, as I shall proceed to show when I come to the statute of 1875—a statute which seems to have been passed really for the purpose of amending and altering the state of the law which Keating and Honeyman, JJ. had to deal with. There was nothing in the case of *Rumball* v. *Schmidt* (46 L. T. Rep. N. S. 661; 8 Q. B. Div. 603), which in the least degree affected the case of *Marshall* v. *Smith*. In *Rumball* v. *Schmidt* the offence was an offence committed against the provisions of sect. 156 of the Public Health Act 1875, and by that section it is laid down that "it shall not be lawful in any urban district without the written consent of the urban authority, to bring forward any house or building forming part of any street, or any part thereof, beyond the front wall of the house or building on either side thereof, nor to build any addition thereto beyond the front of the house or building on either side of the same. Any person offending against this enactment shall be liable to a penalty not exceeding 40*s*. for every day during which the offence is continued after written notice in this behalf from the urban authority." There the case of *Marshall* v. *Smith* was cited, but the court pointed out the great distinction between the two cases, namely, that in *Rumball* v. *Schmidt*, the offence was one which was treated as a continuing offence by the section in the Public Health Act itself. It was not an offence merely under the bye-law, and the Act of Parliament had prescribed the penalties which should follow a breach of the injunctions contained in the section. That distinguishes the cases, and makes the case of *Rumball* v. *Schmidt* really no authority whatsover in support of—and I may add also, against—the contention of either party here. I only mentioned that case that I might dispose of it. Now we come to the Public Health Act 1875 (38 & 39 Vict. c. 55), and there are three or four sections in this Act which require to be carefully considered. The first section to which I shall refer is the 158th, and it runs thus: "Where a notice, plan, or description of any work is required by any bye-law made by an urban authority, to be laid before that authority, the urban authority shall, within one month after the same has been delivered or sent to their surveyor or clerk, signify in writing their approval or disapproval of the intended work to the person proposing to execute the same; and if the work is commenced after such notice of disapproval, or before the expiration of such month without such approval, and is in any respect not in conformity with any bye-law of the urban authority, the urban authority may cause so much of the work as has been executed to be pulled down and removed." Then there follow provisions with regard to how the expenses of removal of a work made contrary to the bye-law are to be defrayed, but with that it is unnecessary for me to deal now. Then the section goes on in paragraph 3 to enact that: "Where an urban authority may, under this section, pull down or remove any work begun or executed in contravention of any bye-law, or where the beginning or the execution of the work is an offence in respect whereof the offender is liable in respect of any bye-law to a penalty, the existence of the work during its continuance in such a form and state as to be in contravention of the bye-law shall be deemed to be a continuing offence." So that this sect. 158 really seems to have been pointed to the making that a continuing offence by law which the two learned judges, who decided *Marshall* v. *Smith*, held not to be a continuing offence. It reversed their judgment as to the existing state of the law, so that if this section had been passed before the decision in *Marshall* v. *Smith* there would have been no doubt at all that the penalties there would have been properly imposed. At all events since 1875 the offence is a continuing offence, and the continuing penalties may now be inflicted. But there is another short sentence in this section, which rather refers to the Statute of Limitations: "But a penalty

shall not be incurred in respect thereof after the expiration of one year from the day when the offence was committed or the bye-law was broken." The limitation of time within which the penalty is to be sued for does not seem to me to affect the procedure at all. It simply provides that, in the case of a continuing offence, no penalty shall be incurred for a greater period than twelve calendar months; but it does not limit the time for proceeding to twelve calendar months, or extend the six months given by Jervis' Act (11 & 12 Vict. c. 43) under sect. 11. It merely provides a limitation to the extent of the amount of the penalty which may be incurred. The next section to be considered is sect. 182, which relates to the making of the bye-laws, and provides that, "All bye-laws made by a local authority, under and for the purposes of this Act, shall be under their common seal; and any such bye-law may be altered or repealed by a subsequent bye-law made pursuant to the provisions of this Act: Provided that no bye-law made under this Act by a local authority shall be of any effect if repugnant to the laws of England or to the provisions of this Act." Then comes sect. 326, which is the last of the sections that require consideration. It enacts that "all bye-laws duly made under any of the Sanitary Acts by this Act repealed, and not inconsistent with any of the provisions of this Act, shall be declared to be bye-laws under this Act." I need hardly say that the two Acts of 1848 and 1858 were then in force; and, therefore, this paragraph of sect. 326 applies to "bye-laws duly made" under them. I confess I felt considerable difficulty in making up my mind as to what was the real meaning of these words; but, upon the whole, I am inclined—not altogether without doubt—to come to the conclusion that they mean that if any bye-laws have been made by the local authorities, with all due formalities required by those two Acts, if those bye-laws are not inconsistent with the provisions of the Public Health Act 1875, they shall, in the language of this Act, "be deemed to be bye-laws under the Act." Certainly that is a convenient interpretation. I think that the object of the Legislature was to make that which was no continuing offence before this Act of 1875 was passed, a continuing offence, and to sanction such a bye-law as would carry out the objects of the statute of 1875. For that reason it is that, I think, although, as I have said, with a great deal of hesitation and doubt in my own mind, which is not at present altogether dispelled, that the bye-law is a good bye-law under this particular Act. But that does not dispose of the case. I say that the bye-law was a good bye-law, subject to the objection which I stated when I read sect. 115 of the Act of 1848. Now, the case of *James* v. *Wyvill* (51 L. T. Rep. N. S. 427) has been commented upon by my brother Denman, and I do not purpose, therefore, to discuss that case any further than to say that I concur entirely with every observation that he has made upon it. But I do not look upon that case as an authority which is binding upon us one way or the other, for the reason which I have already stated. My opinion is, therefore, that the 9th paragraph of the 5th bye-law, which is the one which has been impeached, is not unreasonable. I think that, subject to this, which I confess I deem to be a fatal objection, that the penalty of 40*s.* is made payable for every day the works continue, instead of only making it payable for every day the works continue after a written notice of the offence; subject to that I see nothing which is at all unreasonable or illegal in this 9th section of bye-law 5. Supposing, however, that the latter part of the bye-law relating to continuing penalties could be said to be beyond the jurisdiction of the local board, I do not think there would be any difficulty at all in saying that that part was severable from the first position of the bye-law in that paragraph, and I have authority for so saying in the dicta of the learned judge in the case of *Clark* v. *Denman* (1 B. & A. 95), where it is said that a bye-law may be good in part and bad in part. The argument before the justices against the information was, first of all, that the bye-law under which the penalty was inflicted was a bad bye-law, and that, as a whole, the bye-law was not severable, and that even if the bye-law was a good bye-law so as to justify the conviction of the appellant at all, he could not be convicted because the limitation section (sect. 11 of Jervis' Act), says: "Be it enacted that in all cases where no time has already or shall hereafter be specially limited for making any such complaint, or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made, and such information shall be laid, within six calendar months from the time when the matter of such complaint or information respectively arose." I have already stated that I think that that part of the bye-law which inflicted the penalty of 5*l.* inflicted a penalty which there might have been jurisdiction to inflict, but, looking at the date given in this information, and the absence of any evidence or any finding that any portion of the work was done within the six calendar months before December, when the information was preferred, I come to the conclusion that the Statute of Limitations must prevail although the bye-law is good. Now, when I come to deal with so much of the conviction as deals with the continuing penalties, I am of opinion that if the bye-law had been in other respects good, it would have been re-enacted by sect. 326 of the Public Health Act 1875, yet I think that it was a bad bye-law, for the reason that it makes the continuing penalty run from the time of the execution of the work, which is illegal, instead of making it run only from the time of the giving of the notice of such offence, as was authorised by the Legislature. But it appears to me that there are other objections which may be raised. In the first place, I look in vain upon this conviction for any adjudication by the magistrates. It is true that in their statement they do say, "we convicted him of the offence," in the singular; but if the information was warranted by the facts there were no less than sixty-one offences committed. It is clear that the magistrates meant to convict the appellant of the offence of beginning the works in contravention of the bye-law, and for that he was fined in a penalty of 5*l.* As to the continuation of the offence, I do not think that penalties may be incurred from day to day during the year. I think that the continuing offence is an offence which may be punishable; a man may be convicted day by day as often as he commits the continuing offence, and each day if a summons were taken out he might be prosecuted, and each offence might be the subject of a conviction. Therefore

I think that this conviction cannot be read as a conviction as to continuing penalties, because if it were to be so read, it would be bad. There is authority for saying that in cases of continuing offence the statute does not begin to run. In the case of the *The Metropolitan Board of Works* v. *Anthony* (33 W. R. 166; 54 L. J. 39, M. C.) there was a continuing offence under another Act, where a temporary structure had been erected within the metropolitan district without the licence of the Metropolitan Board of Works, but no complaint of such erection was made until after the expiration of six months from its completion. It was held that the offence was a continuous one as long as the structure remained existent, and that proceedings for the recovery of penalties might be taken within six months of the time within which it continued to exist. There the proceedings were held to be in time. I am therefore of opinion in this case that the continuing penalties cannot be enforced for the two reasons which I have given. First, they are not made the subject of the adjudication at all, because the adjudication is only for one offence: that is the offence which in the information is stated to have been committed on the 21st March, more than six months before the information was laid. But, independently altogether of that which is perhaps a mere technical objection, I think the substantial objection must prevail, namely, that the bye-law is a bad bye-law in requiring these continuing penalties to be paid, not from the date of the notice, but from the time when the building was first of all improperly commenced. For these reasons I think that the building without plans having been approved—the offence, if any, having been committed more than six months before the information was laid—the Statute of Limitations prevails against that. With regard to the continuing offences, I have already stated what my view is in respect to them. I think, therefore, that this appeal must be allowed, and the conviction by the magistrates set aside.

Conviction quashed.

Solicitors for the appellant, *Williamson, Hill,* and *Co.*, for *Dixon*, Gateshead.

Solicitors for the respondents, *Bell, Broderick,* and *Gray*, for *Swinburne*, Gateshead.

Tuesday, March 16, 1886.

(Before Mathew and Smith, JJ.)

Strike *v.* Collins. (*a*)

Local government—Market—Bye-law, validity of—Restraint of trade—Wholesale and retail.

A bye-law made under a local Act for regulating markets is not unreasonable or in restraint of trade by reason of its setting apart a part of a market for sale by wholesale only and providing a penalty for selling by retail in that part.

This was a special case stated by the justices of the city and county of Newcastle-upon-Tyne, on the hearing of a summons issued on an information preferred by Robert Strike, the city market-keeper, the appellant, against Mary Collins, the respondent, for that, on the 7th Nov. 1885, at the parish of St. Nicolas, in the said city and county, she the said respondent unlawfully did vend in the market in Newgate-street, there situate, certain articles, namely, vegetables, by retail, contrary to a certain bye-law (No. 8) for the said market, made, ordained, and ordered by the council of the city and county, under and by virtue of the statute in that behalf, and which said bye-law was at the time of the commission of the said offence, and still is. in force for the said market.

The facts set out in the special case and which were either proved before the justices on the hearing of the summons, or admitted and agreed upon by both parties, are as follows:—

The appellant was, for the time being, the keeper of the fruit, vegetable, plant, and flower market in Newgate-street, in the said city. On the day in question, a Saturday, the respondent did vend vegetables by retail in the said market, and up to and before the coming into operation of the orders, rules, and regulations hereinafter referred to, persons were selling and had sold vegetables by retail in Newgate-street for the preceding five or six years to the knowledge of the appellant, and without interference.

The vegetables exposed by the respondent on the day in question for sale were cabbage, lettuce, carrots, celery, and brocoli, and the appellant deposed to seeing her sell one bunch of celery and one bunch of lettuce, for each of which she received 3*d.*, and also some cabbage and turnips for 1½*d.*

Under the authority of the 91st section of the Newcastle-upon-Tyne Improvement Act 1837, the council of the city were empowered to provide places for public markets in the said city, and to make orders, rules, and regulations relative thereto. The following is a copy of the section:

And be it further enacted that, it shall be lawful for the said council for the time being from time to time to find, provide, and appropriate proper and convenient places within the said borough for holding and keeping public fairs and markets for the sale of horses, sheep, swine, or other live cattle, corn, or other grain, fish, butchers' meat, poultry, milk, butter, eggs, vegetables, and other viands and provisions, goods, wares, and merchandises, and for holding public hirings, and also to find and provide a market-house for the sale of corn and other grains, and when in council assembled by acts or orders of council to order and direct such place or places so from time to time found, provided, and appropriated as aforesaid to be used as public fairs and market places accordingly, and also when in council assembled by acts or orders of council to ascertain, set out, and appoint such particular part or parts of the streets, market places, and other ways and places within the said borough as they shall from time to time judge proper and convenient as well for holding and keeping such fairs and markets as aforesaid, as also for holding public hirings, and also to ascertain, set out, and appoint such particular part or parts of the streets, market places, and other ways and places within the said borough as they shall from time to time judge proper and convenient as well for holding and keeping such fairs and markets as aforesaid, as also for holding public hirings, and also to ascertain, set out, and appoint such particular place or places in the said fairs and markets or any of them for the erecting any stalls or standings for vending or exposing to sale horses, sheep, swine, or other live cattle, corn and other grain, fish, butchers' meat, poultry, milk, butter, eggs, vegetable, and other viands and provisions, goods, wares, and merchandises, and also to make and ordain such orders, rules, and regulations, as to them shall from time to time seem requisite and necessary for the ordering, directing, and regulating the said fairs, markets, and hirings, and for fixing and ascertaining the days and hours when the same respectively shall be held, and also when the said respective commodities shall respectively be begun to be offered

(*a*) Reported by Joseph Smith, Esq., Barrister-at-Law.

and exposed to sale, and also the mode and manner of carrying and conveying the said several commodities to and from such fairs and markets, and also the time or times when any such stalls or standings as aforesaid shall be erected and set up and taken down or removed, all which orders, acts of council, rules and regulations shall be printed or written in legible characters, and affixed in some conspicuous place or places within the said borough, and shall be advertised two successive times in one of the weekly newspapers published in the said borough, and further made known to those whom it may concern in such manner as to the said council for the time being shall seem meet, and in case any person or persons shall offend against or disobey any of the said orders, rules, and regulations so to be made and published as aforesaid, every such person shall for every such offence forfeit and pay any sum not exceeding twenty shillings.

At a meeting of the council of the city, held on the 22nd May 1885, the council, by virtue and in exercise of the powers vested in them by the said Newcastle-upon-Tyne Improvement Act 1837, did find, provide, and appropriate certain proper and convenient places within the city for the purpose of holding and keeping a market for the sale of fruit, vegetables, plants, and flowers, and did make and ordain certain orders, rules, and regulations (hereinafter referred to as the said bye-laws) for the ordering, directing, and regulating the said market and for fixing the days and hours when the same should be held.

The place where the respondent vended her vegetables by retail was at a part of Newgate-street set out, ascertained, and appointed by the council for the sale of fruit, vegetables, plants, and flowers by wholesale only, and the offence was alleged to have been committed by the respondent on a day and within the hours fixed by the council for holding the said market in Newgate-street.

The adjoining street—St. Andrew's-street—is set out, ascertained, and appointed for the sale by wholesale and retail of plants and flowers, and the adjoining covered market is found, provided, and appropriated for the sale of fruit, vegetables, plants, and flowers by wholesale and retail also. The respondent has a stall in the said covered market.

The 8th bye-law above referred to provides that

No person shall vend or expose to sale in the market in Newgate-street any article or thing whatsoever, except fruit, vegetables, plants, or flowers by wholesale from carts or waggons, or fresh vegetables by wholesale from packages.

And the bye-laws also provide that

In case any person or persons shall offend against or disobey any of the above orders, rules, and regulations every person shall for every such offence forfeit and pay any sum not exceeding twenty shillings.

No definition whatever is given of the word "wholesale" in the said bye-laws.

It was held by the justices after argument that the bye-law in question was unreasonable and in excess of the powers conferred on the council of the city by sect. 91 of the said Newcastle-upon-Tyne Improvement Act 1837, inasmuch as such section did not appear to them to warrant in point of law the making of a bye-law wholly prohibiting on all days and at all hours when the market in Newgate-street aforesaid was lawfully being held a sale (otherwise than by wholesale) in the said market; but only in their judgment authorised the regulating of the said market, and was not intended and did not in its true legal construction empower the said council to restrain by any such bye-law as the one under consideration the retail trade of the said market and the general rights of traders there to the extent and in the manner the said bye-law in terms affected to do.

For the above reasons the justices accordingly dismissed the summons.

The question of law arising on the foregoing statement for the opinion of the court was, whether the decision of the justices was correct in law. If the court should be of opinion that the justices were right in their view of the said bye-law being in excess of the powers conferred by sect. 91 of the said Newcastle-upon-Tyne Improvement Act 1837, and consequently illegal, or for that or any other reason bad in law, then their decision is to stand; if otherwise, the case is to be remitted to be further dealt with in accordance with the opinion of the court in due course of law.

Austin for the appellant.—This bye-law is reasonable, and cannot be said to be in restraint of trade. The council have set apart one portion of the market for sale by wholesale, and another for sale by retail, and such provision is in furtherance of trade by regulating it, instead of being in restraint. In *Savage* v. *Brook* (15 C. B. N. S. 264) it was held that a local Act did not exempt from penalties one who violated the bye-laws of the local board of health by exposing for sale meat at a place other than so appointed by them, notwithstanding that the spot where such meat was so exposed for sale was a place where such articles had for a long series of years been sold. No principle of law is violated by this regulation. As long ago as 18 Car. 2, it was said, in *Player* v. *Jenkins* (2 Siderfin, 284), that a bye-law that no butcher should have a shop in Cheapside was good.

Boyd for the respondent.—The bye-law is unreasonable. [MATHEW, J.—Do you contend that a bye-law setting the place apart for the sale of vegetables is unreasonable, and that cattle dealers ought not to be restrained from selling their cattle there?] No reasonable distinction can be drawn between wholesale and retail. The place having been set apart for the sale of vegetables the council cannot interfere further. [SMITH, J.—What is the difference between dividing the sale of two different articles and dividing wholesale trade from the retail?] Bye-laws cannot be made in support of particular theories. In *The Calder and Hebble Navigation Company* v. *Pilling* (14 M. & W. 76) a bye-law that the canal was not to be used on Sundays was held to be unreasonable. There is no legal distinction between sale by wholesale and sale by retail. A large hotel keeper buys more by retail than a small shopkeeper by wholesale. Besides, the bye-laws do not define the word "wholesale," and this bye-law is bad because it creates and makes punishable an indefinite offence. Further, having fixed certain places as "markets," the council cannot afterwards confine the market to certain fixed purposes. He also cited

The Mayor, &c., of Northampton v. *Ward*, 2 Strange, 1238.

Austin was not called upon to reply.

MATHEW, J.—In this case I am of opinion that the justices were wrong in coming to the conclusion that the council had no power to make this bye-law. It was framed under an Act of Parlia-

ment enabling the council to find, provide, and appropriate proper and convenient places within the borough for holding and keeping public fairs and markets for the sale of horses, sheep, swine, or other live cattle, corn or other grain, fish, butcher's meat, poultry, milk, butter, eggs, vegetables, and other viands and provisions, goods, wares, and merchandises. Under these powers the council clearly had a right to say in what part of the space found and provided for holding markets one commodity should be sold, and in what part other trades should be carried on. They have clearly, in that way, power to regulate the trades to be carried on, and to frame rules of this character. So far as this I do not understand that the question is disputed as to the localities in which particular articles are to be sold. But it is said that the council had no power to go further and set apart different places for sale by wholesale and sale by retail. Now, it seems to me that nothing could be more embarrassing to wholesale salesmen than to have retail sellers endeavouring to carry on their business alongside them at the same time. It seems to me, therefore, that this regulation is calculated to further the object to secure which these powers were given to the council. But a second point is also taken. It is said that the word "market" has a technical meaning, and that wherever a market is provided and set apart by these bye-laws, there a market in the technical sense of the word is established, and persons have by consequence a right of selling either wholesale or retail as they choose. I think that the whole of the rules must be construed together. Clearly it was not the intention of the council in framing them to create, in the first place, a market in the full sense of the word, and then afterwards to stultify themselves by derogating from the original grant. I do not think, therefore, that the word "market" is used anywhere in these bye-laws in a technical sense. Lastly, it was said that the bye-law is bad because it is indefinite and there is a difficulty in interpreting it, inasmuch as the distinction between wholesale and retail is unknown to the law of this country and the rules themselves contain no definition of the terms. I confess that I am not pressed by that argument, because, in my opinion, it is a matter of fact in each case, and one capable of being more easily settled than many questions of fact which are commonly left to juries to decide upon. In this case, at any rate, there is no difficulty, because the magistrates have found, and it is admitted, that the sale was by retail. I think, therefore, that the justices were wrong in finding that this bye-law was unreasonable and void, and that the case must be remitted to them to deal with it in accordance with our decision.

SMITH, J.—I am of the same opinion, and I think that the 91st section of the Newcastle-upon-Tyne Improvement Act 1837 (1 Vict. clxxii.) gave the council power to make this bye-law. I am unable to see that anything which Alderson, B. said in *The Calder and Hebble Navigation Company* v. *Pilling* (14 M. & W. 87) is to be understood as tending to show that this bye-law is bad, nor can I see how a bye-law of this kind can be said to be in restriction instead of in furtherance of the business of the market. I think that it is most reasonable that there should be a regulation providing that cattle shall be dealt with in one part and sheep in another, or that vegetables shall be sold by wholesale in one part and by retail in another. To my mind it would be most inconvenient for the public to have the wholesale and retail trades mixed, and I think that, as it is more convenient to sever the two trades, the bye-law is not in restraint of the business of the market. But then it is said that the law knows no distinction between sale by wholesale and by retail. No authority has, however, been cited to lead me to that conclusion, and I do not think that any tribunal would have any difficulty in determining, in any particular instance, whether a man was selling by wholesale or by retail. In my opinion, the bye-law is not unreasonable; it is not in restraint of trade; and it is not beyond the powers of the council to make under their Act of Parliament. I think, on the contrary, that it is a good bye-law, and that our decision must be in favour of the appellant. We do not think that there ought to be any order as to costs.

Solicitors for the appellant, *Collyer-Bristow* and *Co.*, for *Motum*, Newcastle-on-Tyne.

Solicitors for the defendant, *Brownlow* and *Home*, for *E. Clarke*, Newcastle-on-Tyne.

CROWN CASES RESERVED.

Thursday, June 24, 1886.

(Before Lord COLERIDGE, C.J., DENMAN, FIELD, MATHEW, and DAY, JJ.)

REG. *v.* STROULGER. (*a*)

Criminal law — Corrupt practices — Bribery — Indictment — Specific offence not alleged — Generality — Indictment cured by verdict — 26 & 27 Vict. c. 29, s. 6; 46 & 47 Vict. c. 51. ss. 3 and 53 (1).

It is necessary, in prosecutions for corrupt practices under the Corrupt and Illegal Practices Prevention Act 1883, *to allege the particular corrupt practice of which the prisoner is charged with the commission. S. having been indicted for that at an election for members of Parliament he was "guilty of corrupt practices against the form of the statutes in that case made and provided;" and a case having been reserved upon a motion in arrest of judgment:*

Held (*Field, J. dissenting*), *that had the objection been taken before verdict it would have been fatal.*

But held, further (*Denman and Day, JJ. dissenting*), *that the defect in the indictment was such as could be supplemented by the verdict on the evidence, and S. having been found upon the evidence to have been guilty of bribery, the indictment was cured by the verdict of the jury.*

CASE stated for the consideration of this court by Pollock, B. which was as follows:

The prisoner was tried before me at the spring assizes held at Ipswich on the 7th May 1886, upon an indictment which alleged that he was at an election for members of Parliament for the borough of Ipswich, holden on the 25th day of Nov., in the year of our Lord 1885, "guilty of corrupt practices against the form of the statutes in that case made and provided."

It was proved in evidence that the prisoner promised money to two voters in order to induce

(*a*) Reported by R. CUNNINGHAM GLEN Esq., Barrister-at-Law.

thom to vote. The jury found the prisoner guilty of corrupt practices by offering money for votes.

After verdict it was objected by counsel for the prisoner that the indictment was bad because it did not sufficiently describe the nature of the offence with which the prisoner was charged.

Counsel for the prosecution referred to the Corrupt and Illegal Practices Prevention Act 1883 (46 & 47 Vict. c. 51), s. 3 (*a*), which provides that "the expression 'corrupt practice' as used in this Act means any of the following offences," and refers to Part III. of the 3rd schedule of that Act, which includes the Parliamentary Elections Act, s. 3. This provides that "corrupt practices" or "corrupt practice" shall mean bribery, treating, and undue influence, or any of such offences, as defined by Act of Parliament, or recognised by the common law of England.

I thought the indictment was good after verdict, but respited judgment and reserved for the consideration of the Court of Criminal Appeal the question whether it is good or not.

Cock, Q.C. (with him *F. K. North*) moved on behalf of the prisoner in arrest of judgment upon the ground that the nature of the offence was not sufficiently disclosed in the indictment. He contended, in the first place, that no offence at all appeared on the face of the indictment, for "corrupt practices" was not an offence, but merely a description of certain offences against the statute of 1883. The general expression was not defined in the Act as an offence. By indicting for the offence of corrupt practices, the indictment did not show in any way which of the offences known as corrupt practices the prisoner was alleged to have committed. The rule of the criminal law was that an offence must be set out with all the facts and circumstances, unless there is a statutory provision enacting otherwise. [FIELD, J.—Would not a general charge of "bribery" be sufficient?] Yes; but that is because the statute provides that it shall be sufficient. [FIELD, J.—But yet "bribery" is included in the definition of "corrupt practices."] The allegation that corrupt practices have been committed is an allegation that all the offences which are corrupt practices have been committed. [FIELD, J.—Can you not show which corrupt practice it is *aliunde*, as upon a plea of *autrefois acquit* you may show by parol evidence whether it was or was not the particular offence?] Assuming that the indictment had charged "bribery" in the general, you might give evidence to show of what particular act of bribery the prisoner had been convicted, but you cannot give evidence of the facts of a particular offence under a general allegation. The fact that power is given by statute to plead "bribery" in the general, shows conclusively when there is no similar provision as to "corrupt practices," that you cannot plead "bribery" under the general allegation of "corrupt practices." Under sect. 6 of the Act of 1863, although it was not necessary to state the particular circumstances of an offence, still the use of the words "as the case may require," showed it was necessary to specify which of the offences of bribery you charged a man with. Previously to the statute of 1883 "corrupt practices" never existed as an indictable offence, and it was not made an offence in itself by that statute. It was not that the offence was imperfectly stated, for that might be cured by verdict, but that there was no legal statement of any offence at all. The indictment did not show whether it was in respect of a felony or a misdemeanour, but charged the commission of felonies and a misdemeanour in the same indictment, and was therefore bad.

McIntyre (with him *H. Stephen*), on behalf of the Crown, contended that the indictment was good, inasmuch as the effect of the Act was to create a new offence, and to abolish bribery as a specific offence. That instead of bribery being a misdemeanour under the Corrupt Practices Prevention Act 1854, it is only an offence punishable under sect. 6 of the Corrupt Practices Prevention Act 1863 by reason of its being included in the offence of corrupt practices created by the later Act, because sect. 53 of the Act of 1883 provides that sect. 6 of the Act of 1863 shall extend to any prosecution on indictment for the offence of any corrupt practice within the meaning of the Act of 1883, as if such offence were bribery within the previous Acts. That the Act intended it should be sufficient to charge a defendant in the general, but that if it was necessary to charge the defendant with having been guilty of a corrupt practice—to wit, bribery—the omission to do so in the present case was cured by verdict. Even at common law, apart from any statute, a verdict cured a number of inaccurate statements or omissions: (Wms. Saunders, vol. 1, p. 227, notes to *Stennel* v. *Hogg*.) The use of the plural in charging the defendant with "corrupt practices," was at the outside but a formal defect, which could be cured: (14 & 15 Vict. c. 100, s. 25.) In *Reg.* v. *Goldsmith* (L. Rep. 2 Cr. Cas. Res. 74), an objection that an indictment for receiving goods knowing them to have been obtained by false pretences did not set out the false pretences, was held to be good after verdict, and a motion in arrest of judgment was refused. So here this motion should not be acceded to.

Cock, Q.C. in reply—Where sect. 6 of the Act of 1883 deals with indictable offences, it requires that the particular corrupt practice shall be specified; but where it deals with offences which are not indictable it makes a special provision enabling them to be charged generally as "illegal practices." By indicting a man in the general for corrupt practices he is not informed whether he is indicted for the commission of a felony or a misdemeanour. This is not a mere formal omission; it is a statement of something upon which a man cannot be sentenced. The Act makes no provision that a corrupt practice shall in itself be a legal offence, for it defines it as including a number of offences, in respect of each of which an indictment will lie.

DAY, J.—I am sorry that in this case, in consequence of a difference of opinion between my

(*a*) Sect. 3 enacts as follows: The expression "corrupt practice" as used in this Act means any of the following offences: namely, treating and undue influence, as defined by this Act, and bribery, and personation, as defined by the enactments set forth in Part III. of the 3rd schedule to this Act, and aiding, abetting, counselling, and procuring the commission of the offence of personation, and every offence which is a corrupt practice within the meaning of this Act shall be a corrupt practice within the meaning of the Parliamentary Elections Act 1868.

learned brothers and myself, it becomes my duty to deliver my judgment first. The prisoner, John Stroulger, is charged in the indictment with having been guilty of corrupt practices at an election for members of Parliament for the borough of Ipswich against the form of the statutes in that case made and provided. And, in the first place, we have to consider if that is a good indictment; and, in the second place, if it is not a good indictment, whether it is cured by verdict. In my judgment, no offence is charged, with any reasonable certainty, in the indictment. As I understand it, there is no specific offence known to the law such as the offence of "corrupt practices." There are a number of things which are corrupt pratices, such as bribery, treating, undue influence, and personation, each of which is a corrupt practice, and is a specific offence for which an indictment may be sustained; some of them are misdemeanours, and one is a felony. Now, in the present indictment, it is not a question of an imperfect description of an offence—there is no attempt of any kind to charge the prisoner with any specific offence at all. It is just the same as if the prisoner had been charged with an ordinary misdemeanour or felony in the general. The indictment, in my opinion, is clearly bad upon the face of it, and the objection to it is one which, if it had been taken before verdict, would certainly have prevailed, and the indictment should have been quashed. The next question, then, is, whether the indictment, being bad, the defect in it is cured by the verdict, I do not see how it could be cured by the verdict. Corrupt practices, in my opinion, not being an offence which is known to the law, how can it be converted into any specific offence by verdict? In my judgment, it would be impossible to enter up judgment on the record upon a verdict of guilty upon this indictment in such a way as to show clearly of what particular corrupt practice or specific offence the prisoner was found guilty. The uncertainty is an uncertainty of that general character which, in my opinion, goes to the gist of the whole offence charged, and fails to show any offence at all has been committed. It is of such a quality that it cannot possibly be cured by verdict of the jury. I am therefore of opinion, in the first place, that this indictment is bad on the ground that it does not charge any offence; and, secondly, that the objection is such as can be taken at any time, and therefore that it can be taken upon motion in arrest of judgment, and for these reasons I am of opinion that this motion should succeed.

MATHEW, J.—In this case we have to ascertain what the real meaning of the indictment is, and it appears to me that it is capable of one meaning only. That is to say that it, in charging the prisoner with being guilty of the offence of corrupt practices, charges him with being guilty of all the offences that are specified as being corrupt practices within the meaning of the statute. What, then, is the character of the objection which is now made to it? It is an objection on the ground of—to use an old term of common law pleading—its multifariousness; and, if an application had been made to quash the indictment, it seems to me that it would clearly have been the duty of the learned judge to have quashed the indictment. Now, what was the course which was taken by the prisoner? It was that he elected to stand upon his trial, and he was found guilty, not of all the offences covered by the indictment, but of bribery; and it appears to me that the imperfect statement of the offence was therefore cured by the verdict of the jury. In this opinion I am supported by the decision of the Court of Appeal in *Reg.* v. *Aspinall* (36 L. T. Rep. N. S. 297; 13 Cox C. C. 563; L. Rep. 2 Q. B. Div. 48), which is an authority that an indictment which is merely inaccurately stated is cured by verdict. In my opinion, this motion should be refused.

FIELD, J.—This is a motion in arrest of judgment, which I believe, according to the authorities, this court have power to entertain on a case reserved as this is. I am very clearly of opinion that we ought not to arrest the judgment in this case, because, in my opinion, I think that the indictment was always good. But if it is defective by reason that it does not state whether the offence charged was bribery, treating, or any other of the specific offences included in the term "corrupt practice," I am also clearly of opinion that the defect has been supplemented by the verdict, and that objection should have been taken before verdict, so that it might have been cured, I think it is important that the points should be taken at the trial, so that the presiding judge may elect what course to take in order to prevent a failure of justice. Now, in the first place, at common law, it is clear that this indictment was bad, and was one which could not have been cured by verdict; but, as far as I am able to judge, I think that the form of indictment has been sanctioned by the Legislature. Although the old form of indictment, which involved the statement of all the facts and details, might well be adapted to the crime of larceny and other crimes of a like nature, where but few facts are involved, it has been found very inapplicable to a great number of offences where the facts are more complicated, and therefore the Legislature has stepped in and said "You shall be at liberty to allege the offence of which the prisoner has been guilty in certain words we give you." The only question here is, whether the Act of 1883 has applied to this offence the power of general allegation which was provided by the Act of 1863 in the case of bribery and undue influence. I think it has, first of all, by the incorporation of the Act of 1863, by sect. 53 of the later Act, which I think makes bribery an offence under the head of a corrupt practice. I think that the allegation in an indictment of a corrupt practice, or of corrupt practices, is a good form of indictment under this Act. That the indictment charges the prisoner with having been guilty of corrupt practices, and not of a corrupt practice, might have been a good objection before trial on the ground of multiplicity, but after trial it has often been held not to be sufficient. It is unnecessary for me to come to this conclusion, however, for I think that the principle of *Reg.* v. *Goldsmith*, which has been cited on behalf of the prosecution, is applicable to this case, and that, if there is a want of certainty which could be supplemented by evidence, it must be taken this prisoner was proved to have committed an offence, which is an offence under the head of corrupt practices, under the statute, and therefore that it was not essential that the particular corrupt practice

should have been mentioned in the count in the indictment.

DENMAN, J.—I think that this indictment is bad. It alleges that the defendant was "guilty of corrupt practices against the form of the statutes in that case made and provided." Now what corrupt practice he was guilty of, it does not condescend to state. There are a great number of corrupt practices, one of which is a felony, and others are misdemeanours, and, if the objection had been taken in time, it was a fatal objection, and was so held by the learned Baron in other cases where taken in time. It is contended before us that it was not fatal, because the later statute has repealed bribery as a separate offence and left a corrupt practice as the only offence indictable as a felony or misdemeanour. I do not think so. It appears to me that where the statute speaks of the effect of the commission of a corrupt practice and how it is to be punished, it speaks of corrupt practices under a general name; as you might speak of a felony or misdemeanour as including a number of things which are felonies or misdemeanours. It is a *nomen generale*, and you must still say what offence you mean to charge a man with; you must state which of the known offences which are here clubbed together under the definition of a corrupt practice you mean. The sections which bear upon the question are the three which have been discussed. Sect. 6 of 26 & 27 Vict. c. 29, was the first of importance. The effect of that section, it appears to me, is merely to enable a person who prosecutes on behalf of the Crown to charge bribery and undue influence in general terms, and, without specifying all the facts of the case, to allege that the defendant was guilty of one of these offences which are included under the head of bribery or undue influence. Now, sect. 53 of the Act of 1883 does not seem to me to have such an effect as to dispense with the necessity for naming the particular one of the offences which is charged. It merely enacts that sect. 6 of the Act of 1863 shall extend to any prosecution or indictment for the offence of any corrupt practice within the meaning of the Act of 1883 in like manner as if such offence were bribery within the meaning of the Acts of 1854 and 1863, and then, when you come to look back to sect. 6 of the Act of 1863, you find that the offence is to be charged as bribery or undue influence (as the case may require). It seems to me that these words "as the case may require" were meant to show that the Act does require a mention of the particular sort of offence with which the defendant is to be charged, and that the statute clearly meant to say that this was necessary is shown when we compare it with the words of the later Act. For sub-sect. 3 of sect. 5 of that Act says that where a person is charged with a corrupt practice, "it shall be sufficient to allege that the person charged was guilty of an illegal practice, payment, employment, or hiring, within the meaning of this Act, as the case may be." That is a provision to the effect that the person may be charged generally with an illegal practice, payment, employment, or hiring. I will not say that the Legislature did not mean to make a provision so general to apply to felonies and misdemeanours; but all I will say is that, if it was intended to apply to felonies and misdemeanours, words have not been used sufficient to show that such was the intention. The words seem to me, according to all the ordinary rules of construction, to show that where the Legislature have not expressly provided that general words may be used, by their having laid it down in that particular instance, they intended to exclude the use of general words in the other cases. The more important question, and particularly in this case, is whether the defect in the indictment is caused by verdict. Now, I by no means say I have made up my mind clearly that if the jury had found in so many words that the defendant was guilty of bribery, I might not have held that such finding cured the insufficiency of the indictment. I am inclined to think that I should not have so held, because the indictment did not call the attention of the defendant to that particular offence. Anyhow that is not what the jury have done. What they did find was that the prisoner was guilty of corrupt practices; and it does not appear sufficiently from the verdict what the corrupt practice is of which he has been found guilty. In my opinion the conviction should be quashed.

Lord COLERIDGE, C.J. — In this case John Stroulger has been indicted and found guilty of corrupt practices during an election for members of Parliament against the form of the statutes in that case made and provided. That is the indictment, and the question is, whether, under the circumstances which have taken place since he was charged upon that indictment, a conviction can be upheld. It is important to consider, it seems to me, three statutes only. Now, the statute 45 & 46 Vict. c. 51, s. 3, uses these words: "The expression 'corrupt practice,' as used in this Act, means any of the following offences—namely, treating, undue influence (as defined by this Act), and bribery, and personation, as defined by the enactment set forth in part 3 of the third schedule to this Act." The statute uses the word "means," not the word "includes." Therefore the strict meaning of this indictment was that the prisoner was guilty of all the offences which are corrupt practices, for the word is used in the indictment in the plural. Therefore it must mean two at least out of the three offences which the words "corrupt practices" are defined by the Act to mean. He has been found guilty in the terms of the indictment, and the question is, whether that is sufficient. Undoubtedly I am of opinion that, had the objection been taken in time and in the proper form, the objection must have prevailed. Because, it having been pointed out that two of the offences are misdemeanours, and one is a felony, and, as everyone knows, the rights of a prisoner vary according as he is charged with the commission of a felony or a misdemeanour. The objection must have prevailed, because the indictment did not point out to the prisoner with reasonable certainty what was the offence with which he was charged. Now, it has been held by one of my learned brothers that it would have been a good indictment under any circumstances, because sect. 6 of the Act of 1863 enacts that: "In any indictment or information for bribery or undue influence, it shall be sufficient to allege that the defendant was, at the election at or in connection with which the offence is intended to be alleged to have been committed, guilty of bribery, or undue influence (as the case may require)." That is to say, that he may be charged in general terms, and the 53rd section of the Act of 1883 has incorporated sect. 6 of the earlier Act

into the later Act, and says that sect. 6 shall extend to the offence of any corrupt practice under the later Act. Now, I am of opinion that the true view of what the Legislature have enacted is that, in indicting any person for a corrupt practice under the later Act it is necessary to state in the general that he has been guilty of bribery, treating, undue influence, or personation, which have been made offences under the later Act. That may be stated in general words, and I am of opinion that general words would have done; but, inasmuch as the earlier Act has said that he shall be indicted for bribery or undue influence (as the case may require), by incorporating that into the later Act, I am of opinion you must give the same effect to the words "as the case may require" when used in the later Act as they had when used in the earlier Act. I therefore think that in the present form of indictment the generality is too great, and that, if objection had been taken to it in time, it would have been fatal at common law, and would not have been cured by the effect of sect. 6 of the Act of 1863. Now, it is familiar to us that there are many cases in which, if objection were taken to the indictment at the proper time, it would have been fatal, but that, if conviction follows before objection is taken, the defect in the indictment is cured by verdict. With regard to that, I cannot do better than read the statement referred to by Mr. McIntyre of Wms. Saunders, vol. 1, p. 227, where, in a note to the case of *Stennel* v. *Hogg*, he says, with reference to the statute 4 Anne, c. 16, s. 2: "In order to ascertain the nature of the defects, which are aided after a judgment by default since the statute of Anne, to distinguish with accuracy between such imperfections as are cured by a verdict by the common law, and those which are now remedied after verdict by the several statutes of jeofails. With respect to the former case it is to be observed, that where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission, is cured by the verdict by the common law; or, in the phrase often used upon the occasion, such defect is not any jeofail after verdict. But when there was any defect, omission, or imperfection, though in form only, in some collateral parts of the pleading, that were not issue between the parties, so that there was no room to presume that the defect or omission was supplied by proof, a verdict did not cure them by the common law." That is to say, that if two or three offences are charged by the use of general words in an indictment, and the prosecutor is not put to his election and the case proceeds, and a verdict of guilty in general words is found, the jury shall be taken to have found a verdict of guilty upon that charge alone upon which the judge charged them, and upon which alone they would be justified in finding a verdict. Therefore, upon the principle laid down in Wms. Saunders, I am of opinion that this man having been found guilty of corrupt practices, the term "corrupt practices" being large enough to include the offence upon which he really was tried, and with regard to which the evidence was given, and to which the jury were directed and gave their verdict, it appears to me that all the elements necessary to sustain an indictment after verdict, which indictment would not have been good before verdict, are here, and, therefore, that this conviction must be affirmed.

Conviction affirmed.

Solicitors for the prosecution, *The Solicitors to the Treasury.*

Solicitors for the defendant, *Aldridge, Thorn,* and *Co.*, for *Jennings*, Ipswich.

Thursday, June 24, 1886.

(Before Lord COLERIDGE, C.J., DENMAN, FIELD, MATHEW, and DAY, JJ.)

REG. *v.* SHURMER. (*a*)

Criminal law — Evidence — Dying depositions — Reasonable notice of intention to take statement — Omission to give notice in writing — Admissibility of depositions — Condition precedent — 30 & 31 Vict. c. 35, s. 6.

The depositions of a deceased witness are not admissible in evidence against a prisoner under 30 & 31 Vict. c. 35, s. 6, unless it be proved that at a reasonable time previously to the taking of such depositions, the prisoner was served with a written notice of the intention to take them.

Whether reasonable notice of the intention to take the depositions of a dying witness under 30 & 31 Vict. c. 35, s. 6, has been given, and full opportunity for cross-examination afforded, is a question for the judge at the trial, and his ruling thereon will not be questioned.

Per Day, J.: The notice of intention to take a statement under 30 & 31 Vict. c. 35, s. 6, need not be in writing.

CASE reserved for the consideration of the court by Hawkins, J., from which it appeared that the prisoner was tried and convicted at Swansea, on the 21st May 1886, of having committed a rape upon his daughter, Annie Shurmer, a girl aged between fourteen and fifteen years, on the 10th Feb. 1886, who died on the 7th March following.

On the part of the prosecution a statement on oath of the deceased girl, purporting to be taken on the 20th Feb. last, in accordance with the provisions of the statute 30 & 31 Vict. c. 35, s. 6, (*b*) was tendered as evidence against the prisoner.

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

(*b*) By sect. 6 of 30 & 31 Vict. c. 35, after reciting that by the 17th section of 11 & 12 Vict. c. 42, it is permitted under certain circumstances to read in evidence on the trial of an accused person the deposition taken in accordance with the provisions of the said Act of a witness who is dead, or so ill as to be unable to travel; and that it may not be practicable or permissible to take, in accordance with the provisions of the said Act, the examination or deposition of the person so being ill, so as to make the same available as evidence in the event of his or her death before the trial of the accused person . . . . Therefore, whenever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and, in the opinion of some registered medical practitioner, not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition in

Objection was made to it by the prisoner's counsel on two grounds: First, that there was no evidence "that reasonable notice of the intention to take such statement" had been served upon the prisoner against whom it was proposed to read it; and secondly, that there was no proof that the prisoner (although he was present when the statement was made) had full opp ortunity o cross-examining the deceased girl who made it. In all other respects the statement was duly and regularly taken so as to be admissible in evidence against the prisoner.

Neither the magistrate nor his clerk was present at the assizes, but a police-sergeant, Thomas Williams, proved that he arrested the prisoner on Thursday, the 18th Feb., on two charges of rape on his daughter Annie, on the 10th and 11th Feb. That prisoner was taken to the police-station, where he was detained in custody until the 20th Feb., when, the girl being then very ill in her father's house, it was determined to take her statement there under the statute above mentioned. That the police-sergeant on this latter day took the prisoner from the police station to the house, telling him that he was taken there for the purpose of taking Annie's statement, to which he said nothing. That he was taken into the room, where were present the magistrate, his clerk, and Annie. That Annie was then in prisoner's presence told by the clerk that they had come to take her statement in writing. That she was duly sworn and made her statement, which was written down by the clerk. That it was afterwards read over to and signed by her. That during the whole time the prisoner was present, and could see and hear all that took place. That nothing was said to the prisoner.

The prisoner elected to give evidence under the Criminal Law Amendment Act, and stated that he was not allowed to ask the girl questions, that he was going to do so, but was stopped by the magistrate, and "did not trouble to say anything afterwards;" and, he added, "I had begun to speak—I was going to get up—I was going to say don't make her tell any more lies." The prisoner also swore that he did not know he had a right to put questions. On this Sergeant Williams was recalled, and stated that it was untrue that the prisoner was prevented from saying anything, as alleged by him.

Hawkins, J., in stating the case, said he did not believe the prisoner's statement that he was not allowed to ask, or was in any way prevented from asking, the girl questions, or that he was stopped by the magistrate, or that he did not know that he had a right to put questions to her.

As to the first objection, the answer on the part of the Crown was that the prisoner, being in custody on the charge upon which he was subsequently tried, and present when the statement was taken, no notice of the intention to take it was necessary; the object of the statute in requiring notice being only to give the person to be affected by the statement an opportunity of being present, as in this case he was. Moreover, the prisoner had, in fact, notice of the intention to take such statement, inasmuch as Police-Sergeant Williams told him expressly that he was being taken to the house for the purpose of taking it, and although the 6th section requires notice to be served upon the person against whom it is proposed to be read in evidence, it is not in words required to be in writing, and therefore a verbal notice was sufficient. The 7th section (a) points to the object for which notice is required, viz., that the accused may have the opportunity of being present.

The learned judge found that: "If such notice as is mentioned in sect. 6 was essential to the admissibility of the statement, and if verbal notice is sufficient, then it must be taken to have been proved to my satisfaction that reasonable notice of the intention to take such statement was served on the prisoner before the statement was taken."

As to the second objection, the answer on the part of the Crown was that it is not necessary that a prisoner should be invited to cross-examine or be told in words that he has a right to do so; that the prisoner knew that he was in custody upon the charge touching which the deceased made her statement; that he was taken into her presence for the express purpose of hearing it made; that he was actually present and heard it made from beginning to end, and must be taken, without being told so in words, to know what his right was.

The learned judge found that: "If there was any evidence upon which I could legally find that the prisoner had full opportunity of cross-examining the deceased girl, I must be taken so to have found;" and admitted the statement, reserving the question whether, upon either of the above-mentioned objections, the statement was inadmissible in evidence.

Marchant Williams, on behalf of the prosecution, contended that notice was actually given to the prisoner of the intention to take the statement, because he was told he was being taken for that purpose; and the object of sect. 7 of 30 & 31 Vict. c. 35 being to secure the presence of the prisoner when the statement was made, the notice so given was sufficient. That the word "served," in sect. 7, applied to a prisoner in gaol who the prosecutor was unable to give notice to, except by procuring the service of a written

accordance with the provisions of the said Act of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill . . . . and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead . . . . it shall be lawful to read such statement in evidence, either for or against the accused, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and *provided it be proved to the satisfaction of the court that reasonable notice of the intention to take such statement has been served upon the person* (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person, or his counsel or attorney, had or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same.

(a) By sect. 7 of 30 & 31 Vict. c. 35, it is enacted that: Whenever a prisoner in actual custody shall have served, or shall have received notice of an intention to take such statement as hereinbefore mentioned, the judge or justice of the peace by whom the prisoner was committed, or the visiting justices of the prison in which he is confined, may, by an order in writing, direct the gaoler having the custody of the prisoner to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the statement; and such gaoler shall convey the prisoner accordingly.

notice upon him, while the word "received" applied to the case where, though written notice was not given, it was proved that the prisoner had in fact received notice. [Lord COLERIDGE, C.J.—Does not sect. 7 merely explain sect. 6? How can you narrow the meaning of the word "served," in sect. 6, by reference to sect. 7? DENMAN, J.—Do not the use of the words "mentioned in the said notice," in sect. 7, refer to a written notice?] The place to which the prisoner was being taken was mentioned in the verbal notice, and the object of the Act was effected; therefore the statement was admissible. He was not required by the court to argue the second point raised by the case.

No one appeared on behalf of the prisoner.

DAY, J.—In this case I differ from my learned brothers with great distrust. The question which arises is as to whether a deposition made by a deceased person was admissible in evidence. Two objections have been taken to it: one, that notice in writing of the intention to take such deposition was not given to the prisoner; and the other, that it did not appear from the evidence that the prisoner had had sufficient opportunity of cross-examining the witness upon such deposition. Now, I think, there is no difference in opinion among us as to the second question. The question being whether the prisoner undoubtedly being present, and having the opportunity of putting questions if he wanted to do so, and the only objection to the sufficiency of his opportunity being that he was not told that he could ask questions, in my opinion it is not necessary to tell a prisoner that he may ask questions. If he has had, in fact, full opportunity of doing so, and as here knew that he could ask questions, in my opinion, he has had full opportunity, and it would be idle to hold that he must also be told that he may ask questions. As to the first question, the Act of Parliament says that notice shall be served upon the prisoner of the intention to take the depositions, and sect. 6 provides that when such depositions have been taken, and it shall be proved that the witness cannot be present, it shall be lawful to read such statement in evidence, provided it be proved to the satisfaction of the court that reasonable notice of the intention to take such statement has been served upon the person against whom it is proposed to be read in evidence. The object, of course, is to enable the person about to be charged with an offence to attend at the place and time when and where the depositions are to be taken, and to enablo him to secure such assistance as he requires in order to protect his interests. The object of the statute is to secure the evidence of the person who is in a dying condition in furtherance of justice. Now, in the present case, there is no question as to the prisoner's being there at the time and place when and where these depositions were taken, and he did not require that he should be allowed to obtain any further protection, nor does it appear that the justice of the case was in any way affected by notice in writing not having been given. A notice was given to him by the sergeant of police, who gave him full notice of the intention of his being taken to the girl. He did not object, but goes there having a knowledge of the reason for his going. It seems to me, therefore, that the object of the statute was attained. If the words in the statute had been "written notice," whether the object of the statute had been attained or not, I should have held otherwise than I do. But the statute uses the word "served." Now, the word "served" is a word of doubtful meaning. It may mean "served orally," if the message is an oral message, as well as served "by a written instrument" when it is a written instrument which has to be served. Many notices, in my judgment, may be served orally just as well as by a written document. The suggestion on behalf of the prisoner is that the statute contemplates a written notice only. It seems to me that, if sufficient notice is given, that notice is served, whether it was a written notice or not, and if it was reasonable notice, then the deposition is admissible in evidence. Sect. 7 provides for the machinery of securing the attendance of a prisoner who is in gaol, and provides that the persons therein named may direct the gaoler having the custody of the prisoner to convey him to the place mentioned in the notice where notice has been served or received. Where a notice has been served or received the magistrate may make an order in writing. That order has to be in writing, but the statute does not say the notice is to be in writing, and, in my opinion, where the statute uses the word "writing" it means a writing; but when it does not use it, it does not mean a writing. There may be circumstances of emergency where notice in writing cannot be given, and therefore it is that, in my opinion, the statute does not require that the notice should be in writing. In my opinion, this statement was admissible, and the conviction should be affirmed.

Lord COLERIDGE, C.J.—My learned brothers are desirous that I should deliver judgment on their behalf as well as my own. We are sorry that we should feel obliged to differ with my learned brother Day. I may say, speaking, however, only for myself, that with a great many of the general observations of my learned brother I entirely concur, and I agree that there is no particular objection to the notice being verbal. But the question here is, what has been enacted by this Act of Parliament? I have been always anxious in construing an Act of Parliament to find out what the Act really does say, and to hold that it does say it, and not to import anything which I may think would be better by straining the words of statutes. The two points taken here are—and I will deal with the second first—secondly, that there was no proof that the prisoner had full opportunity of cross-examining the witness; and, as to this, we are all agreed that there was full opportunity for his so doing. The first question is that there was no evidence that reasonable notice of the intention to take the statement had been served upon the prisoner. If either of the objections taken could have been sustained, this conviction ought not to stand. With regard to the second, I conceive that it may be that in certain cases fuller provision might be required; but here we are dealing with the words of the learned judge, who has in fact found "that the prisoner had full opportunity of cross-examining the deceased girl." When we consider the much better opportunity of judging whether there was full opportunity given that the learned judge had, who saw the witnesses, we ought not to differ

from the conclusion at which he has arrived. We do not, therefore, feel prepared to differ from the plain view he took that there was the full opportunity for cross-examining given the prisoner which is required by the statute. Now, as to the other point: by the words of the statute, which are contained in a proviso to sect. 6, the deposition is not to be read unless "it be proved to the satisfaction of the court that reasonable notice of the intention to take such statement has been served upon the person against whom it is proposed to be read in evidence." And those are not the only words which are important, because, that being the condition precedent with which we have to deal, it is important to see by reference to sect. 7 what sort of a notice it is which is intended by sect. 6—whether that section means an oral notice, which, according to the ordinary meaning of words, cannot be "served," or means a written notice, which, according to the ordinary meaning of words, can be "served." The section assumes that the prisoner has been served or has received notice of the intention to take the statement, and where the notice has been served or received, the justice of the peace or visiting justices may, "by an order in writing, direct the gaoler having the custody of the prisoner to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the statement." Now, what is the *primâ facie* meaning of that? What would any man conclude, if that section stood alone, with regard to the notice as to which the justice is to make an order as to the place mentioned in it. He would clearly understand that a written notice was meant, and that throws considerable light upon what the word "served" means when used in sect. 6, and it makes it much more reasonable to assume that the word "served" means that which anyone, if sect. 7 stood alone, would assume was a written notice. It is true you may give a notice written or oral; but the word here is, not "given" but "served." And the question is, what in this Act of Parliament does the word "served" really imply? In my judgment, on the whole, it implies it is to be a written notice. There are many reasons why it should be a written notice, for the power to read the statement is something beyond the common law. Another reason is that, if it is not in writing, the magistrate, who has to make an order for the conveyance of the prisoner to the place mentioned in the notice, would have to take evidence as to what had passed when the oral communication was made. The objection here is a technical one, but it may sometimes be a very important one; and I am clearly of opinion that it is a condition precedent to the reading of depositions taken under this Act that notice in writing of the intention to take such depositions should have been properly given.

Solicitor for the prosecution, *G. Mayor Cooke*, for *E. G. Davies*, Crickhowell.

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, May 17, 1886.

(Before Cotton, Lindley, and Lopes, L.JJ.)

Wimbledon Local Board *v.* Croydon Rural Sanitary Authority. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *s.* 32—*Works for sewage purposes—Works outside district.*

By sect. 32 *of the Public Health Act* 1875, "*a local authority shall, three months at least before commencing the construction or extension of any sewer or other works for sewage purposes without their district, give notice of the intended work*" *in manner therein mentioned.*

The defendants had some sewage works on the bank of the river Wandle.

The effluent water from these works was carried away by a drain, which passed through the plaintiffs' sewage farm and discharged itself into a piece of water called the Western Pool, which communicated with the river by means of a sluice, and, becoming narrower, ultimately formed a backwater into the river, into which it discharged itself lower down the stream. Into this backwater the effluent water from the plaintiffs' sewage farm was discharged.

The bottom of the Western Pool being uneven, sewage fungus collected there and caused a nuisance.

The freeholder of the pool commenced proceedings in respect of the nuisance, which were compromised, the defendants agreeing with him to cleanse the pool and cement the bottom of it. The pool was entirely out of the defendants' district and partly within the plaintiffs' district.

The defendants commenced their operations without giving any notice under sect. 32.

Held (*reversing the decision of North, J.*), *that the works were within the section.*

The defendants, the Croydon Rural Sanitary Authority, on the 22nd Oct. 1881 gave notice, under sect. 32 of the Public Health Act 1875, to the Wimbledon Local Board and others, of the intention of the defendants to commence the construction of sewage works without their own district. No objection being taken to the works, the Local Government Board sanctioned a loan for carrying them out. A part of the scheme was to carry a sewer from sewage works higher up the river through land forming the site of a sewage farm belonging to the plaintiffs, and on the 13th March 1883 the plaintiffs, for a consideration, granted to the defendants the right to maintain and use this sewer, which was specified on a plan. The sewer passed into a pool called the "Western Pool," which communicated with the river Wandle, and the defendants passed through it the effluent water from the sewage works occupied by them higher up the river.

The Western Pool communicated with the river by means of a sluice, and, becoming narrower, ultimately formed a backwater into the river, into which it discharged itself lower down

(*a*) Reported by Frank Evans, Esq., Barrister-at-Law.

the stream. Into this backwater the effluent water from the plaintiffs' works was discharged.

In 1882 Selous, who was the owner of the land forming the site of the Western Pool, and Syer, who was his tenant, brought an action against the plaintiffs, and another action against the defendants, to prevent the pollution of the pool.

These actions were consolidated by order, and on the 12th Jan. 1885 Denman, J. gave judgment restraining the defendants (the Croydon Board) from further polluting the Western Pool by discharging sewage matter into it, contrary to the provisions of sect. 17 of the Public Health Act 1875.

The defendants brought an appeal from this decision, but before it was heard a compromise was come to between them and Selous and Syer, by which it was agreed that the injunction against the defendants should be dissolved, the defendants undertaking to clean out and level the bottom of the Western Pool, which was very irregular and full of holes, and make a concrete bottom to it, so that the accumulations of sewage fungus which had been complained of in the action might be prevented. Before putting down the concrete bottom it was necessary to let the water out of the Western Pool, and on the 6th April 1886 the engineer of the defendants, without any notice being given under sect. 32 of the Act, put a temporary dam across the upper part of the Western Pool, and another at the lower end, and made a ditch, leading from the Western Pool above the upper dam, and carrying off the water from the upper part by means of a temporary wooden trough, supported by piles and crossing the lower part of the Western Pool, and discharging below the lower dam. The water between the two dams was then pumped out.

The Western Pool was partly within the Wimbledon district and partly within the district of the Wandsworth Board, but no part of it was within the Croydon district.

The Wimbledon Board and the overseers of the parish of Wimbledon, on the 22nd April 1886, commenced the present action against the Croydon Board, claiming an injunction to restrain them "from commencing or proceeding with any works for sewage purposes in and upon the Western Pool of the river Wandle, or any place without their district and within the parish of Wimbledon, contrary to the provisions of sects. 32 and 33 of 38 & 39 Vict. c. 55," and damages.

On the following day the plaintiffs obtained an *ex parte* injunction till the 28th April, and on that day Mathew, J., sitting for Pearson, J., continued the injunction till the 5th May or further order.

The defendants gave notice for the 4th May of a motion to discharge the injunction, as having been obtained by misrepresentation and suppression of facts. The cross-applications to continue the injunction and to discharge it came on before North, J. on the 7th May 1886.

There was evidence that a portion of the upper dam had originally rested on the land of the plaintiff board, but that before the *ex parte* injunction was obtained this part of the dam had been removed, and that no trespass then existed.

Bazalgette for the plaintiffs.—The works are likely to injure the plaintiffs, and they are entitled, under sect. 33 of the Public Health Act 1875 (38 & 39 Vict. c. 55), to have an inquiry by the Local Government Board. As the defendants have not complied with sect. 32 of the Act, they ought to be restrained from proceeding with the works. It is irregular to issue a cross-notice like that given by the defendants, for the injunction would expire itself; the defendants' motion ought therefore to be dismissed with costs:

Bolton v. *London School Board*, 33 L. T. Rep. N. S. 277; 7 Ch. Div. 766.

Higgins, Q.C. and *John Henderson* for the defendants.—The work in course of construction by the defendants is not "the construction or extension of any sewer or other work for sewage purposes," within the meaning of sect. 32 of the Public Health Act 1875. The defendants are merely cleaning out and repairing an existing sewer, and to such operations the sanction of the Local Government Board under sect. 33 is not required. If what the defendants are doing is a sewage work, it is only auxiliary to their original scheme, of which notice has been duly given. *Uberrima fides* is required on making an application for an *ex parte* injunction:

Dalglish v. *Jarvie*, 15 L. T. Rep. O. S. 341; 2 Mac. & G. 231, 243.

As misrepresentation was employed in obtaining the *ex parte* injunction, the defendants are right in applying to have it discharged.

Bazalgette replied.

North, J.—I think Mr. Bazalgette has said everything that could be said on behalf of the plaintiffs, but, in my opinion, this case fails. It appears that in 1881 certain works were in contemplation. The proper notices under the Act were given by the defendants, and in pursuance of the arrangements consequent on such notices, an outfall sewer or carrier was made by the defendants, extending, for a considerable distance through land in the district of the Wimbledon Local Board, down to what has been called the Western Pool upon the river Wandle. Those works were completed within a year—by Oct. 1882. From that time down to the middle of the year 1885 that sewer was in full and complete use, and the sewage water was carried through it and discharged into the Western Pool upon the Wandle. That was done through the sewer, and for that the plaintiffs had been paid. I do not forget the suggestion that the plaintiffs could not give any right to the defendants to discharge the sewage that passed through that sewer or carrier into the pool beyond the limits of the defendants' and the plaintiffs' property; but what was contemplated when that sewer was made was that the sewage would be carried through the sewer, and that it would be discharged at the further end of it into what was immediately outside the sewer, because the sewer was simply made with the object of carrying matter through it, and discharging it at the end further from the plaintiffs' property. So far, therefore, as the plaintiffs could give authority to make and use that sewer for the purposes for which it was made, that was done. Of course, as the persons who were the owners of the Western Pool were not parties to the arrangement, their rights were absolutely and entirely unaffected by anything done at that time between the plaintiffs and the defendants. The sewer was completed, and it afterwards turned out that the sewage carried through it was not sufficiently purified, but that

the matter discharged was such as to give good ground of complaint on the part of the owner of the pool into which for two and a half years it had been discharged. He took proceedings which resulted in an injunction being obtained to restrain the further discharge by the defendants, through that sewer, of sewage matter into the pool. The nuisance seems to have arisen from the fact that the bottom of the pool into which the sewage was discharged was very uneven. It was in very large ridges and furrows—or hills and valleys perhaps would be a better description—and the deposit of the sewage matter in these hollows naturally prevented it getting away, and tended to cause a nuisance. In consequence of something which took place pending an appeal from the decision upon which the injunction was granted, the plaintiffs in that action and the present defendants put their heads together, and an arrangement was arrived at, that the defendants should be allowed to continue to discharge their effluent water into the pool, subject to their making such an arrangement as to prevent the nuisance which had arisen there continuing to exist, or, in other words, that the state of things which had continued for two and a half years should be allowed to go on exactly as it had done before if the defendants would do something on the land of Mr. Selous, the plaintiff in that action, which would prevent the deposit of sewage matter therein passing. In other words, the state of things existing down to that time was to be allowed to continue, notwithstanding the injunction, on the condition that the defendants would level the bottom of the pond or pool. Steps were taken to carry that out, and in the course of the present spring it was being done. Early in April the first communication took place between the plaintiffs and the defendants, and that was consequent upon the defendants having done this. To put the concrete at the bottom of the pool it was necessary to get the water out. There was a stream passing through it. That could not be stopped, and therefore the only way to get the water out, so as to get to the bottom of the pool was to put a dam at each end of the pool, pump out the water, and allow the stream to continue to flow, not through the pool, but through a trough continued across the site of the pool and below the lower dam. While that was going on the plaintiffs complained. It was suggested that there was some trespass, and that the dam put across the upper end of the pool, and the trough which was carried from it, to some slight extent rested upon the plaintiffs' land, and therefore caused a trespass. I am not quite satisfied that it did rest on their land; but that does not seem to me really to be material. It may be assumed for the present purpose that the plaintiffs were right in that view, and that to some extent it did touch upon the property of the plaintiffs. [His Lordship alluded to the complaints made by the plaintiffs and to the correspondence, and continued:] Before this action was commenced the dam and the trough were entirely taken away. It appears to me, in the first place, that matters which were important were not as fully brought before the judge on the *ex parte* application as they ought to have been. He had not as full information as he ought to have had with respect to the matter at the time at which the *ex parte* motion was made, and therefore the defendants were quite justified in coming here and saying that the order was one which ought not to have been made. But the question remains still, whether, supposing the full matters had been brought before the judge then, as they have been brought before me now, he could then have made, and I now can make, an order to the same effect as that which was made by him upon that occasion. It appears to me that I cannot, and for this reason: It does not seem to me that this is a case coming at all within the sections of the Public Health Act which have been referred to. It does not seem to me that the defendants are constructing or extending "any sewer or other work for sewage purposes without their district," within the meaning of sect. 32. In my opinion, they are simply wishing to continue the use of works completed three or four years ago. The use of the works has been interrupted for a time, not by reason of any reference to these works themselves, but because the stream belonging to Mr. Selous, into which the effluent water was discharged, was in such a condition that he was entitled to restrain the defendants from continuing that discharge. What they have done now has been not to extend their works, in my opinion, in anyway; but, by an arrangement with the owner of the land interfered with by that discharge, they have agreed to concrete the bottom of the pool. That is not the commencing the construction or extension of sewage works within the meaning of the section. It seems to me, therefore, that the injunction ought not to be granted. Then the point was suggested by Mr. Bazalgette that, if the motion by the defendants to discharge the order in other respects were right, yet, inasmuch as it was only made on the day (as a matter of fact it was the day before) on which the order itself would expire, the motion could not have served any legal purpose, and therefore the defendants ought to pay the costs of it. A case was referred to by Mr. Bazalgette in which the course was followed of dismissing with costs a motion to dissolve an order that died on the evening of the day on which the motion was made. To begin with, it appears to me that was not a case of moving to discharge an order for irregularity, which shows a great difference between that case and this. But, independently of that matter, even if I had taken the view that *Bolton* v. *London School Board*, so far as it went, was an authority in favour of the proposition for which Mr. Bazalgette cited it, it still would not have led to the result he suggests, because the order here contains not merely an injunction, but also an undertaking by the plaintiffs to abide by any order the court may make as to damages. It seems to me that the order is one which ought not to have been obtained, and that, under those circumstances, inasmuch as it is obvious from the affidavits that some damage has been sustained by the defendants, they are entitled now to have a reference to inquire what the damage is.

The plaintiffs appealed.

Moulton, Q.C. and *Bazalgette* for the plaintiffs.—The act threatened by the defendants being contrary to the statute, the question of the balance of convenience or inconvenience does not arise; the plaintiffs claim the benefit of an absolute statutory protection. It is no answer that the consent of the owner of the soil has been

obtained, and that some work has already been carried out on his land. If it were, a freeholder could make a system of sewers on his own land, and then sell the whole to a sanitary authority outside the district; a sewage farm could be constructed outside the district without complying with the Act.

Higgins, Q.C. and *John Henderson* for the defendants.

By consent the following order was, after some discussion, agreed to: "The court being of opinion that the works of the defendants in the Western Pool of the branch of the river Wandle are works for sewage purposes within the meaning of sect. 32 of the Public Health Act 1875, and the plaintiffs and defendants undertaking to submit the objections of the plaintiffs to such works to the decision of the Local Government Board, as if the defendants had given the notice required by sect. 32 of the same Act, and as if the plaintiffs had sent in objections thereto, and undertaking to submit the objections of the plaintiffs to such works to the decision of the Local Government Board, and if necessary to settle a special case for that purpose, and the defendants undertaking to abide by the decision of the Local Government Board as to such objections, and as to the propriety of the aforesaid works, and to make any modifications in or additions to the said works which may be required by the decision of the Local Government Board, let the appeal motion stand over, with liberty to apply, both parties undertaking that upon the further hearing of the motion this court shall have power to deal with the action as on the hearing thereof. The Court doth, by consent, order that all proceedings in the action in the meantime be stayed, and that no pleadings are to be delivered, but that the writ is to be considered as amended so far as necessary to raise all questions between the parties."

The Court then delivered the following judgment:—

COTTON, L.J.—I think we ought to express our opinion as to the true construction of the Public Health Act 1875, with reference to such a work as this. His Lordship stated the facts and continued:] In my opinion, North, J. was wrong in his decision. This is not the commencement of a new system of sewage, or of a new system or mode of getting rid of the sewage, but the work is done to prevent the fungus of which I have spoken being caught in the hollows which exist in the natural bottom of this pool. To enable the defendants to get rid of that fungus they are not preparing to construct a culvert or sewer in the ordinary sense of the word, but they are preparing to construct a fresh bottom to the pool, with a view to carrying away this fungus. To my mind, that fungus must be considered part of the sewage, for it is the consequence of the sewage coming down the long trough, which has its outfall into this pool. In order to carry the sewage fungus away from the land of Mr. Selous, the defendants propose to level the bottom of this pool, and not only to level it, but concrete it, so that it shall have a smooth surface, capable of being flushed by letting in the water. In my opinion that is a sewage work. It is very different from merely clearing the pool. That would not be a work. It might be work, but it would not be *a* work, and although it might be done for sanitary purposes, it would not, in my opinion, be constructing a work for sewage purposes. But when the bottom of a hollow is made concrete in order more effectually to carry away the sewage further down, away from a person who complains of the effects of the sewage, that, in my opinion, is a work constructed for sewage purposes. It is said that the defendants are not commencing the construction or extension of any sewer, and are not commencing a new system of sewering, or commencing a work which is joined on to anything already existing. They are not doing so, but they are certainly extending that which they have already constructed down to this pool, and, in my opinion, we must, in considering whether what they are doing comes within those words of the section, look and see whether the work is one which was contemplated in their original scheme, and whether they are not beginning that which is in fact a work for sewage purposes. In my opinion, they are beginning something which was not in any way contemplated or provided for by the previous sewage works. They are beginning (I will not say commencing) to construct that which, in my opinion, is a work, and a work for sewage purposes, within the meaniug of the Act of Parliament. I cannot agree with the view taken by North, J., and on which, as I understand, he discharged this injunction. But the substantial question is (and I am glad the parties now see that), what ought to be done if any injurious effect is produced either to the parish represented by the overseers, or to any works of the Wimbledon Local Board? If the works have that effect, of course that ought to be set right, and although the defendants have not given the statutory notice, we are very unwilling to restrain them from doing this work, which apparently is very useful for some purposes, although it may have an injurious effect on property which is lower down the stream. We think that what has been proposed and acceded to by both parties will give a reasonable result to this litigation, and prevent any injury being done.

LINDLEY, L.J.—I quite agree with the interpretation put upon sect. 32 of the Act by Cotton, L.J. and I do not wish to add anything more upon that point. I do not think it possible to come to the conclusion that this concreting is not a construction of a work for sewage purposes. I cannot imagine for what purpose it is done except for some sewage purpose in connection with the sewer which the defendants made in 1881. I am quite satisfied that the plaintiffs have taken the right view of the construction of the section. I wish to add what I think this court has said over and over again, that it will never flinch from ordering work to be undone, if it has been forced on pending an appeal or a motion for an injunction.

COTTON, L.J.—I intended to make a similar remark, lest parties should think that by hurrying on a work pending a motion for an injunction they can get any advantage. I should certainly in any such case order the parties who hurried on the work to undo what they had so done. There is no doubt about that in my mind.

LINDLEY, L.J.—I quite agree.

LOPES, L.J. concurred.

Solicitors: for the appellants, *W. H. Whitfield*; for the defendants, *West, King, Adams*, and *Co.*

May 27 and 28, 1886.

(Before Lord HERSCHELL, L.C., Lord ESHER, M.R. and FRY, L.J.)

LOUGHBOROUGH HIGHWAY BOARD *v.* CURZON. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Highway—Repair—Admissions by waywardens as to road being a highway, and liability to repair—Liability of highway board — Jurisdiction of justices—25 & 26 Vict. c. 61 (*Highway Act* 1862), *s.* 18—41 *& 52 Vict. c.* 77 (*Highways and Locomotives Amendment Act* 1878), *s.* 10.

A summons, issued under sect. 18 *of* 25 *& 26 Vict. c.* 61, *against the highway board of a district, and the waywarden of a parish within that district, alleged that a certain highway in the said parish was out of repair, and required the highway board and waywarden to appear before the justices in petty sessions to answer the information.*

At the hearing the waywarden bonâ fide admitted that the road was a highway which the parish was liable to repair, and that the road was out of repair. The highway board denied that the road was a highway, and objected that the justices had no jurisdiction to hear the summons, and contended that the power to enforce the repair of a highway by a defaulting highway authority was vested in the county authority under sect. 10 *of* 41 *& 42 Vict. c.* 77, *which repealed sect.* 18 *of* 25 *& 26 Vict. c.* 61, *and that the waywarden was not a person qualified to make the above admission.*

The justices made an order on the highway board for the repair of the road.

Held, that sect. 18 *of* 25 *& 26 Vict. c.* 61, *was not repealed by sect.* 10 *of* 41 *& 42 Vict. c.* 77, *and that the procedure at petty sessions was not altered by the latter Act.*

Held, also, that the admission by the waywarden that the road was a highway which the parish was liable to repair, was conclusive, and that it was not competent to the highway board, after the admission of the waywarden, to deny those facts.

Judgment of Huddleston, B. and Wills, J. affirmed.

THIS was an appeal by the Loughborough Highway Board from the judgment of Huddleston, B. and Wills, J. on a special case.

The facts are fully stated in the report in the court below (*ante*, p. 74; and 54 L. T. Rep. N. S. 168).

Jelf, Q.C. and *Sills* for the Highway Board, supported the appeal. *Shiress Will*, Q.C. for the respondent.

A preliminary objection taken by *Shiress Will*, Q.C., who contended that the judgment appealed from was a judgment in a criminal cause or matter within the meaning of sect. 47 of the Judicature Act 1873, and therefore no appeal would lie, was overruled.

The arguments on the hearing of the appeal were similar to those used before the Divisional Court.

The LORD CHANCELLOR (Herschell).—I am of opinion that the judgment of the court below ought to be affirmed. A complaint was made that a highway within the appellants' jurisdiction was out of repair, and thereupon the waywarden and the highway board were summoned before the justices in petty sessions under the provisions of the Highway Act 1862 (25 & 26 Vict. c. 61), s. 18. At the hearing the waywarden did not deny the liability of the parish to repair, and the justices accordingly made an order on the appellants for the repair of the road. The question is whether it was competent to them to make such order, or whether the order ought to be quashed. That depends on whether sect. 18 of the Highways Act 1862 is repealed by sect. 10 of the Highways and Locomotives Amendment Act 1878 (41 & 42 Vict. c. 77). It is said that under the Act of 1862, although the highway board was charged with the duty of repairing the highways, still the burden of the repair of the highways within each parish rests with the parish, and under such circumstances it is reasonable that an admission made by the representative of the parish to the effect that any road is a highway should be conclusive. It is urged that the waywarden would have peculiar knowledge of the locality, and would not be likely improperly to admit the liability of the parish. Then it is said that the Act of 1878 made a great alteration, for sect. 7 of that Act provides that all expenses of keeping the highways of a parish in repair, and all other expenses legally incurred by such board, shall be defrayed out of a common fund. The effect of that section is said to be to take away the separate liability of the parish for its own highways, and to cast the burden on all the parishes in common, so that the waywarden now occupies a different position, because, if the admission of the waywarden is conclusive it would now have the effect of casting liability not only upon his own parish, but upon all the other parishes in the district as well. That observation is no doubt to a certain extent well founded, and the point may be worthy of the consideration of the Legislature. But, however this may be, if the Legislature has so enacted, the law must take its course, and the court cannot interfere. Sect. 18 of the Act of 1862 is not in terms repealed, and it is impossible to hold that it is repealed by implication unless there is something inconsistent with its provisions in the later Act. It is not enough that the provisions of the later Act make it unreasonable that the earlier Act should apply if there is nothing in the later Act that is inconsistent with the earlier Act. Then it is said that sect. 10 of the later Act provides a similar remedy to that which existed under sect. 18 of the earlier Act, and therefore must have been intended to take the place of that section; but there is nothing which makes it impossible that proceedings under the Act of 1862 shall still be taken. Two concurrent proceedings, taken before different tribunals, and carried on in different ways, may exist at the same time. Then it is argued that by the provisions of the later Act, s. 18 of the earlier Act has been made inapplicable, because the parish is not now liable to repair the highways. I do not, however, think that the law has been changed in this respect, for the common law liability of the parish to repair is unaltered. Sect. 7 of the Act of 1878 provides that the expenses of the highway boards shall be deemed to be incurred for the common use of the parishes. That means that the parish remains liable to repair, being in effect a new mode of charging in place of having separate accounts for the different parishes. It seems to me that those who drew the

(*a*) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

Act of 1878 had not in their minds the exact state of the law as it stood at the time. I can see that there are inconsistencies in the mode in which the law operates, but it would be beyond our functions to attempt to set right any defects which may exist; the remedy is by appealing to the Legislature. For these reasons, I am of opinion that the decision of the Divisional Court was correct, and that this appeal ought to be dismissed.

Lord ESHER, M.R.—It is admitted that, unless sect. 18 of the Highways Act 1862 has been repealed by the later Act, the order of the justices was right, for all the proceedings were carried out in strict conformity with the terms of that section. Now, that section is not repealed, either altogether or in part, unless something can be shown in the terms of the subsequent Act which is inconsistent with the maintenance of it. The argument of mere inconvenience will not suffice. It has been suggested that if this section stands side by side with the later legislation some unfairness and injustice must arise. That, if true, is not enough to compel us to break the ordinary rule of construction, but I doubt whether the suggestion is well founded. It is said in the first place, that the parish is not liable now, because the person who represents the parish practically may make an admission on behalf of somebody who incurs no liability thereby. But this is not correct, for the parish does remain liable both to the public, who have a right to have the public highways kept in order, and may look to the parish for that purpose still, and also to the highway board. If the roads are out of repair the parish is undoubtedly liable to contribute whether the provisions of sect. 18 of the Act of 1862, or those of sect. 10 of the Act of 1878, are utilised for that purpose. That being so, the parishes which are liable to pay and are still indictable, can elect waywardens, who are to be members of the highway board, and who can have no interest in any contract for the repair of the roads. A public duty, from which the can obtain no benefit, is therefore cast upon them, and there seems to be nothing unreasonable in the Legislature trusting to them to perform their duty aright. If they do wrong they are liable to be fined, and the magistrates may inquire whether they are acting *bonâ fide*. The Legislature seems to me to have taken every precaution in appointing disinterested persons, with special knowledge, and subject to a public duty, to act in such cases as this. If the waywarden does not deny the liability of the parish to repair, the fact of his not denying should, in my opinion, be conclusive. If he neglects to deny that liability he incurs for his parish, at any rate, a considerable part of the expense; and if he does not satisfy his parish his chances at the next election would be small. I agree with the Lord Chancellor in the view that sect. 18 of the Highways Act 1862 is not repealed either expressly or by implication. The result is that the appeal of the highway board will be dismissed.

FRY, L.J.—I am entirely of the same opinion. The short question is, whether sect. 18 of the Act of 1862 is repealed impliedly by sect. 10 of the Act of 1878. There can only be an implied repeal where the later section is inconsistent with the earlier. In cases like the present there were two modes of procedure: by indictment at common law, or by summary proceedings under the Act of 1862. Sect. 10 of the Act of 1878 gave a new remedy, but this does not take away the old remedies unless they are inconsistent with the new remedy given. Here there is nothing to prevent the remedies from being concurrent.

Appeal dismissed.

Solicitors for appellants, *Field, Roscoe,* and *Co.*, for *Deane* and *Hands*, Loughborough.

Solicitors for respondents, *Crowder, Austie,* and *Vizard*, for *Owston, Dickinson,* and *Simpson*, Leicester.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Tuesday, June 8, 1886.

(Before Lord COLERIDGE, C.J. and CAVE, J.)

REG. on the prosecution of THE WELLS URBAN SANITARY AUTHORITY *v.* THE WELLS WATER COMPANY LIMITED. (*a*)

Water company—Waterworks Clauses Act 1847 (10 *Vict. c.* 17), *s.* 38—*Duty to fix proper fireplugs in mains.*

The 38th section of the Waterworks Clauses Act 1847 (10 *Vict. c.* 17) *imposes no duty on the undertakers to provide a pipe of sufficient capacity to carry a proper fireplug in a place where their existing pipe is insufficient for that purpose, although, in the opinion of the justices empowered by the section to settle the proper position of the fireplugs in the district, it is, as a fact, essential that a fireplug should be placed there.*

THIS was a case stated by justices for the city of Wells, under the statutes 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, for the purpose of obtaining the opinion of the court upon a question of law which arose before them as hereinafter stated.

At a petty sessions holden at the Town Hall in and for the city of Wells, on Monday, the 19th Jan. 1885, an information preferred by the Wells urban sanitary authority, hereinafter called the respondents, against the Wells Water Company Limited, hereinafter called the appellants, charging for that the appellants, within six calendar months then last past, at the city of Wells, then being the undertakers of the works known as the Wells Waterworks, did unlawfully neglect to fix a certain fireplug in the main or other water pipe of the said company at Portway, upon being requested so to do by the Wells urban sanitary authority, contrary to the provisions of the Waterworks Clauses Act 1847, was heard and determined by the justices, and upon such hearing the appellants were duly convicted of the said offence and adjudged to pay a fine of two shillings and sixpence.

The justices found as facts: That all the proceedings were regular. That by the appellants' provisional order the works authorised were as follows: A conduit pipe to the city of Wells, and pipes through the streets and public places thereof, with hydrants and other appliances. That the place named in the information was part of a street of the city, and that the houses approxi-

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

mate thereto formed an integral position of such city where it was essential a hydrant should be placed. That the existing pipe was of insufficient capacity to carry a proper hydrant. That the appellants were willing to place a proper hydrant at the point indicated provided the respondents would pay the expense of laying a new length of three-inch main in lieu of the existing one-inch pipe.

On behalf of the respondents it was shown: That the appellants obtained their order under the Waterworks Clauses Act 1872. That by such Act, and the appellants' provisional order, the appellants obtained the monopoly of laying water pipes throughout the city. That with the appellant's provisional order were incorporated the provisions of the Waterworks Clauses Act 1847 and 1863, except where expressly varied. That by sect. 38 of the Waterworks Clauses Act 1847 it was enacted that the undertakers at the request of the town commissioners should fix proper fireplugs in the main and other pipes belonging to them, at such places as may be most convenient for the supply of water for extinguishing any fire. That by sect. 39 of the same Act the undertakers were to repair such fireplugs and deposit the keys thereof. That by sect 40 of the same Act the cost of such fireplugs, and the expense of fixing, placing, and maintaining the same in repair, and of providing such keys as aforesaid, were to be defrayed by the town commissioners. That by sect. 42 of the same Act the undertakers were at all times to keep charged with water all their pipes to which fireplugs should be fixed, unless prevented by frost, &c., and should allow all persons at all times to take and use such water for extinguishing fire without making compensation for the same.

It was contended on behalf of the respondents that the clear scope of the Act was, that the appellants in return for the monopoly they enjoyed had imposed on them by the Legislature liability to supply water for extinguishing fire in order that the public might have the benefit whenever they needed it. That, in order to ensure this, the Legislature laid down in sect. 43 of the Waterworks Clauses Act 1847 that the appellants should be liable for certain penalties in case they neglected or refused to fix such fireplug, or to keep their pipes charged with proper pressure, except when unavoidably prevented, and it was the duty of the respondents to take precautions for the safety of the town from fire.

On behalf of the appellants it was contended: That by sect. 35 of the Waterworks Clauses Act 1847 a supply of water was to be kept for domestic purposes, but the water company were only bound to supply such water when a return of 10 per cent. was guaranteed them upon their outlay, and that if the respondents' contention was correct this section would be wholly inoperative, inasmuch as the company would be bound to carry mains or pipes, for the purpose of fireplugs, to places to which they were not bound to provide a domestic supply. That the respondents, by the exercise of such a power as now claimed, might compel the appellants to carry main pipes throughout the district to which their order extended, and thereby swamp not only the monopoly of the appellants, but their income, and force them to raise more capital. That there was nothing in sect. 38 of the Waterworks Clauses Act 1847 to show that the appellants were bound to lay this main at their own expense, and that the absence in specific terms of such obligation was sufficient argument that they were not bound to lay the main. That the words in sect. 38, "fix proper fireplugs," had a relative meaning, and that only where the appellants had a main capable of carrying a proper hydrant were they liable to place a fireplug. That if the respondents' contention were correct the compulsory powers of the local authority might be used by individuals as a lever against the appellants to force them to do what, under sect. 41 of the Act, the owner is bound to pay for. That sects. 38 and 41 of the Act are in similar terms, and that if the respondents could force the appellants at the expense of the latter to lay down mains of sufficient capacity to carry a proper hydrant where such mains did not exist, so could the owner or occupier of any work or manufactory under the powers contained in sect. 41, which latter contention, it was submitted, could not for a moment be held.

The justices, however, were of opinion that, upon the facts stated, sect. 38 of the Waterworks Clauses Act 1847 authorised the respondents to call upon the appellants to fix the fireplug in the main or other pipe referred to in the information, and that it was not competent for the appellants to contend that because a pipe of too small a bore to supply a hydrant had been laid down they were therefore freed from the responsibility imposed upon them by the Act of Parliament.

The justices therefore gave their determination against the appellants in the manner before stated, and the appellants, being dissatisfied with their determination upon the hearing of such information as being erroneous in point of law, applied to them to state a case, which they did, setting out the facts and arguments above stated.

The question of law upon which the case was stated was, whether under the foregoing facts and circumstances the appellants did neglect to fix a fireplug contrary to sects. 38 and 43 of the Waterworks Clauses Act 1847.

Odgers for the appellants.—It is not disputed that the existing pipe is sufficient for the supply of water for domestic purposes. The order of the justices is equivalent to an order to take up the existing main and to put down a larger main. The 35th section compels the company to provide a constant supply of water for domestic purposes to all parts of their district where so many owners require it that the aggregate water rate payable by them annually shall be not less than one-tenth part of the expense of providing and laying down the pipes. Then the 36th section provides a penalty for neglect to lay pipes for such supply, provided that the company shall not be liable to any penalty for not supplying water if the want of such supply shall arise from frost, unusual drought, or other unavoidable cause or accident; and the 37th section provides that they shall keep a constant supply of water for cleansing drains and other public purposes in all the pipes to which any fireplug shall be fixed. These sections contain the whole liability of the company for the supply of pipes and water, and it cannot be supposed that after these specific provisions it was

the intention of the Legislature to place upon them by implication a further and more onerous liability. There is therefore no liability imposed upon the company by this Act to take up the existing main and replace it by a larger. [He was stopped by the Court.]

Bucknill, Q.C. for the respondents.—The 35th and 36th sections provide for the supply of water to the inhabitants for domestic use, and the 37th for a supply for cleansing sewers and watering streets. Then the whole of the following five sections apply to the provision of fireplugs and the supply of water for extinguishing fires, and it is clear from them that the Legislature intended that, in return for the monopoly which a water company undoubtedly has, they should be compelled to protect the public so far as possible against fire. It is true that the 40th and 41st sections provide that the town commissioners or the owner of a manufactory, as the case may be, shall pay for the cost of the fireplugs, and of fixing, placing, and maintaining them; but that is the only expense from which they are relieved, and otherwise these sections show conclusively that it was the intention of the Legislature that the company should be bound to place at short intervals, and in all the most convenient and proper places, proper fireplugs for the supply of water for extinguishing "any fire which may break out within the limits of the special Act." In this case the place mentioned and fixed upon by the justices is a factory where it is essential for the protection of the public that a fireplug should be placed, and the company cannot protect themselves from placing a proper fireplug at that place by the plea that the pipe is not large enough. The Legislature has enacted that they shall place a proper fireplug there. It has also enacted that the urban sanitary authority shall pay for the fireplug. It has not enacted that the urban sanitary authority shall pay for any of the pipes necessary to supply the fireplug. The company must therefore bear that expense themselves. [Lord Coleridge, C.J.—Why should not the owner of the factory pay for it in accordance with the provisions of the 41st section?] That only deals with the case where an owner is willing to pay for it. In this case he has made no request to the undertakers, and it is impossible to compel him to do so, whereas it is necessary for the protection of the public that a fireplug should be placed here.

Odgers was not called upon to reply.

Lord Coleridge, C.J.—I am of opinion in this case that the decision of the justices was wrong, and that it must be reversed. Mr. Bucknill has ingeniously contended that a duty is cast upon the undertakers by the Act of Parliament to provide not only proper fireplugs, but also proper pipes in which to place the fireplugs. I cannot help thinking that, if this were so, a serious addition would have been made to the duties of the undertakers, and that it is very unlikely that, if the Legislature intended to make such an addition, they would do it in this way, instead of using plain and unmistakable words for that purpose. Mr. Bucknill says that they have done so by implication; but, as I pointed out in the course of the argument, the Act of Parliament contains a section which is opposed to this view. By the 41st section, "the undertakers shall, at the request and expense of the owner or occupier of any work or manufactory situated in any street in which there shall be a pipe of the undertakers, place and maintain in effective order a fireplug (to be used only for extinguishing fires) as near as conveniently may be to such work or manufactory." As I read that section it appears to me that it was the intention of the Legislature that whatever was done in pursuance of that section should be done at the expense of the owner or occupier of the work or manufactory, and I think that, if it were necessary to increase the diameter of the pipe in the street for the purpose mentioned in that section, and the owner or occupier requested the undertakers to put down a larger pipe, and they did so, the owner or occupier would have to pay for it. The existence of that section shows, in my opinion, that it was not the intention of the Legislature that any such additional burden as that for which Mr. Bucknill contends should be imposed upon the undertakers. Then again, after the provision has been made for domestic purposes, the 37th section provides that in all the pipes to which any fireplug shall be fixed the undertakers shall provide and keep constantly laid on, unless prevented by frost, unusual drought, or other unavoidable accident, or during necessary repairs, a sufficient supply of water for the following purposes (that is to say), for cleansing the sewers and drains, for cleansing and watering the streets, and for supplying any public pumps, baths, or washhouses that may be established for the free use of the inhabitants, or paid for out of any poor rates, or borough rate levied within the limits of the special Act, and such supply shall be provided at such rates, in such quantities, and upon such terms and conditions as may be agreed upon by the town commissioners and the undertakers. The burden cast upon them by the Act of Parliament is therefore plain, and I cannot conceive that any further burden is cast upon them than so appears. It is true, as has been urged, that the undertakers have a monopoly for the supply of water to the district; but, on the other hand, certain burdens are cast upon them, and, as I read the statute, this is not one of those burdens. I therefore think that the decision of the magistrates was wrong, and that the conviction must be quashed.

Cave, J.—I am of the same opinion.

Solicitors for the appellants, *Prior, Church,* and *Adams,* for *Welsh* and *Son,* Wells.

Solicitors for respondents, *Bolton, Robbins, Busk,* and *Co.,* for *S. Hobbs,* Wells.

Tuesday, June 22, 1886.

(Before Grove and Grantham, JJ.)

Reg. on the prosecution of Turner *v.* Johnston. (*a*)

Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 147—*The Summary Jurisdiction Act* 1879 (42 *&* 43 *Vict. c.* 49), *s.* 39—*Supplying seamen to ships without licence — Evidence — Onus of proof of licence on defendant.*

A defendant having been charged, under the 147*th section of the Merchant Shipping Act* 1854, *with*

(*a*) Reported by Joseph Smith, Esq., Barrister-at-Law.

supplying a seaman to a merchant ship in the United Kingdom, he not being a person holding a licence from the Board of Trade for that purpose:

Held, on case stated, that proof having been given of the supply of the seaman by the defendant, the onus of proving that he held a licence from the Board of Trade rested with him.

This was a case stated by Robert Arthur Valpy, Esq., the deputy stipendiary magistrate for the borough of Cardiff, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions which arose before him as hereinafter stated.

At a petty sessions holden at the Town Hall, in the borough of Cardiff, on the 2nd March 1886, on an information preferred by William Turner, hereinafter called the appellant, against Gunstave Johnston, hereinafter called the respondent, under sect. 147, sub-sect. 1, of the Merchant Shipping Act (17 & 18 Vict. c. 104), charging for that he the said Gunstave Johnston, not being a person holding a licence from the Board of Trade to engage or supply seamen or apprentices for merchant ships in the United Kingdom, and not being an owner or master or mate of the ship or vessel *Astracana* hereinafter mentioned, or the *bonâ fide* servant in the constant employ of the owner, or a shipping master duly appointed pursuant to the said Act, 17 & 18 Vict. c. 104, did on or about the 27th Feb. then last past engage or supply one John Johnson, a seaman, to be entered on board the British ship or vessel *Astracana*, then being in the port of Cardiff, in the county of Glamorgan, was heard and determined by the deputy stipendiary magistrate, the said parties respectively being then present, and upon such hearing he dismissed the information.

The appellants being dissatisfied with his determination, as being erroneous in point of law, duly applied for a case setting forth the facts and the grounds of his determination, whereupon he, in compliance with their application, stated the following case:—

Upon the hearing of the information, it was proved on the part of the appellant, and found as a fact, that the respondent had, on or about the 26th Feb. then last past, engaged or supplied the said John Johnson, a seaman, to be entered on board the British ship or vessel *Astracana*, then being in the port of Cardiff, in the county of Glamorgan, that the respondent was not the owner or master or a mate of the said ship, or a *bonâ fide* servant in the constant employ of the said owner; but I held that it was not proved that the respondent did not, at the time of the commission of the said alleged offence, hold a licence from the Board of Trade to engage or supply seamen or apprentices for merchant ships in the United Kingdom and I therefore dismissed the information.

The only evidence in support of the allegation of the appellant, that the respondent did not hold the licence from the Board of Trade hereinbefore mentioned, was the evidence of the appellant, who is the chief superintendent of the Mercantile Marine Office of the Board of Trade for the Newport, Cardiff, and Penarth district, who produced a written document signed by one of the assistant secretaries to the Board of Trade and bearing the seal of the said board, and who stated that, as far as he personally knew, the respondent had no licence, though he would not state positively the respondent had no licence and that the said document referred to the respondent.

The following is a copy of such document:

This is to certify that Gustave Johnston, of 116, Bute-road, Cardiff, boarding-house keeper, does not hold, and has not held during the past six months, a license from the Board of Trade to engage or supply seamen or apprentices for merchant ships in the United Kingdom, under sect. 146 of the Merchant Shipping Act 1854.

It was contended, on the part of the appellant, that this document was made evidence of the fact stated therein under sect. 7 of the statute 17 & 18 Vict. c. 104, and should be received by me as evidence of such fact.

I, however, being of opinion that there was no evidence before me that the respondent was not a licensed person as aforesaid, and that the said document was not legally evidence of such fact, either under sect. 7 of the said statute or otherwise, and that such certificate could not be evidence of any such fact, unless it was expressly made so by the statute itself, gave my determination against the appellant in the manner before stated.

The questions of law arising for the opinion of the court, therefore, are: (1) Whether the document hereinbefore referred to was legal evidence that the respondent did not, at the time of the commission of the said alleged offence, hold a licence from the Board of Trade to engage or supply seamen or apprentices, pursuant to sect. 146 of the statute 17 & 18 Vict. c. 104. (2) Whether the onus of proof that the respondent did not hold such licence was on the appellant.

If the court should be of opinion that my decision was wrong in point of law, then the case is to be remitted to me, the said deputy stipendiary magistrate, with the opinion of the court thereon and with such order as to the court may seem fit.

The 7th section of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) provides:

All documents whatever, purporting to be issued or written by or under the direction of the Board of Trade, and purporting either to be sealed with the seal of such board, or to be signed by one of the secretaries or assistant secretaries to such board, shall be received in evidence, and shall be deemed to be issued or written by or under the direction of the said board, without further proof, unless the contrary be shown; and all documents purporting to be certificates issued by the Board of Trade in pursuance of this Act, and to be sealed with the seal of such board, or to be signed by one of the officers of the marine department of such board, shall be received in evidence, and shall be deemed to be such certificates without further proof, unless the contrary be shown.

And the 146th and 147th sections provide:

146. The Board of Trade may grant to such persons as it thinks fit licences to engage or supply seamen or apprentices for merchant ships in the United Kingdom, to continue for such periods, to be upon such terms, and to be revocable upon such conditions, as such board thinks proper.

147. The following offences shall be punishable as hereinafter mentioned; (that is to say)

(1) If any person not licensed as aforesaid, other than the owner or master or a mate of the ship, or some person who is *bonâ fide* the servant and in the constant employ of the owner, or a shipping master duly appointed as aforesaid, engages or supplies any seaman or apprentice to be entered on board any ship in the United Kingdom, he shall for each seaman or apprentice so

engaged or supplied incur a penalty not exceeding twenty pounds.

Danckwerts for the appellant. — After consideration, the appellant does not rely upon the first question raised, and does not now contend that the document proposed to be offered in evidence is a document or certificate issued by the Board of Trade, in pursuance of the Merchant Shipping Act 1854, within the meaning of the 7th section of that Act. It is, however, submitted that, on the authorities, and on the true construction of the Summary Jurisdiction Acts, the onus was on the defendant, in this case, to prove that he held a licence from the Board of Trade under the 146th section. In *Rex* v. *Turner* (5 M. & S. 206) it was held that, upon a conviction under 5 Anne, c. 14, s. 2, against a carrier for having game in his possession, it is sufficient if in the information and adjudication the qualifications mentioned in 22 & 23 Car. 2, c. 25, s. 3 (*a*), be negatived without negativing them in evidence. Lord Ellenborough there said: "The question is upon whom the *onus probandi* lies; whether it lies upon the person who affirms a qualification, to prove the affirmative, or upon the informer, who denies any qualification to prove the negative. There are, I think, about ten different heads of qualification enumerated in the statute to which the proof may be applied: and, according to the argument of to-day, every person who lays an information of this sort is bound to give satisfactory evidence before the magistrates to negative the defendant's qualification upon each of those several heads. The argument really comes to this, that there would be a moral impossibility of ever convicting upon such an information. If the informer should establish the negative of any part of these different qualifications, that would be insufficient, because it would be said, *non liquet*, but that the defendant may be qualified under the other. And does not, then, common sense show that the burden of proof ought to be cast on the person who, by establishing any one of the qualifications, will be well defended? Is not the statute of Anne in effect a prohibition on every person to kill game, unless he brings himself within some one of the qualifications allowed by law; the proof of which is easy on the one side, but almost impossible on the other? I remember the decision of *Rex* v. *Stone* (1 East, 639), and the arguments of the learned judges, who held the necessity of giving negative proof, were undoubtedly urged with great force; but I felt at the time that, if they were right, it would in most cases be impossible to convict at all." [GRANTHAM, J.—Then suppose an information is laid against me for shooting without a licence, I should be convicted if I failed to produce my licence.] That follows directly from the judgment of Lord Ellenborough in *Rex* v. *Turner*. Again, in *The Apothecaries Company* v. *Bentley* (R. & M. 159), there was an averment in a declaration on the 55 Geo. 3, c. 194, that the defendant practised as an apothecary without having obtained such certificate as by the said Act is required, and it was held that the *onus probandi* that the defendant had obtained his certificate lay with him and not with the plaintiffs. Then in *Huggins* v. *Ward* (29 L. T. Rep. N. S. 33; L. Rep. 8 Q. B. 52) it was proved on an information alleging that the defendant had five sheep affected with a contagious disease, and did not give notice to a constable that the appellant had five sheep so affected, and it was held that there was *primâ facie* evidence on which the appellant might be convicted of the offence charged, and it lay on him to show, if he could, that he had given notice to a police constable. Then by 11 & 12 Vict. c. 43, s. 14, it provided that, if the information or complaint in any such case shall negative any exemption, exception, or proviso, or condition in the statute on which the same shall be framed, it shall not be necessary for the prosecutor or complainant in that behalf to prove such negative, but the defendant may prove the affirmative thereof in his defence, if he would have advantage of the same; and the 39th section of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) has now enacted that in proceedings before courts of summary jurisdiction any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, bye-law, regulation, or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant. A similar provision was contained in the Licensing Act 1872 with respect to offences under that Act; and in the case of *Roberts* v. *Humphreys* (29 L. T. Rep. N. S. 387; L. Rep. 8 Q. B. 483), a keeper of licensed premises having been charged with opening his premises for the sale of intoxicating liquors during prohibited hours, and persons having been shown to have been supplied with liquor on his premises during such hours, it was held that the onus showing that the persons came within the exception lay with the defendant. It is submitted that in this case the possession of a Board of Trade licence is an exception, exemption, proviso, excuse, or qualification which need not be negatived by the informant, the onus of showing that he possesses it resting with the defendant, and that the defendant ought therefore to have been convicted.

The respondent did not appear.

GROVE, J.—I was at first somewhat startled by the proposition advanced by Mr. Danckwerts that it was necessary for the defendant to negative an allegation advanced on behalf of the prosecution, and that, if he failed to do so, he was liable to be convicted; but, upon consideration, I do not think that this case goes to that length. The respondent is charged for that he not being a person holding a licence from the Board of Trade to engage or supply seamen or apprentices for merchant ships in the United Kingdom, and not being an owner or master or mate of the ship or vessel *Astracana*, or the *bonâ fide* servant in the constant employ of the owner or a shipping master duly appointed

(*a*) This section provided that all and every person or persons not having lands and tenements or some other estate of inheritance in his own or his wife's right of the clear yearly value of one hundred pounds per annum, or for term of life, or having lease or leases of ninety-nine years, or for any longer term, of the clear yearly value of one hundred and fifty pounds, other than the son and heir of an esquire or other person of higher degree, &c., &c., were prohibited from keeping or using guns, bows, dogs, &c.

pursuant to the Merchant Shipping Act 1854, did engage or supply a seaman to be entered on board that ship in the United Kingdom. Then it was proved that he did engage or supply a seaman to be entered on board the ship in the United Kingdom. I think that, when this was proved, he was then brought within the purview comprehended by the 39th section of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49), and he could then defend himself by proving any one or other of the exceptions which the section mentions, and I do not think that the appellant was called upon to negative by evidence each one of those exceptions. I am of opinion therefore that the appellant is entitled to succeed, and that the case must be remitted to the stipendiary magistrate with an intimation that the onus of proving that he has a proper licence from the Board of Trade rests with the respondent. We shall not make any order as to costs.

GRANTHAM, J. concurred.

Appeal allowed without costs.

Solicitor for the appellant, *The Solicitor for the Board of Trade.*

HOUSE OF LORDS.

Feb. 11, 12, *and March* 26, 1886.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, BRAMWELL, FITZGERALD, and HALSBURY.)

BARLOW *v.* KENSINGTON VESTRY. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Metropolis Management Amendment Act 1862 (25 & 26 *Vict. c.* 102), *s.* 75—*General line of buildings — Architect's certificate — Order of magistrate.*

The appellant purchased a piece of land fronting the K.-road, on which were old buildings. He pulled down these buildings, and made a new street through the land, at right angles to K.-road, called "D.-gardens." A row of houses was erected in D.-gardens, standing back from the road, and the superintending architect of the Board of Works certified, under sect. 75 *of the Metropolis Management Amendment Act* 1862, *that the line of the main fronts of those houses was the general line of buildings in D.-gardens. The appellant built a row of houses fronting K.-road, one of which was at the corner of K.-road and D.-gardens. It was not built on the site of any old house in K.-road, and projected seven feet beyond the line of the buildings in D.-gardens up to the line of the pavement.*

The vestry obtained a magistrate's order under the Act to remove the projecting part of the house.

Held (reversing the judgment of the court below), that the appellant had committed no offence under sect. 75 *of the Act, and that the magistrate had no jurisdiction to make an order for the demolition of the house.*

Spackman *v.* Plumstead Board of Works (10 *App. Cas.* 229; 53 *L. T. Rep. N. S.* 157) *followed.*

The magistrate made a verbal order under sect. 75 *for the demolition of part of a house within a limited time in the presence of the builder. It was not reduced into writing, or served upon him till the expiration of the limited period.*

Held, by Lords Blackburn and Fitzgerald, that the order was invalid, not being "an order in writing made on" the builder, within the meaning of the section.

THIS was an appeal from a judgment of the Court of Appeal (Baggallay, Cotton, and Lindley, L.JJ.), reported in 27 Ch. Div. 362 and 52, L. T. Rep. N. S. 155, reversing a decision of Bacon, V.C., reported in 48 L. T. Rep. N. S. 348.

The question involved was whether, where a new street is made at right angles with a main road, the building line adopted in the side street is to govern the plan of the corner house situated in the main road.

It appeared that a new street called De Vere-gardens was made from Kensington-road, the house at the corner of the new street and in the main road being left standing until after the houses had been built in De Vere-gardens. The building line, as far as the frontages of the houses in the new street were concerned, was set back seven feet from the pavement, but the line was broken by porticoes, and bay windows which projected beyond it.

Mr. William Elsdon, who had purchased the corner plot, proceeded to pull down the corner house and to erect a better building upon its site, aligning its side with the inner edge of the pavement at the corner of De Vere-gardens and the Kensington-road. The vestry thereupon threatened to enter and demolish the corner building for a distance of seven feet from the inner edge of the pavement at the corner of De Vere-gardens.

The present action was that instituted for the purpose of restraining any action of the vestry in the matter.

Bacon, V.C. granted the injunction asked for, but his decision was reversed, as above mentioned.

The facts, and the section of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), and the certificate of the superintending architect of the Board of Works, are fully set out in the judgment of the Lord Chancellor.

Rigby, Q.C. and *B. B. Rogers* appeared for the appellant, and contended that, on the facts, no offence had been committed under the sect. 75 of the Act. See

Lord Auckland v. *Westminster Local Board*, L. Rep. 7 Ch. 597; 26 L. T. Rep. N. S. 961;
Spackman v. *Plumstead Local Board*, 10 App. Cas. 229; 53 L. T. Rep. N. S. 157.

To hold otherwise would lead to great inconvenience. Further, the magistrate's order, not being in writing, was bad.

Sir *R. Webster*, Q.C., *Millar*, Q.C., and *Ingle Joyce*, for the respondents, supported the judgment of the Court of Appeal.

Rigby, Q.C. was heard in reply.

At the conclusion of the arguments, their Lordships took time to consider their judgment.

March 26.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).—My Lords: This is an action which is now being prosecuted by the appellants as the legal personal representatives of Charles Edward Barlow, the original plaintiff, to restrain the respondents from pro-

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

ceeding to demolish a part of a dwelling-house belonging to them, situate within the metropolis. The respondents do not deny that they threaten such demolition, but they claim the right to demolish the building under the provisions of the 75th section of the Metropolis Management Amendment Act 1862. The house in question is situate at the corner of Kensington-road (a street which has long existed) and a new street which has been formed at right angles to it, called De Vere-gardens. The site upon which this and the adjoining houses in the Kensington-road were erected was the property of Charles Edward Barlow, and was by him sold to the respondent William Elsdon under an agreement of the 2nd Aug. 1881, the arrangement being that William Elsdon should raise a part of the purchase money by a first mortgage, and, subject to this, give Charles Edward Barlow a second mortgage on the premises to secure 5000*l.* and interest. This arrangement was carried out by an indenture of mortgage of the 22nd Nov. 1881, under which Charles Edward Barlow entered into possession of the premises, and remained in possession until the time of his death, whilst this action was pending. The side of the house facing the new highway was built by William Elsdon up to the pavement. The houses which were at that time built on the eastern side of De Vere-gardens had an area seven feet wide (except so far as the same were overhung by bay windows and porticoes) between them and the pavement. Under these circumstances, the surveyors to the respondents contended that no part of the appellants' house facing De Vere-gardens ought to have been built within seven feet of the pavement. He accordingly took proceedings under sect. 75 of the Metropolis Management Amendment Act 1862. That section enacts "that no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of building in any street, place, or row of houses in which the same is situate, in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance from the line of building therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being, and in case any building, structure, or erection be erected or be begun to be erected or raised without such consent, or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish, or the board of works for the district in which such building or erection is situate, to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged in any work contrary to this enactment, to appear at a time and place to be stated in the summons to answer such complaint, and if, at the time and place appointed in such summons, the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder, or person, directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable." The respondents' surveyor first applied to Mr. Vulliamy, the superintending architect to the Metropolitan Board of Works, and requested him to decide the general line of buildings on the east side of De Vere-gardens. Mr. Vulliamy gave a certificate which, after reciting a portion of the section I have just quoted, proceeded as follows: "And whereas Mr. William Weaver, surveyor to the vestry of Kensington, and Mr. William Elsdon, of Victoria-road, Kensington, have severally appeared before me, and been heard regarding the erection of a house in Kensington-road, at the corner of De Vere-gardens, and beyond the face or front of the buildings forming a row of houses on the eastern side De Vere-gardens aforesaid, and I have been required to decide the general line of buildings in such gardens as provided in this said statute. Now, therefore, having considered the several matters, I, the undersigned, being the superintending architect to the Metropolitan Board of Works, do hereby, pursuant to the said Act, decide that the main fronts of the buildings forming the row of houses aforesaid, and tinted pink on the plan hereto annexed and signed by me, is the general line of buildings on the eastern side of De Vere-gardens aforesaid." To this certificate there was attached a plan, in which a pink line was drawn along the front of the main wall of the houses on the eastern side of De Vere-gardens, which commenced at the southern end of the houses and terminated at the last of the houses then built, which was a point upwards of fifty feet to the south of the appellants' building. The next step taken was to make a complaint before Mr. Sheil, one of the magistrates of the metropolitan police-courts, and on the 24th Jan. 1882 he made a verbal order directing the respondent Elsdon to demolish the seven feet in question within a period of eight weeks from the 24th Jan. 1882. The order was not reduced into writing until the 20th March 1882, after which date a copy of it was served on the respondent Elsdon. On the 2nd March 1882 the writ in the present action was issued, claiming an injunction to prevent the defendants from pulling down or interfering with any part of the houses. The action came on for trial before Bacon, V.C., who granted a perpetual injunction in the terms of the writ. This judgment was reversed by the Court of Appeal, who made an order dismissing the action. It appears to me that the question whether this action is well founded depends entirely upon whether the respondents are able to establish that, by reason of the provisions of sect. 75 of the Metropolis Management Amendment Act 1862, and the proceedings which have been taken under it, they would be justified in demolishing that portion of the appellants' building which had given rise to this controversy. The construction of the section I have just referred to, and the functions under it of the superintending architect to the Metropolitan Board of Works and the magistrate, came recently under the consideration of your Lordships' House in the case of *Spackman* v. *The Board of Works for the Plumstead District* (10 App. Cas. 229; 53 L. T. Rep. N. S. 157). It was there held that the offence created by

the statute consisted in building beyond the line fixed by the superintending architect to the Board of Works as the general line of buildings in the street or row of houses in which the building in question was situate, and to which it was therefore bound to conform. It was decided that the magistrate's duty was confined to seeing whether the building projected beyond the line so decided, and that he was not empowered himself to inquire or determine what was the general line of buildings. In that case it was manifestly considered by their Lordships, and I think rightly, that a building may be situate in a row of houses and bound to conform to the general building line of such row of houses, though that is not the general building line of the street; and, further, that the general building line may differ in different parts of the same street, and that it is for the superintending architect to determine "the extent of the space along which a line is to be laid down" in deciding what is the general line of buildings at any part of the street. Now, in the present case, the language of the architect's certificate is somewhat peculiar. It appears clear that he did not determine, or intend to determine, that the building in question was situate in the row of houses on the eastern side of De Vere-gardens, for he describes the house as "in Kensington-road, at the corner of De Vere-gardens, and beyond the face or front of the buildings forming a row of houses on the eastern side of De Vere-gardens." And all that he decides is that the main fronts of the buildings forming that row of houses "is the general line of buildings on the eastern side of De Vere-gardens." I think, therefore, that the architect has not decided that the line he has drawn on the plan is the general line of buildings, either of the row of houses or the street in which the building of the plaintiffs is situate, unless it can be said as matter of law that, where a row of houses has been erected along a portion of a highway, any building abutting upon the same highway, whatever the interval between it and the row of houses built, and whatever the other circumstances, necessarily forms part of the same row of houses, or is to be regarded as necessarily governed by and bound to conform to the general line of building of such row of houses. It seems to me that your Lordships cannot so hold as matter of law. I think that such a construction of the section would run counter to the view expressed by this House in the case of *Spackman* v. *Plumstead Board of Works* (*ubi sup.*); and I do not think it would be a reasonable construction of the section. Various cases were suggested in the course of the argument which showed the unreasonable consequences which would flow from such a construction, and the injustice which it might work, where a new street is created leading out of an existing one. The owner of land abutting on the new street at the other end from the existing street, and however distant from it, might, by erecting a few houses, or it may be a single house, compel the owner of the land at the corner of the two streets so to set back his building as to deprive him of his building site altogether. For in such a case the architect might give a precisely similar certificate to that which he has given in the present case, and, indeed, could hardly avoid doing so, if he gave a certificate at all. I have therefore come to the conclusion that the respondents have not established that any offence has been committed under the 75th section by the erection of the building of which the respondents complain. I do not intend to say that a building situate at the corner of two streets can never, for the purposes of the section, be regarded as situate in both, or that it cannot, in such a case, ever be regarded as situate in two rows of houses. Such a question must in each case be decided upon its own merits, having regard to all the circumstances. In the view I have taken, it is unnecessary to determine whether, if the offence had been established, the injunction ought nevertheless to have been granted on the ground that the magistrate had not made such an order as is required by the statute. But I must not be understood as expressing an opinion that the order was a valid one. It follows from the conclusion at which I have arrived that, in my opinion, the judgment of the Court of Appeal cannot be supported. I therefore move your Lordships that the judgment of the Court of Appeal be reversed, and the judgment of Bacon, V.C. restored, with the variation that the injunction should be limited to restraining the respondents from demolishing or interfering with the buildings in question, or taking any steps for that purpose in virtue either of the certificate of Mr. Vulliamy or of the complaint and proceedings following thereon, and that the respondents, the vestry of St. Mary Abbotts, Kensington, do pay the costs in the Court of Appeal and the costs of this appeal.

Lord WATSON.—My Lords: I think it is a necessary consequence of the judgment of this House in *Spackman* v. *Plumstead Board* (*ubi sup.*) that, until the superintending architect of the Metropolitan Board has decided the matters committed to him by sect. 75 of the Metropolis Management Amendment Act 1862, no justice of the peace has jurisdiction to entertain a complaint under that section, and to issue an order in terms thereof, directing the demolition of a building or erection. And, in my opinion, the function assigned to the superintending architect is, not merely to lay down the general line of buildings in a street, place, or row of houses in which the building or erection complained of is alleged to be situated, but to fix and determine the general building line of the street, place, or row in which, according to his professional judgment, such building or erection is actually situate. The question whether a building is or is not, within the meaning of the Act, situate in a particular street, place, or row may involve considerations of the same character with those upon which the determination of a general line of buildings must often depend; and it appears to me to have been the intention of the Legislature to intrust the decision of both points to the architect, and not to the justice before whom the complaint is brought. The certificate of Mr. Vulliamy, dated 18th Oct. 1881, and the plan therein referred to, which must be construed together, do not appear to me to meet the requirements of sect. 75, inasmuch as they do not contain any decision by that gentleman to the effect that the building in dispute, or any part of it, projects beyond the general building line of the street or row in which it is situate. They do indicate that the building is "in Kensington-road at the corner of De Vere-gardens," that the main

fronts of a row of houses on the east side of the gardens is the general line of buildings on that side of De Vere-gardens, and that the building is beyond the main fronts of that row of houses. But they do not show that, according to the judgment of Mr. Vulliamy, the building is situate either in that row of houses or in De Vere-gardens. I am therefore of opinion that the magistrate had no jurisdiction to pronounce the order of demolition which, *ex facie*, bears date the 24th Jan. 1882, and that it must be treated as a nullity. I also think that, even if there had been jurisdiction in the magistrate, his order would, in the circumstances of this case, have been void. Sect. 75 prescribes that it shall be made "in writing on" the person who is directed to take the building down, and that, for the purpose of demolition, he shall be allowed "such time as such justice shall consider reasonable." The order professes to allow for that purpose a period of eight weeks from the 24th Jan., which consequently expired on the 21st March 1882. But it is admitted that, although the magistrate announced the terms of his judgment on the 24th Jan., the order itself was not reduced to writing or subscribed by him until the 21st March following. It was never served upon the person to whom it is directed, and the fact of a written order having been made did not come to his knowledge before the expiry of the day upon which it was issued. I am of opinion that an order verbally intimated by the magistrate is not in any sense an order "in writing" within the meaning of the Act; and, further, that in proceedings like these of a harsh and penal character a written order cannot be regarded as made "on" the defendant until it has been duly served upon him, or otherwise brought to his knowledge. In that view no time whatever was allowed for implementing the order to demolish; and that circumstance of itself would be sufficient to vitiate the order, even if the rest of the proceedings had been regular and competent. Other important questions have been argued before us relating to the construction of sect. 75; but these I do not think it necessary to decide. If the views which I have already expressed are well founded, the respondents are not at present in a position to institute a complaint in terms of sect. 75, and it is possible that they may never be able to place themselves in that position. I am accordingly of opinion that your Lordships ought to reverse the order appealed from, and to restore the judgment of the Vice-Chancellor, with the variations which have been proposed by my noble and learned friend.

Lord BRAMWELL.—My Lords: I agree in the reasons that have been given by my noble and learned friends for reversing the judgment in this case. I arrive at the same conclusion on other reasons. My reasons are, that I am of opinion that sect. 75 only applies to buildings in a row of houses, or buildings in a line of buildings, and that the building in question was not in such a row of houses or line of buildings in De Vere-gardens. I construe the statute as I do for the following reasons: Sect. 75 uses the words "street, place, or row of houses." This evidently means that a *row* of houses is to be looked for; that, though there may be a general line of buildings in a street, yet, if there is a row of houses not in that general line, the building is not to be beyond the line of the row, though within the line of the street. Great Cumberland-place affords an illustration of what I mean. It may be said that there is a general line of buildings in Great Cumberland-place; I think there is. But there is another and different one for the row of houses in the recess in it. No houses could be projected beyond the line of this row. Again, there may be said, in a sense, to be a general line of buildings in the Strand on the north side. There is not there a recess or projection from Charing-cross till Hollywell-street is reached. It would be correct to say that that showed the general line of buildings in the Strand. But, doubtless, if a house in the Strand east of St. Mary's Church was pulled down, it might be rebuilt out to its present extent without being subject to the consequences attaching by sect. 74 to the rebuilding of houses which project "beyond the general line of street." Then the good sense of the thing requires this construction, whatever we may suppose the motive of the enactment—whether the convenience of neighbours, their amenities, sanitation, or what not. Next I find, as a fact, that the appellants' house is not in the row of houses or line of buildings called De Vere-gardens. I do not say it is not in De Vere-gardens. If houses are in streets at all, and not by the side of them only, a corner house is in two streets. I think there was nothing in the suggestion I made that the road by the side of the house was not a part of, but a road leading to, De Vere-gardens. I think that, if the builder of the appellants' house had chosen to have built it as part of the row of houses there, he must have built it in their line. But he did not. If I am to define what is a building which is built as part of a row, I answer at once that I cannot. The particular case must be examined. But I can give an example that I think cannot be denied. Suppose a row of small houses in a side street, and a row of palaces in the main street. Could it be said that one of the latter was in the same row as the former? I remember what Mr. Millar said, that the statute says nothing about uniformity of elevation, or requires anything but uniformity of frontage. But still I say that in the case I put the palace is not in a row with the cottages. I do not say that it depends on one street being the main street, or the other not. Nor do I attach value to the entrance being in the side of the house where the row is, except in so far as it helps to show whether it is in that row or not. Further, it must be admitted, I think, that if another house like the one in question were built to the south of it, it must be built not projecting beyond the row of houses called De Vere-gardens. It would then be in their row. This is not. See what would be the consequence of holding that it is. Here is the case I put. A man buys land at the back of Nos. 98, 99, 100, 101, and 102. He pulls down 100, and makes a way to his land, on which he builds houses behind 98 and 102. Suppose the owner of 99 pulls down his house, could he, by virtue of sect. 74, be made to set it back to the level of the new houses at the back? Further, though builders in a row may affect subsequent builders in the same row, I cannot think they can where the frontage is different. I lay down no general rule. I do not think it

possible to do so accurately; but I hold, as a fact, that the appellants' house is not within any row or line of buildings in De Vere-gardens. It is said that the question I have dealt with is for the architect. I think not, or I should not have written as I have. When a house is in a row of houses it is for the architect to decide what is the "general line of buildings." But I think, if he puts a house in a row in which it is not, he exceeds his jurisdiction. But if it is for the architect to determine this matter, then it is clear that Mr. Vulliamy has not decided it in favour of the respondents. On the contrary, he has shown that his opinion on the question is the same as that which I have expressed, viz., that the house in question is not in the row of houses to the south of it. It is not necessary to decide the other question, but I cannot but think that the appellants were entitled to some notice and some time to pull down, and they have had none.

Lord FITZGERALD.—My Lords: I have had the advantage of reading the judgment which has been delivered by the Lord Chancellor, and also the judgment which has been delivered by Lord Watson, and I entirely agree in the conclusions at which they have arrived, and in their reasoning. I especially wish to advert to, and express my agreement with, the judgment of Lord Watson, indicating that the order on which it was intended to proceed to demolish the house in question was absolutely void and valueless. I adhere to what was said and done in *Spackman* v. *Plumstead* (*ubi sup.*), in which I took part. The judgment of Lord Bramwell goes beyond the judgments of the Lord Chancellor and of Lord Watson; but I wish to be understood as not expressing any dissent from what has fallen from him.

Lord HALSBURY concurred.

Judgment of the Court of Appeal reversed. Judgment of Bacon, V.C. restored, with a variation. The respondents to pay the costs in the Court of Appeal, and the costs of this appeal. Cause remitted to the Chancery Division.

Solicitors for appellant, *Last* and *Sons*.
Solicitors for respondents, *Pontifex*, *Hewitt*, and *Pitt*.

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, July 30, 1886.

(Before COTTON, LINDLEY, and LOPES, L.JJ.)

BATEMAN *v.* POPLAR DISTRICT BOARD OF WORKS. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Metropolis Local Management Act 1855 (18 & 19 *Vict. c.* 120), *ss.* 68, 73, 74, 75, 76, 250—"*Sewer*"—"*Drain*"—*Draining by* "*combined operation*"—*Metropolis Local Management Act* 1862 (25 & 26 *Vict. c.* 102), *s.* 106.

B. was the owner of a continuous row of cottages on the north side of and fronting on W.-road at one end, where W.-road joined X.-road at right angles. M. was the occupier of one of the cottages. At the rear of the cottages, under the back yards or gardens belonging to them, there was a 9-inch drain which received the sewage from the cottages only, and carried it into the main sewer of the Metropolitan Board of Works under X.-road.

The cottages were built in 1877, *and on the 7th April* 1877 *the then owner of the property gave notice to the Board of Works for the Poplar District that he intended, on the expiration of seven days, unless he received notice from the board to the contrary, at his own expense, to make the 9-inch drain from the cottages to connect with the main sewer under X.-road. No such notice being given (the proposed work being approved by the board, though no formal order was drawn up) the drain was constructed.*

B. and M. in 1886 *commenced an action to restrain the Poplar Board from permitting offensive smells to emanate from the 9-inch drain, which the plaintiffs contended was a "sewer" within the meaning of sect.* 250 *of the Metropolis Local Management Act* 1855. *The defendants contended that the 9-inch drain was not a sewer, but a "drain" within the meaning of the same section, that it was the property of the plaintiff B., and that the defendants were not liable for any nuisance arising from it. Sect.* 250 *defines a "drain" as meaning and including any drain of, and used for the drainage of one building only, or premises within the same curtilage, &c., and also "any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board."*

"Sewer" is defined as meaning sewers and drains of every description, except drains as so interpreted. By sect. 68 *all sewers made or to be made within the district, with certain exceptions, are vested in the district board. Sect.* 73 *gives a general power to the district board, if any house (whether built before or after the commencement of the Act) is not drained by a sufficient drain communicating with some sewer, to require the owner to construct a drain into the common sewer. By sect.* 74 *a district board may, if it appears that a group or block of contiguous houses may be drained more economically or advantageously in combination than separately, to order that such group or block be drained "as hereinbefore provided by a combined operation," and this is the only section, except sect.* 250, *which refers to draining by a "combined operation."*

By sect. 76, *before laying the foundation of a new house, or draining into a sewer, seven days notice are to be given to the district board, and every such drain is to be made in such direction, manner, and form, and of such materials, and with such branches, and other works as "hereinbefore mentioned, and as the vestry or board shall order."*

Held, by Cotton and Lindley, L.JJ. (Lopes, L.J. dissentiente), that "combined operation" in sect. 250 *did not refer solely to combined operation under sect.* 74 *when houses were already existing, but meant a drain which was to take away not the sewage of one house only, but of several houses in combination, and did not refer to a combination of owners, but of houses; that power was given by sect.* 76, *as regarded houses that were not built but about to be built, to direct that they*

(*a*) Reported by FRANK EVANS, Esq., Barrister-at-Law.

should be drained in combination; that a sufficient order of the board had been made, though no formal order had been drawn up; and that the 9-inch drain was a "drain" within sect. 250, and not a "sewer" vested in the defendants, and therefore that the defendants were not responsible for any nuisance arising from it.

The decision of North, J. reversed.

Semble, that before bringing such an action, no notice need be given under sect. 106 *of the Metropolis Local Management Act* 1862.

THIS action was brought by Frank Bateman and James Meckiff, claiming (1) an injunction to restrain the defendants, the Board of Works for the Poplar District, from permitting offensive and pestilential smells to emanate from the sewers and drains of and under the control of the defendants, situate near to, at the rear, and in the front of the plaintiffs' houses, known as Nos. 1 to 15, Vulcan-cottages, Wallis-road, Victoria Park, so as to constitute a nuisance and be injurious to the health of the plaintiffs' tenants and the occupiers of the houses; (2) damages for loss sustained by the alleged nuisance.

The plaintiffs moved for an interlocutory injunction before North, J. on the 18th May 1886.

The plaintiff Bateman was the owner of Vulcan-cottages, and the plaintiff Meckiff was the occupier of one of the cottages. The cottages, which formed a continuous row, were situate on the north side of Wallis-road, on which they fronted. The west end of the row was close to the junction of Wallis-road with Windsor-road, which ran nearly north and south. Under Wallis-road, in the front of the cottages, there was a 12-inch sewer, which was the property of the defendants. At the rear of the cottages, under the back yards or gardens belonging to them, was a 9-inch sewer or drain, which received the sewage from the cottages (and that sewage only) and carried it into the main brick sewer belonging to the Metropolitan Board of Works under Windsor-road.

The cottages were built in the year 1877, and on the 7th April 1877 a notice was given on behalf of the then owner of the property, by his surveyor, to the defendants, stating that he intended, on the expiration of seven days from the service of the notice (unless he should receive directions from the board to the contrary), to build and lay a glazed 9-inch pipe drain from the fifteen houses to connect with the main sewer in Windsor-road, and to be constructed at the expense of the owner. The board raised no objection to the proposed drain, and it was accordingly laid, and the 9-inch drain was existing in the rear of Vulcan-cottages

The plaintiffs complained of a nuisance arising from the escape of sewer gas from both the 12-inch sewer and the 9-inch drain, caused, as they alleged, by insufficient trapping; and they further alleged that both the sewers were the property of the board. The principal question was whether the 9-inch drain was the property of the board, or a private drain and the property of the owner of the cottages, and this depended upon whether it came within the definition of a "sewer" contained in sect. 250 of the Metropolis Local Management Act of 1855, or within the definition of a "drain" contained in the same section.

The material statutory enactments and decisions referred to during the argument sufficiently appear from the judgments of North, J. and the Lords Justices.

T. L. Wilkinson and *Crispe* for the plaintiffs.

N. Higgins, Q.C. and *Borthwick* for the defendants.

NORTH, J.—This is a motion for an injunction to restrain the defendants from allowing offensive smells to issue from the sewers and drains referred to in the notice of motion. The plaintiff Bateman is the owner of all, and the plaintiff Meckiff is the occupier of one, of fifteen houses in a row which are substantially within the district of the defendants, although, as regards the whole, the boundary line between that district and another district intersects the block of houses. There are two sewers, or drains, which are complained of, one called the 12-inch sewer, which runs along Wallis-road, the road upon which the fronts of these houses look out, and the other, called the 9-inch drain, or sewer, which is the means by which these fifteen houses are drained, and which runs along the back of the houses, passing from there to the west till it comes to Windsor-road, where it runs into a sewer belonging, not to the Poplar Board of Works, but to the Metropolitan Board of Works. The emanations from those two drains or sewers are the subject of complaint in this action. The first question which I have to consider is, whether the action is maintainable upon the ground that no proper notice has been given. The question of notice turns on the 106th section of the Metropolis Local Management Act 1862, which provides that "no writ or process shall be sued out against or served upon, and no proceeding shall be instituted against . . . any vestry or district board . . . for anything done or intended to be done under the powers of such board or vestry" under the prior Acts or this Act "until the expiration of one calendar month next after notice in writing shall have been served upon such board or vestry . . . stating the cause of action or grounds of the proceeding or demand, and the name and place of abode of the intended plaintiff or claimant and his attorney or agent in the cause or proceeding." The evidence shows that no notice has been given in the present case strictly in conformity with the sort of notice there described. The Act proceeds to say: "Upon the trial of any action the plaintiff shall not be permitted to go into evidence of any cause of action except such as is stated in the notice so served or delivered, and unless such notice be proved the jury shall find for the defendant; and every such action or proceeding shall be brought or commenced within six months next after the accrual of the cause of action or ground of claim or demand, and not afterwards, and every such action shall be laid and tried in the county or place where the cause of action accrued and not elsewhere; and the defendants shall in any such action be at liberty to plead the general issue, and give the said recited Acts and this Act and all special matter in evidence thereunder;" and then it proceeds, that it shall be lawful for the persons to whom the notice is given to tender amends at any time within one calendar month after service of such notice, "and in case the same be not accepted, to plead such tender in bar, and (by leave of the court)

with the general issue or other plea or pleas; and if upon issue joined upon any plea pleaded to the whole action the jury find generally for the defendant, or if the plaintiff be nonsuited or discontinue, or if judgment be given for the defendant, then the defendant shall be entitled to full costs of suit, and have judgment accordingly; and in case amends have not been tendered as aforesaid, or in case the amends tendered be insufficient, it shall be lawful for the defendant, by leave of the court, at any time before trial, to pay into court under plea such sum of money as he may think proper, and (by the like leave) to plead the general issue or other plea or pleas, any rule of court or practice to the contrary notwithstanding." When that Act was passed, an action in a court of law and a suit in the Court of Chancery were entirely distinct. Although there was no doubt at that time power in a court of law, to a limited extent, to grant injunctions, yet it may be said that, as a rule, applications for injunctions were made to the Court of Chancery, and not to the courts of common law; the granting of injunctions in courts of law was ancillary to other relief, and not substantial independent relief. Now, reading that section through, I have no doubt that it applies simply and solely to an action of law, and not to a suit in equity; and at the time at which that section became law it never crossed the minds of any one that the existence of that section could be an impediment to any proceeding whatever in a court of equity to obtain an injunction to restrain a nuisance. The various points referred to, as, for instance, that the jury are to decide the case, the absence of any reference whatever to a judge, the mode of pleading indicated, giving the general issue and putting special matters in evidence, and the other directions of that section with reference to a nonsuit and otherwise, all show to demonstration that the section was intended to apply to an action at law as distinguished entirely from a suit in equity. In the present case the action is for an injunction to restrain a nuisance. The prayer substantially is for the injunction which is now sought, although there is a second paragraph of the prayer that claims "damages for the loss sustained by reason of the said nuisance rendering the said cottages unhealthy and untenantable." This is the only section that touches the case. It seems to me that, whatever might be the state of things under the Public Health Act 1875, under this section there is no reason whatever why an action for an injunction should be preceded by a month's notice. Under those circumstances, it seems to me that that reliminary objection cannot prevail. I must say this also, that if the case had been under the Public Health Act 1875, instead of under the Metropolis Local Management Act 1855, the case of *Flower* v. *Low Leyton Local Board* (36 L. T. Rep. N. S. 760; 5 Ch. Div. 347) seems to me to show that I could not have refused to entertain the action upon the ground that such notice had not been given. The next question is with respect to the 9-inch drain or sewer at the back or north of the houses, and the point between the parties is whether that is a drain or a sewer. The result of the decision, one way or the other, is this, that if it is a sewer it is vested in the defendants, because it is in their district, and so far as it is in their district it is vested in them under the concluding words of the 68th section of the Act of 1855. If, on the other hand, it is not a sewer, but a drain, then the defendants are not responsible for its state, and cannot be made liable to the injunction which is now asked. Now, the question whether it is a drain or sewer depends upon the construction of the Act of 1855, and in the interpretation clause, sect. 250, a definition of each of those things is given. The interpretation clause says: "The word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed." Pausing there for a moment, it is clear that "drain" means the mode by which one building is drained—the building including the premises within one curtilage—and anything which is not a drain to be used for the drainage of one building does not come within that definition. The words "one building only, or premises within the same curtilage" point clearly to what is intended. I did not quite finish the definition, because there are these further words, "and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board." Then there is a definition of the word "sewer," that it "shall mean and include sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies." So that we have a technical interpretation of "drain" for the purpose of the Act, which is smaller than the ordinary use of the word drain, because technical drains only are called "drains," other drains and sewers being by the terms of the Act called "sewers." Now, these fifteen houses are drained by the 9-inch sewer at the back, to which the pipes are carried from each of the fifteen houses—from the water-closet, the sink, and whatever other parts require drainage. Therefore the drainage of each house, as far as the main drain or sewer, is distinct, but this sewer is the common means by which the fifteen houses are drained, and through the lower part of which, at any rate, all the contents of the sewer of those fifteen houses reach the main sewer of the Metropolitan Board. It is clear, therefore, that this is not a drain draining one house or premises within one curtilage only. That being so, it must be a sewer within the meaning of the Act, unless it is covered by the last few words of that definition, namely, "a drain for draining any block or group of houses by a combined operation under the order of any vestry or district board." The question, therefore, is, whether it comes within those words. To understand those words, and to apply the definition given there, it is necessary to turn to the other sections of the Act, commencing with the 67th section, where that portion of the Act commences which relates to the duties and powers of vestries and district boards. The 68th section, by its final words, vests all sewers, "made or to be made" within a district, in the vestry or board. Then the 69th section requires the boards to repair, and so on, all sewers vested in them, and from time to time to construct new ones, and says, that they "shall

cause to be made, repaired, and maintained, such sewers and works . . . . as may be necessary for effectually draining their parish or district." I pass over the 70th section; that merely relates to the expenses. Then the 71st section provides that "every district board and vestry shall, by providing proper traps, or other coverings, or by ventilation, or such other ways and means as shall be practicable for that purpose, prevent the effluvia of sewers from exhaling through gully-holes, gratings, or other openings of sewers in any of the streets or other places within their district or parish." Sect. 72 provides that, "Every vestry and district board shall cause the sewers vested in them to be constructed, covered, and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed, and emptied," and so on. Then we come to the 73rd section, which is this, "If any house or building, whether built before or after the commencement of this Act, situate within any such parish or district, be found not to be drained by a sufficient drain communicating with some sewer, and emptying itself into the same, to the satisfaction of the vestry or board of such parish or district, and if a sewer of sufficient size be within 100 feet of any part of such house or building, on a lower level than such house or building, it shall be lawful for the vestry or board, at their discretion, by notice in writing, to require the owner of each house or building, forthwith, or within such reasonable time as may be appointed by the vestry or board, to construct and make from such house or buildings into any such sewer, a covered drain," and to do other works which I do not stop to mention in detail. The words provide for carrying a branch into the sewer, and conclude as follows: "And all other such fit and proper works and arrangements as may appear to the vestry or board, or to their officers, requisite to secure the safe and proper working of the said drain, and to prevent the same from obstructing or otherwise injuring or impeding the action of the sewer to which it leads." Then the section provides for the inspection of the works during construction, and gives a power, in case the owner of the house or building neglects or refuses for twenty-eight days to do the works, for the board to do them, and charge him with the expense. Then we come to the 74th section, which provides that, "if it appear to the vestry or board of any parish or district that a group or block of contiguous houses, or of adjacent detached or semi-detached houses, may be drained and improved more economically or advantageously in combination than separately, and a sewer of sufficient size already exist or be about to be constructed within 100 feet of any part of such group or block of houses, whether contiguous, detached, or semi-detached, it shall be lawful for such board or vestry to order that such group or block of houses be drained and improved, as hereinbefore provided, by a combined operation." It is admitted by counsel that draining the houses by a combined operation is not referred to anywhere else in the Act, but only in that section. There is a provision in the 75th section that no house may be erected, and no house that has been pulled down rebuilt, unless a drain and such branches, and so on, and such works and apparatus and water supply as thereinbefore mentioned, be constructed and provided to the satisfaction of the surveyor of the vestry, and so on. Then in the 76th section, for the purpose of providing for buildings that are about to be erected, there is this provision: "Before beginning to lay or dig out the foundation of any new house or building, within any such parish or district, or to rebuild any house or building therein, and also before making any drain for the purpose of draining directly or indirectly into any sewer under the jurisdiction of the vestry or board of or for any such parish or district, seven days' notice in writing shall be given to the vestry or board by the person intending to build or rebuild such house or building, or to make such drain;" and then the section provides for the foundations being laid so as to allow of that being done, "and every such foundation shall be laid at such level as will permit the drainage of such house or building in compliance with this Act, and as the vestry or board shall order, and every such drain shall be made in such direction, manner, and form, and of such materials and workmanship," and so on, as the board shall direct. Then notice of their order upon that point may be given seven days after the receipt of a notice under the 75th section, showing what he proposes to do. The question is, whether what was done as to these houses was a "combined operation" or not. When the houses were about to be constructed the person acting on behalf of the owner gave notice to the Board of Works of what was proposed to be done, and in this case it appears that Robert Parker, the surveyor of the Board of Works, was the person who acted on behalf of the owner, and actually gave the notice. It is a notice that within seven days from notice thereof, "I intend, unless I receive directions to the contrary, to make a drain or sewer"—which actually was made. Then, at the foot of that, there is a note of certain charges for work executed by the board, and at the bottom it states that it is to be connected with "the main and district sewer." Under that notice the work was done, and the board seems to have approved of it. I do not find any order approving of it, and I do not find it necessary that there should be any order approving of it, because if the surveyor approves of it, it seems to me to be quite sufficient for the Act. But it was approved of; there was no disapproval; no order to do anything different; and the works were carried out in accordance with that section. In a book produced there is a receipt for the notice as follows: "I am directed to acquaint you that your notice for the building and drainage of nineteen houses in Wallis-road and Windsor-road, Bow, according to the plan presented by you on the 7th inst. has been approved by the board. And take notice you are requested to attend at this office, between the hours of nine in the forenoon and four in the afternoon, in order that the preliminary steps may be taken previously to the commencement of the works," and I notice this, which is significant, immediately following that, —"Fee to pay, 2*l.* 4*s.*" That would be one of the things to be attended to, no doubt. Now, looking at the sections which I have read, it seems to me clear that the 73rd section merely applies to the case of an existing building, and provides for the drainage of the existing building being found defective, and it gives power to the vestry in that case, under given circumstances, if they exist, to require what it considers a defective scheme to be

given up, and another scheme substituted for it. It speaks of the house or building in such a way as to show clearly that existing buildings are referred to. It cannot be said that any house or building is found not to be sufficiently drained unless the house or building exists, and it cannot be said that there is a good sewer existing or about to be made within a sufficient distance, or within a given distance, of a building which does not exist; and it seems to me clear, on reading that section, that it provides for the alteration in the existing drainage of existing buildings, and provides that the drainage may be altered by the order of the board, and that the owner is obliged to carry that out. Then we come to the 74th section, and I may say at once that it appears to me that the true construction of that section is, that it is to apply to the same state of things as is referred to in the 73rd section, subject to this, that it provides for what is not covered by the 73rd, namely, existing buildings side by side, belonging very possibly to different owners, all drained to a cesspool or cesspools, or otherwise, in a way which does not satisfy the vestry. And it provides for the case where they think that the drainage may be improved; but it enables them to do what they could not have done under the 73rd section alone, namely, to give notice requiring the different owners to combine in doing it together. If it had not been for the 74th section, all that could have been done would have been to give notice to the owner of each of the different houses and require each of those owners to drain his house in the way required by the board. But the 74th section points out what is obvious, that there may be a group of contiguous houses or adjacent detached or semi-detached houses which may be drained or improved more economically or advantageously in combination than separately. More economically or advantageously to whom? Why, to the person who has to pay for it, and who has to do it, and can be required by notice to do it. What this section contemplates is a combination which may have the result of producing economy and advantage to the persons who have to do the work; that is to say, to the owners to whom notice is to be given under sect. 73. The provision in sect. 74 that if "a sewer of sufficient size already exist or be about to be constructed within 100 feet of any part of such group or block of houses, whether contiguous, detached, or semi-detached, it shall be lawful for such board or vestry to order that such group or block of houses be drained and improved, as hereinbefore provided, by a combined operation," means that the board may require that the fifteen houses, or whatever number it may be, may be drained by combined operation; and the only way in which that combination can take place is by a combination of the persons whose economy or advantage is gained—that is to say, a combination of the owners. It seems to me, therefore, that it enables the board to do what they could not have done without that section, namely, to enforce the draining of adjoining houses by requiring the owners to combine for the purpose of doing it; and for that purpose all the provisions of the 73rd section as to a single house apply to the combined block of houses under the 74th section. Notice would have to be given to the several owners, and then they would have to settle among themselves in what way they would have to combine to do it. If they did not do so, the provisions of the 73rd section, which give the board power to do the work in case of the owners' default, would come into operation, and they could proceed to execute the works. It seems to me, therefore, that the 73rd section clearly deals with houses already constructed and nothing else, and that the 74th section is supplemental to the 73rd section for the purpose of giving the benefits conferred by the 73rd section to the owners of adjoining houses or a block of houses, instead of leaving those persons out in the cold to do a great deal more work and incur a great deal more expense than would be necessary if the 73rd section were put in operation against them. Then it is said, that if you get that meaning, there is something to which the words of the interpretation clause, "for draining any group or block of houses by a combined operation under the order of any vestry or district board" have a practical application, because there it is to be done by notice to the owners, and they can be ordered to do it, and, unless they do it within a time fixed, the board would have a right to do it in their place. But then it is urged that the order is merely an approval. I asked what the order was which the defendants said made this drain a drain for draining a group of houses by a combined operation under the order of a vestry or district board. No order of any sort was produced, but it appears that the board did approve, and it was stated that the approval was either an order, or equivalent to an order, and that under the 75th and 76th sections, even in the case of a single builder proceeding to build his house, an order is provided for in the same way. Now, it seems to me that an approval is not an order. If the scheme proposed by the owner or the owners is approved of, no order is wanted. Looking at the sections, the case in which an order is wanted is where what the owners propose is not approved of, and something is required to be done by the board. Therefore, an order made by the board is not an approval, but it is the result, in my opinion, of a non-approval. An order is a thing upon which the 211th section of the Act provides that there shall be an appeal in the way pointed out, and to say that a mere approval of what a builder proposed was an order from which there could be an appeal seems to me to be rather absurd. Where the board consent to what he proposes, there is no ground for appeal, and no reason, therefore, for an order, and a mere approval would in itself be quite sufficient. It seems to me, therefore, that there is nothing that shows that an approval is an order. In the present case it appears to me that there has been no order made by the board at all, and that, unless a drain is made for draining a group or block of houses by a combined operation under an order, a drain so made is not a drain within the definition of "drain," when it drains more than one house. Then it was said that it would be rather absurd that, in cases where a builder proposing to build got the sanction of the board to drain several houses together, the drain would be a sewer because it would not come under the 250th section, and yet that where exactly the same thing was done with respect to houses already built it would be a drain, and would not vest in the board. But there seems to me this

distinction. When a man is proposing to build he can make his proposal, and if the board do not assent to it he is not bound to build. He can abstain from going on with the works, and he cannot be compelled to build in any way; but if existing defective drainage is found under circumstances under which the 73rd section can be put into operation, there the board have power to say that the owners shall combine and do the works. Now, if a builder, building for the first time, adopts the view of the board, and makes a drain to drain several houses, and that drain becomes a sewer, he knows what he is doing, and he cannot complain if the result should be that it vests in the board. But if, on the other hand, the owners of several houses, who are under no liability to improve their drainage, can be, by a board making a sewer close by and then giving notice, compelled to improve their drainage, the Legislature seems to have considered that it would be rather hard in that case that they should take out of them the drains already existing and vest them in the board, and the Legislature seems to have drawn the distinction between the cases. Where the drain which otherwise would be a sewer is made by a combined operation, in that case they are content to leave the ownership of it in the owners, where it was before, and not take it out of them, but it is different in the case where a drain is made to drain two or more houses, because that drain is under the definition of the Act a sewer, unless it comes within the distinction, which, as I have pointed out, in my opinion, this does not come within. It seems to me, therefore, that in this case the 9-inch sewer or drain is a sewer, and as such it is vested by the 68th section of the Act of 1855 in the defendant board. It was said that the notice given showed that all parties at the time thought that this really was a drain and not a sewer. I quite admit that. The notice does look to me as if the parties did take that view, but that cannot affect the construction of the Act, and, as a set-off against that at any rate, it is clear to me that when Mr. Parker was referred to in the early part of the present year, and when he first went to the premises and looked at them and saw the state of things, he clearly thought that it was a sewer and not a drain, and the idea that it was a drain was only raised afterwards, and was an after-thought. That settles the points of law, and the only remaining question is one of fact. Now, as to the facts, it appears to me that the plaintiffs have proved that there is a substantial nuisance both from the 9-inch sewer and from the 12-inch sewer. [His Lordship examined and discussed the evidence at length, and concluded:] Under these circumstances, it seems to me that the plaintiffs are right, and that there must be an injunction as asked.

The defendants appealed.

N. Higgins, Q.C. and *Borthwick* for the appellants.

T. L. Wilkinson and *Crispe* for the plaintiffs.

Cur. adv. vult.

July 30.—Cotton, L.J.—This is an appeal by the defendants, who are the Board of Works for the Poplar District, against an order of North, J., by which he granted an injunction to restrain them from committing a nuisance in respect of the state of what I will call two drains. One was a drain in front of certain houses fronting Wallis-road, and this was undoubtedly a sewer within the meaning of the Act which we have to construe. The only question about that was, whether there was such evidence as would justify the injunction appealed from. The other drain ran at the back of the houses into Windsor-road, where it communicated with or joined the metropolitan sewer, one of the main sewers. Into that drain at the back of all this row of houses, there are what I will call house-drains, carrying the refuse from the water-closets and sinks in each house instead of its being carried out through the front into the main sewer, which undoubtedly belonged to the Board of Works for the Poplar District. It was conceded, or rather it was clear on the evidence, that the state of the 9-inch drain at the back of the houses was such that, if the defendants were answerable for it—that is to say, if it was vested in them—the injunction was right. The first question, therefore, which I will consider is, whether that drain was vested in the defendants. Now, that really turns on what is the true construction of the interpretation clause, sect. 250, of the Metropolis Local Management Act 1855, and I may say that, although a later Act was referred to, in my opinion that Act has no material bearing on the question we have now to consider. Now, sect. 250, so far as regards drains, says this: "The word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage"—this drain at the back of the houses does not come within that, of course—"or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include" (and on this arises the question) "any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board." Then the section goes on to say that, "the word 'sewer' shall mean and include sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies." All sewers, except the metropolitan sewer, are, by sect. 68, vested in the board. Therefore, the question which we have to consider is, whether this is a "drain for draining any group or block of houses by a combined operation under the order of any vestry or district board." As far as we can ascertain, with the assistance of counsel, and from what we have seen of the Act, there is only one section of the Act in which the expression "combined operation" appears, and we must look to that section for the purpose of seeing what "combined operation" means. North, J. thought that reference was simply to a combined operation under sect. 74, and held that that section, like sect. 73, only applied to houses already existing, and not to the drains to be made, from a house to be built, in the course of building, as was the case with these houses when this drain at the back was made. Now, for the present moment I am only considering these sections for the purpose of deciding what "combined operation" means, and when one looks at sect. 74, in my opinion, it means a drain which is to take away, not the sewage of one house only, but the sewage of several houses in combination—either a block of houses or several houses

—and it refers not to the combination of owners, but to the combination of houses to be drained, so that their refuse may be carried off into the main sewer. The section provides that, if it appear to the vestry or board of any parish or district that a group or block of contiguous houses, or of adjacent detached or semi-detached houses, may be drained and improved more economically or advantageously in combination than separately, and a sewer of sufficient size already exist within a certain distance, then they may make an order for the combined drainage of houses into the common sewer—houses in combination—instead of giving an order under sect. 73 that a house not properly drained into the main sewer shall have a separate fresh drain to carry off its refuse into the sewer. That, therefore, is the meaning, as I understand it, of a combined operation; and if this section were the only section under which the local board could order that houses be drained into the common sewer in combination, I should agree with North, J., because, in my opinion, sect. 74 is a sort of annex to sect. 73, which gives power to the local board to give directions as to how houses not properly drained into the common sewer are to be drained. Under sect. 73 it is to be done by ordering a sewer direct from each house into the common sewer. Under sect. 74 they may order several houses in combination to be drained, and it is material, I think, that sect. 74 recognises the fact that the draining of several houses in combination may not only be done more economically, which of course was a thing which the owners of existing houses would have to consider, but more advantageously than by draining the houses direct, by one drain from each house into the common sewer. I may state here that it is obvious that in many cases that may be so, because, if there is to be a draining direct into the main sewer from each house, that must be as a rule from the front of the house. The main sewers, as a rule, go down the public thoroughfares, and it is obvious that there may be many inconveniences arising from all the sewage of a house being carried through it, or under it, by means of drains, so as to be carried in front, which inconveniences would be obviated if the drainage could be carried out at the back near the place where it first originated and never pass under the house at all. But then, is power given by any section of the Act, to the local board, as regards houses which are not built, but about to be built, to direct that they shall be drained in combination? Sect. 74, I agree, does not apply. Sect. 75 is a prohibiting section; it prevents any house from being built without drains constructed to the satisfaction of the vestry or district board. Sect. 76 gives power to the vestry or local board, after notice, to give directions as to the mode in which the house is to be drained. Now, it would be rather curious if power was given to local boards to order that existing houses should be drained in combination, but no such power was given as regards houses not yet built, when sect. 74 recognises the fact that houses may under certain circumstances be drained more advantageously by being drained in combination, as in fact these houses are, than by each house being drained by a separate drain into the common sewer. But still we must look at the Act and see whether such power has been given, for we cannot make Acts of Parliament. In my opinion, the power is given, as regards houses not yet built, by sect. 76, which provides that, "Before beginning to lay or dig out the foundation of any new house or building within any such parish or district, or to rebuild any house or building therein, and also before making any drain for the purpose of draining directly or indirectly into any sewer under the jurisdiction of the vestry or board of or for any such parish or district, seven days' notice in writing shall be given to the vestry or board by the person intending to build or rebuild such house or building, or to make such drain; and every such foundation shall be laid at such level as will permit the drainage of such house or building in compliance with this Act, and as the vestry or board shall order, and every such drain shall be made in such direction, manner, and form, and of such materials and workmanship, and with such branches thereto, and other connected works and apparatus and water supply as hereinbefore mentioned, and as the vestry or board shall order." I will stop there. Before the house is to be built application is to be made to the vestry or local board, saying what the proposed system of drains is; and if there are several houses as regards which there is to be an application to the board, and as regards which a direction or order is to be given by the board, in my opinion they may, if they think it more advantageous for the purpose of draining those houses, direct that they shall not be drained directly and separately or individually into the common sewer, but that there shall be a combination of the houses, and a drainage of the houses in combination, just as has been done here, by a drain running along the back of all the houses, receiving the refuse from all the houses without allowing it to pass under the houses and to be discharged in that way into the common sewer, and carrying it into the metropolitan sewer, which is accessible from the back. It may be (and I think it is so) that the Act contemplates, as a general rule, that each house shall be drained separately, and that may in most cases be most advisable; but the question is, whether there is not a power in the local board to direct the contrary when, in the special circumstances of the particular case, they are satisfied that that can be done more advantageously or more economically in that way. In my opinion it is here more advantageous. Then we come, of course, to this question—having regard to the 250th section, whether or not there has been an order of the district board that the drainage may be done in combination. In my opinion there has. The book was produced to us. The application was made. I have it, or a copy of it, in my hand, and it states what was proposed to be done and how it was proposed to be done—it mentions the pipes, &c., and shows on the plan how the drain was to go, and what communication there was to be between it and the houses. That was brought before the vestry, and in a book which we saw there was the signature of the chairman, showing that the matter had come under the consideration of the local board, and that it had been approved. Now it is said that that was not an order. It is very true that that book with the signature is not a formal order. It is not drawn up as the formal order of the local board, which would have to be served if it was necessary in any way to enforce it. But the order

does not depend upon its being drawn up. The order of a court is represented by that which is drawn up, but the order of a court may be made long before anything is drawn up at all, and if anyone, trusting to there being no order until something was drawn up, knowing of an injunction granted or an order made by the court, were to disobey it, he would be sent to prison, if he was in court or it was otherwise shown he knew it, even though no order had been drawn up. Therefore, in my opinion, the local board, having the power to direct that there should be the drainage from these houses in combination as was proposed, and having approved of that, although no formal order was drawn up, have ordered and directed that these houses shall be drained by means of this drain at the back—that is to say, that their refuse and sewage shall be carried into the main sewer by means of this drain conveying the refuse of several houses in combination. It was suggested that an order means that which is to be enforced *in invitum*, and that here there is only an assent to a proposal; but many proposals upon which a person coming before the court asks for an order are really assented to in order to assist and favour the wishes of those who come to the court, and in my opinion, if a thing is ordered, it is not less so ordered because it is not to be enforced against anyone at the time, or because the man applying for it and all other parties come and ask that the order may be made. Of course, if, having got the order, they depart from it, then it may have to be enforced against them; and here, if instead of making the drain in this way, the building owner had made a different drain into the main sewer, of course then, on the formal order being drawn up, and it being duly served upon him, the board could have put in force against him any powers which they have over those who disregard their orders. In my opinion, therefore, this drain at the back of the houses, leading into one of the main metropolitan sewers, was a drain within the definition of sect. 250, and not a sewer, and therefore was not vested in the local board; and, as regards that drain, in my opinion, the injunction was wrong, and must be discharged. Then we come to the other, which was a larger drain and undoubtedly a public sewer vested in the local board. Now the real complaint about that was this—that there was a gully just on the opposite side of the road from one of these houses which was very offensive. There was a great conflict of evidence as to what really did cause the offensive smell. I should think the offensive smell was caused by offensive manufactories near, and the refuse getting into the sewer coming out to some extent through this gully; but it is a different question whether now, on an interlocutory motion, an injunction ought to be granted, which is, in fact, mandatory. If the smell were to be entirely removed, it would probably mean that the local board would have to rebuild this gully and put it in a different form, and it would involve questions not only as regards this gully, but probably as regards many other gullies in their district. I give no opinion that this is a satisfactory form or kind of gully. That will be dealt with at the hearing of the action. But I think that on this motion the proper course will be to direct that, on the undertaking of the local board, which they offer to give, to keep this gully in proper order and properly supplied with such disinfectants as may be required, there ought not to be any such injunction as has been granted, even as regards this main sewer. The question as to whether this gully is sufficient to keep out the smells which arise in these particular places, and is of proper construction, ought to be left to be decided at the hearing, for we have not sufficient evidence before us, at any rate to satisfy me, that this was a form of gully which was not appropriate to this particular spot or to be used generally by the local board for their sewers. In my opinion, therefore, on that undertaking being given by the local board, the injunction ought to be altogether discharged.

Lindley, L.J.—This case is not by any means free from difficulty, and it turns really upon a careful examination of the Metropolis Management Act 1855, which contains 250 sections, and on the Metropolis Local Management Act 1862, which contains more than 100 sections. We have to read these two Acts together and apply them to the facts of the case which is now before us. Now, with respect to the Act of 1862, I do not think, having read it carefully, that much turns upon it. It is not wholly immaterial, because proceedings, as I understand, were to a certain extent taken under it; but the real difficulty arises on the construction of the Act of 1855. North, J. granted an injunction restraining the local board from permitting smells and so on to emanate from a 9-inch pipe, which is at the back of the houses, and a 12-inch sewer, which is in front. As regards the 12-inch sewer in front, it is admitted on all hands that that is a sewer, as distinguished from a drain, and that it is the property of the local board, and the only question was as to whether there was or was not any nuisance emanating from the gullies of that sewer. As to that I concur in the observations made by Cotton, L.J., and I do not propose to say anything more upon that, except that the undertaking will be quite sufficient to dispose of it. The real difficulty arises with respect to the 9-inch pipe at the back, and the question there is reduced to this—whether that 9-inch pipe is a "sewer" vested in the local board, or whether it is a "drain" with which they have nothing to do except to clean it out and so on—if they are responsible for that. With reference to that, the case turns upon the provisions of the Metropolis Local Management Act 1855, and in particular upon sect. 250, which is the definition clause, and upon a group of sections commencing at sect. 68 and ending with sect. 76. The 250th clause says, that a drain shall mean, amongst other things, "any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board." On looking into the Act, the only place where we find an expression in any way similar to this is at the end of the 74th section, which does contain the words "it shall be lawful for such board or vestry to order that such group or block of houses be drained and improved, as hereinbefore provided, by a combined operation." That is the only place in the Act, so far as I can see, where that expression is used, and it is quite obvious that sect. 250 applies to a drain of that kind—that is to say, it applies to anything which is done or made under an order, as contemplated and provided by sect. 74. As to that there is no difficulty at all. The question

really is whether the expression "drain," in sect. 250, is confined to that which is done under sect. 74. For that purpose we must look a little closely into the sections, and it appears to me, if we take the group of sections from sect. 68 to sect. 76, they are divisible primarily into two classes. First of all, we have sects. 68, 69, 71, and 72, relating to sewers as distinguished from drains. Sect. 69 enables the local authority, where they block up a sewer and interfere with a man's drain, to make another; but, leaving that out as having no application to this case, the group from 68 to 72 inclusive relates to sewers. The next subdivision, sects. 73 to 76 inclusive, relates to drains as distinguished from sewers, and these four sections are again subdivisible. Sects. 73 and 74 relate to drains that exist in houses, and sects. 75 and 76 relate to new houses and the drains thereof. Now, bearing that in mind, we must proceed to inquire what was done, and certainly one is a little disinclined to hold that that which everybody intended to do has not been done. One is always desirous, if possible, to give effect to parties' intentions and not to defeat them. One thing is manifest beyond all controversy. When this 9-inch pipe was made, when the application was made to the defendants to sanction it, and when they did sanction it, everybody supposed that what was intended to be made and approved was a 9-inch drain, not a sewer. The whole of the documents make that plain enough. It does not follow that they have not done that which they did not intend to do. It does not necessarily follow that, although they all thought they were making a 9-inch drain and not a sewer, they did not in fact make a sewer, with all the consequences which flow from it; but one is reluctant to come to that conclusion. I quite agree in the construction put by North, J. upon sects. 73 and 74—that those two sections by themselves apply only to existing houses. I think that is tolerably plain when you come to scan the language carefully. But that does not solve the difficulty. The question which really does arise turns upon the true construction of sect. 76, and the question which we have to consider is whether the language of sect. 76 does not apply to such an application as was made, and to such works as were done, under the application, with the approval of the board which was given in this case. Now sect. 76 appears to me to include that which was done. It is very true that there are general words, and general words only, in sect. 76. It is very true you do not find in sect. 76 any such expression as an order for draining a group or block of houses by a combined operation. But although you do not find those words in it, it appears to me that you do find general words in sect. 76 which are perfectly capable of including such a combined operation as that. Sect. 75 prohibits new buildings being erected without proper drains, and so on. That is a prohibitory section. That is followed by sect. 76. [His Lordship read the section, and continued:] Now when we come to spell that out, it appears that, when new buildings are being erected, the vestry can give directions and make orders about drains, and the drains are to be made in such direction, manner, and form "as hereinbefore mentioned," and of such materials and workmanship, and with such branches thereto and other connected works and apparatus as hereinbefore mentioned, the "hereinbefore mentioned" occurring once in the section, but being applicable to every branch of the clause which really terminates with it. That throws one back, it appears to me, with reference to this new house, upon sect. 73 and sect. 74. I see no reason at all for holding, and I do not think it would be a correct construction to hold, that it throws us back upon sect. 73 alone. It seems to me to throw us back upon both sections, and if the board is asked to sanction the making of one drain for a group of houses by what is called a combined operation, they have ample powers of doing it under sect. 76; and indeed it would be remarkable if it were otherwise, because if they could do it under sect. 74 when the houses were up, it seems *à fortiori* that they could do it before the houses were up, and sanction that which they could afterwards order to be done. Having come to the conclusion, therefore, that the order, if there was an order, was one which the board could make under sect. 76, the next inquiry is, whether what was done amounted to an order. Now, when we look at what was done, it would be strange to hold that what was sanctioned by them was not an order. It was an order by consent, it is true. There was an application by the person about to build or erect these houses for the approval, or sanction, or order—call it what you like—of the board authorising him to do it. He could not do it without that sanction, and, inasmuch as his plan was approved as sent in, the local authority approved and made an entry in their book. Now, that appears to me to be in substance an order—an order made by consent. It is very true it is not formally drawn up. We all, who have any experience in courts and proceedings of this description, know that there are a vast number of orders made every day in the police-courts which are never drawn up at all. The order consists in what the court directs to be done, and a little scratch or minute is made, sometimes on one piece of paper, sometimes somewhere else, and the order is not drawn up unless it is wanted for the purpose of being enforced, or for the purpose of appeal; and it appears to me what we have got here, in substance and effect, is an order by consent, never drawn up, but capable of being put into shape and of being drawn up at any time, if necessary, either for the purpose of enforcing it or for the purpose of appealing against it. Although, of course, one sees that a person who has consented to it cannot appeal against it, still that does not affect the question whether it is an order or something short of an order. Under those circumstances I am compelled to dissent from the view taken by North J. of the true construction of this section. It appears this 9-inch pipe at the back is not a sewer vested in the defendants, but is, what everybody supposed it would be, a drain belonging to the person who made it. The drain is not made by the local authority under any section which authorises them to make it. It is made by the building owner. It is his drain, and he is responsible for it. It appears to me, therefore, the appeal ought to be allowed.

Lopes, L.J.—As I differ from the rest of the court on the construction of the Act of Parliament, I feel bound to give my reasons at some length, and have committed my judgment to writing. This is a motion for an injunction to restrain the defendants from allowing offensive

smells to issue from their sewers and drains. Bateman is the owner of all the fifteen houses, and the other plaintiff, Meckiff, is occupier of one of the fifteen houses, which are in a row within the district of the defendants. There are two sewers or drains which are complained of, one called the 12-inch, which runs along the Wallis-road—the road upon which the fronts of these houses look—and the other called the 9-inch, which is the means by which these fifteen houses are drained, running along the back of the houses, passing to the road called Windsor-road, where it runs into a sewer belonging, not to the Poplar Board of Works, but to the Metropolitan Board of Works. It is the offensive smell issuing from these two drains or sewers which is complained of. Three questions arise: First, whether a notice of action is necessary? Secondly, is what I will call the 9-inch a drain or a sewer? Thirdly, is there, as a matter of fact, a substantial nuisance from the 12-inch and 9-inch, or either of them? With regard to the first question, it is clear that the 106th section of the Metropolis Local Management Act 1862, which is relied on, has no application to an action for an injunction to restrain a nuisance. *Flower* v. *Low Leyton Board* is in point and a conclusive authority. With regard to the third question, I am of opinion that there was evidence before the learned judge below to justify him in finding that there was a substantial nuisance both from the 9-inch and 12-inch, but I concur with what has been said on this part of the case by Cotton, L.J. So far I agree; but on the second question, which raises a most important point of law on the construction of the Metropolis Local Management Act 1855, I regret to say that I differ from the judgments that have been delivered. The question is, whether the 9-inch behind the houses is a drain or a sewer. If it is a sewer, it is vested in the defendants under the concluding words of the 68th section of the Act of 1855. If it is not a sewer, but a drain, then the defendants are not responsible for its state, and the plaintiffs' case fails. Whether it is a drain or a sewer depends upon the construction of the Act of 1855. It will be convenient first to see how "drain" and "sewer" are respectively defined in the interpretation clause, sect. 250. That section says: "The word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed." Up to this point one building only is contemplated, and any drain used in respect of more than one building is not a drain within the definition. The definition proceeds—"and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board." I think the scheme of the Legislature is disclosed here, namely, that every house should have a separate drain, and if it had not, the drain should be a sewer, and become vested in a public body; but, in the case of groups or blocks of houses already existing, permitting the board to order drainage by a combined operation, in my opinion, the latter part of the definition refers to sect. 74, and to that section only. It is to be observed that the only occasion where the words "by a combined operation" occur are in the interpretation clause and in sect. 74. The fifteen houses in question are in course of construction, and are drained by a 9-inch sewer or drain at the back, to which the pipes are carried from each of the fifteen houses. The drainage of each house, so far as the main drain or sewer, is distinct, but this drain or sewer is the common means by which the fifteen houses are drained, and through the lower part of which all the drainage from these fifteen houses reaches the main sewer. The 9-inch is not, therefore, a drain draining one house or premises within the same curtilage. That being so, it is a sewer within the meaning of the Act, unless it is covered by the last words of the definition, namely, "a drain for draining a block or group of houses by a combined operation, under the order of any vestry or district board." We must now turn to the body of the Act. At the 67th section commences that portion of the Act which relates to the duties and powers of vestries and district boards. The 68th section, in its final words, as I have already pointed out, vests all sewers, made or to be made within a district, in the vestry or board respectively. The 69th, 70th, 71st, and 72nd sections are not material. Then comes the 73rd section, which it is most important to consider. It relates to the insufficient drainage of individual houses, whether built before or after the commencement of the Act, and enables the vestry or board, by notice in writing, to require the owner to construct a covered drain into the sewer in the manner therein provided, authorises an inspection during progress, and provides, in case of default by the owner, that the vestry or board may do the work themselves, and recover the expenses from the owner. The Legislature therein provides for the insufficient drainage of separate existing houses. Most clearly this section relates to existing houses only, and not to houses in course of construction. The latter are provided for, as we shall see presently, by sect. 76. Then we come to sect. 74. I think this section is supplemental to sect. 73. It is intended to apply to deficient drainage in existing groups or blocks of contiguous houses—not separate, as in sect. 73, but side by side. It may be these houses belong to different owners, and the vestry or board are enabled to do that which they could not have done under sect. 73 alone, namely, by a notice to require the owners to combine to do what is required. I adopt the words of North, J., where he says: "If it had not been for the 74th section, all that could have been done would have been to give notice to the owner of each of the different houses, and require each of those owners to drain his house in the way required by the board. But the 74th section points out what is obvious, that there may be a group of contiguous houses or adjacent detached or semi-detached houses, which may be drained or improved more economically or advantageously in combination than separately. More economically or advantageously to whom? Why to the person who has to pay for it, and who has to do it, and who can be required by notice to do it. What this section contemplates is a combination which may have the result of producing economy and advantage to the persons who have to do the work; that is to say, to the owners to whom

notice is to be given under sect. 73." If the notice given, requiring the different owners to combine, was not complied with, the same consequences would ensue as under sect. 73, namely, the board or vestry would do it themselves, and charge the owners with the expenses. This, in my opinion, is the kind of order that is referred to in the interpretation clause when it says "a combined operation under the order of any vestry or board"—a very different thing from that relied on here, which is at the most an approval only. In my opinion, the Legislature intended that at the 74th section all the provisions with regard to defective drainage in existing houses, whether separate or side by side, should end, and did not intend that drainage by a combined operation should have any place in the provisions subsequently made for houses thereafter to be constructed. Sect. 75 applies entirely to houses to be erected or to be rebuilt, and provides that they shall not be erected or rebuilt without drains constructed to the satisfaction of the board. Nothing is said about groups, or blocks of contiguous houses, or drainage by a combined operation. Now I come to the 76th section, which is the section relied upon. It states what is to be done before beginning to lay down the foundation of a new house. Seven days' notice is to be given. Every foundation is to be laid as therein provided. Every drain is to be made in such direction, manner, and form, and of such materials and workmanship, and with such branches thereto, and other connected works, and apparatus and water supply, as thereinbefore mentioned, and as the vestry and board shall order. In default of notice, or in case of non-compliance, the board or vestry may demolish or alter, &c., and charge the expenses to the owners. There is nothing in this section about groups or blocks of contiguous houses, and nothing about drainage by combined operation. The section, in express terms, refers to single houses and single drains. It is suggested that the words "hereinbefore mentioned" have the effect of incorporating sect. 74, and of making sect. 76 applicable to the state of things contemplated by sect. 74. "Hereinbefore mentioned," in my opinion, refers to the latter part of sect. 73, and to that only. If it was intended to refer to and incorporate sect. 74, it would be only reasonable to suppose that sect. 76 would not only speak of a new house, but would refer to groups and blocks of contiguous houses and to drains by a combined operation. There is, however, no mention of any kind of groups or blocks of houses, or drainage by combined operation. I cannot think such important provisions were intended to be introduced into sect. 76 by the words "hereinbefore mentioned," more especially when I find sect. 76 dealing only with separate houses and separate drains. It may be said: "Why should the Legislature, in the case of existing houses imperfectly drained, allow drainage by combined operation and not permit it in houses about to be constructed?" I believe the Legislature thought it was best for each house to have a separate drain, but in the case of existing houses thought it harsh to take the property in the drains away from the owners of contiguous houses without first giving them an opportunity of draining by combined operation, if it was for their advantage so to do. Owners of several houses under no liability to improve their drainage might, by a board making a sewer close by and then giving notice, be compelled to improve their drainage. The Legislature seems to have thought that, in such a case, it would be unjust to take the drains already existing out of them and vest them in the board. On the other hand, when a man is about to build, he can make his proposal, and if the board do not assent, he is not bound to build. Again, if an owner, building new houses, makes a drain to drain several houses, he knows it becomes a sewer and vests in the board, and has nothing to complain of. For these reasons I think the 9-inch is a sewer, and as such is, by the 68th section of the Act, vested in the board. I think, therefore, that North, J. was right, and that the appeal should be dismissed.

COTTON, L.J.—Our order will be prefaced by a declaration that the court are of opinion that the 9-inch in the rear of the fifteen cottages was a drain and not a sewer within the meaning of the Act.

Appeal allowed.

Solicitor for the appellants, *A. R. Oldman.*
Solicitor for the plaintiffs, *Edward Clarke.*

May 14 *and* 17, 1886.

(Before Lord ESHER, M.R., BOWEN and FRY, L.JJ.)

REG. *v.* THE LONDON SCHOOL BOARD. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Poor rate—Rateable value—School Board—Rating of schools—Hypothetical yearly tenant—Valuation (*Metropolis*) *Act* 1869 (32 *&* 33 *Vict. c.* 67), *s.* 4.

In calculating the rateable value of schools occupied by the School Board, the School Board itself ought to be considered as a possible hypothetical yearly tenant of the premises, and the rateable value calculated by the rent which the board would be willing to pay for the premises for use as schools. Judgment of Cave and Wills, JJ. affirmed.

THIS was an appeal by the London School Board from the judgment of Cave and Wills, JJ., in favour of the respondents, the Assessment Committee of the parish of Saint Leonard's, Shoreditch, on a special case stated by justices assembled in general assessment sessions.

The question on which the decision of the Court of Appeal turned was whether, in calculating the rateable value of the schools occupied by the School Board, the School Board itself ought to be treated as a possible hypothetical yearly tenant of the premises, and the rateable value calculated by the rent which the board would be willing to pay for the premises for use as schools.

The appeal was argued by *Charles*, Q.C. and *Marriott*, Q.C. (*Ram* with them) for the appellants, and by *Jelf*, Q.C. and *Castle* for the respondents.

The following authorities were referred to:

Reg. v. *West Middlesex Waterworks Company*, 1 E. & E. 716; 28 L. J. 135, M. C.;
Metropolitan Board of Works v. *Overseers of West Ham*, L. Rep. 6 Q. B. 193;
West Bromwich School Board v. *Overseers of West Bromwich*, 13 Q. B. Div. 929;
Mersey Docks and Harbour Board v. *Overseers of Llanelilan*, 51 L. T. Rep. N. S. 62; 52 L. T. Rep. N. S. 118; 14 Q. B. Div. 770;

(*a*) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

Reg. v. *South Staffordshire Waterworks Company*, 54 L. T. Rep. N. S. 782; 16 Q. B. Div. 359; *Dewsbury and Heckmondwike Waterworks Board* v. *Assessment Committee of Penistone Union*, 54 L. T. Rep. N. S. 502; 16 Q. B. Div. 585; 17 Q. B. Div. 384.

Lord ESHER, M.R.—The real question to be decided here is, whether, in calculating the rateable value of the schools in question, the School Board itself ought to be taken into account as one of the possible hypothetical yearly tenants. The contention that the School Board is not rateable was not seriously pressed. The building is not placed in such a position by statute that it could not profitably be occupied or owned by anyone; it is not what has been called struck with sterility; it is therefore rateable, and the School Board are liable to be rated in respect of it. The real question for decision is how the value is to be ascertained. The inquiry is not as to what rent is paid by the actual occupier. The mode of ascertaining the value is laid down in the statute; the mode is to ascertain the rent which a tenant (not *the* tenant), taking one year with another, might reasonably be expected to pay, and where the owner occupies he is to be considered as if he were a tenant. The directions given by the Act are equivalent to saying that all possible tenants must be taken into account, and the phraseology does not exclude an owner who himself occupies the premises. Therefore an owner who is in occupation of the premises is not excluded from consideration as a possible tenant. If by the terms of any statute the School Board could not legally be tenant, it would be excluded from the calculation. It is contended here that the School Board ought to be excluded because it can never obtain any beneficial interest from its tenancy; but it can be a tenant; for it has a duty to perform which may induce or force it to be a tenant. It follows, therefore, that it would be wrong to exclude the School Board from the list of possible hypothetical tenants, whether it is in the position of owner or in that of occupier. That is the real question of principle in this case, and it is the question which was intended to be argued. The calculation is founded on this, that the court took the School Board as a possible tenant, and calculated the rent which could be expected from any tenant, including the School Board. That, in my opinion, is the correct view, and if this is so it follows that the judgment of the Divisional Court must be affirmed.

BOWEN, L.J.—I am satisfied that the real, and indeed the only, question for our decision is whether the School Board is to be excluded from the list of possible hypothetical yearly tenants. In order to decide this it is necessary to refer to the Act of Parliament, and when the Act is looked at it seems to me that there is no difficulty. By 6 & 7 Will. 4, c. 96, s. 1, the rate is to be made upon an estimate of the net annual value of the hereditaments, "that is to say, of the rent at which the same might reasonably be expected to let from year to year," and the Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67), s. 4, contains a similar provision. The meaning must be that the rate is to be made upon an estimate of the rent at which the premises might reasonably be expected to let to someone who wanted to hire them. The question is whether, in making this calculation, the School Board itself is to be excluded from the list of possible occupiers. To an inquiry whether it might reasonably be expected that the premises would be let to the School Board, the answer must be in the affirmative, and therefore it seems impossible to exclude the School Board from the list of hypothetical tenants. Therefore the language of the Act answers the question. The case cannot fairly be decided on the hypothesis that the one person that requires the premises most would not take them. It does not matter whether the School Board wants the premises for the purpose of profit, or will make any profit out of them, for the question is only whether the School Board wants and would take them. I am perfectly satisfied that the principle on which the value has been estimated is sound, and I therefore agree that the judgment of the Divisional Court ought to be affirmed.

FRY, L.J.—I am of the same opinion. It seems to me that the difficulty arises from referring, not to the Act itself, but to certain expressions which occur in the decisions. The Valuation Metropolis Act 1869 (32 & 33 Vict. c. 67), in sect. 4, defines "gross value" as meaning "the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament," &c. These words refer to the annual rent which any person might reasonably be expected to pay to any landlord, and the actual owner and occupier are not excluded. The question has been asked, why the actual occupier is not to be treated as a possible tenant, and no answer has been given except that the School Board is not to be considered as a possible tenant, because, though it occupies the premises, it can make no profit out of them. It seems to me that a man who occupies a house for his own comfort might as well be excluded. The term "sterility" has been introduced into the cases, because, as a general rule, a profit is produced; but it does not, by any means, follow that because there is no profit there is no value. It would be impossible to find a better illustration of this than the present case. The only question is whether the person who is to be considered as a tenant could reasonably be expected to take the premises from any motive. It seems to me that the very words of the section answer the question, and that the argument for the appellants is founded upon a misapprehension of what has been said in the cases. I am of opinion that the right mode of calculating the value has been adopted, and that the judgment of the Divisional Court ought to be affirmed.

Appeal dismissed.

Solicitors for appellants, *Gedge, Kirby,* and *Millett.*

Solicitors for respondents, *Mills, Lockyer,* and *Mills.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Monday, April 19, 1886.

(Before MATHEW and SMITH, JJ.)

NEWMAN *v.* JONES. (*a*)

Licensing Acts—Selling without a licence—Sale by steward of a club contrary to orders of the managing trustees—Liability of the trustees—6 Geo. 4, c. 81, s. 26—4 & 5 Will. 4, c. 85, s. 17—23 Vict. c. 27, s. 19.

The appellants were convicted under the Licensing Acts for having sold liquor to certain persons who were not members of a club of which the appellants were trustees, and as such trustees were admitted to the meetings of the committee of management, and took part in the proceedings thereof.

It was found as a fact by the justices that the steward was employed by the committee and paid by the trustees, and that he had orders from the trustees and committee not to serve anyone but members and affiliated members of the club.

Held, that the conviction was wrong on the ground that a master or principal is not liable when a servant or agent sells in direct contravention of the bonâ fide orders given, and without the knowledge or assent, direct or indirect, of the master or principal.

CASE stated by justices under 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49.:—

On the 25th July 1885 four informations were preferred against the appellants at a petty sessions held at Stratford, by the respondent, who was an officer of Inland Revenue, and the offences charged were as follows:

1. For having as trustees of the Cyprus Workmen's Club and Institute, on the 12th March 1885, retailed certain spirits, to wit, one gill of brandy, without having in force such licence as was required by 23 Vict. c. 27, s. 19.

2. For having on the 17th March 1885 sold one pint of beer by retail, to be drunk and consumed in and upon their premises, without having an Excise licence under 4 & 5 Will. 4, c. 85, s. 17.

3. For having on the 12th March 1885 sold certain wine, to wit, one gill of port, without having a proper licence.

4. For having on the 17th March 1885 dealt in and sold certain tobacco, drink, and two cigars, without having a licence as required by 6 Geo. 4, c. 81, s. 26.

The appellants were convicted by the justices on each information, and were ordered to pay the several penalties of 25*l.*, 10*l.*, 10*l.*, 25*l.*, and costs, and in default of sufficient distress, to be imprisoned for the several terms of two months, one month, one month, and two months respectively.

The Cyprus Workmen's Club and Institute was registered as a working man's club under the Friendly Societies Act 1875 (38 & 39 Vict. c. 60), and it was admitted that the appellants were trustees of the club (one of them being the treasurer) who, according to the rules of the club, were admitted to the meetings of the committee of management, and to take part in the proceedings thereof, and vote on any question under discussion. The appellants, as such trustees, held office permanently until death, resignation, or refusal, and they were removable only by three-fourths of the members present at a special general meeting. The secretary received all subscriptions and other moneys, and handed the same over to the treasurer. The treasurer was responsible for such moneys as were paid to him by the secretary or by any person on account of the society, and he rendered his cash account quarterly. Leach (one of the appellants) was the landlord of the premises, and the treasurer paid rent to him. The club was under the management of a committee, but there was no evidence, nor was it shown by the rules, how such committee was appointed.

The steward or manager of the club was employed by the committee and paid by the trustees, and he had orders from the trustees and committee not to serve anyone but members and affiliated members. An affiliated member is an associate of the Working Men's Union Club, and it was the common practice to allow affiliated members to introduce members. There was a notice as to the supply of liquor posted up in the club, but there was no evidence of the contents of the notice.

The justices found that on the 12th March 1885 John O'Connell, an Excise officer, who was not a member or affiliated member, visited the club with an affiliated member (Musto) and ordered and was served with brandy, for which O'Connell paid 3*d.* On the same occasion O'Connell ordered port wine, beer, and brandy, which was served by the manager or steward, and for which he paid 1*s.* 6*d.* On the 17th March O'Connell again visited the club with Musto and one Jones (who was not a member) and paid a member of the club, and also a member who was acting in the absence of the steward, for port wine, whisky, beer, and cigars at different times, and he also paid the member acting for the steward for whisky and cigars which he brought away from the clerk.

It was contended on behalf of the appellants that they were not liable for the act of the steward or manager in selling the excisable articles, inasmuch as he was not their servant, but the servant of the committee of management; and even if he were the servant of the appellants he was acting not in obedience to, but in defiance of the orders he had received, the principle of law being that a master is not responsible for the criminal act of his servant, unless he authorises it or becomes an accessory after the fact.

The justices were of opinion that the trustees, as legal owners of the property of the club, and as actual members of the committee, taking a part in the proceedings thereof, and voting on any question, were responsible for the acts of the steward or manager, or any person acting for him, although such acts were in direct disobedience of the orders of the committee and of the trustees, and were done without their knowledge or assent, and in direct violation of the rules of the club, and they therefore decided against the appellants.

The question for the opinion of the court was, whether under the above circumstances the appellants, as trustees of the club, were liable

(*a*) Reported by H. D. BONSEY, Esq., Barrister-at-Law.

for the acts of their servants and delegates in selling the excisable articles.

Blackwell for the appellants,.

R. S. Wright for the respondent.

April 19. — The judgment of the Court (Mathew and Smith, JJ.) was delivered by

SMITH, J.—In this case, Thomas Jones, one of Her Majesty's officers of Inland Revenue, preferred against the appellants four informations: first, for having, as trustees of the Cyprus Workmen's Club and Institute, on the 12th March 1885, retailed one gill of brandy without having a licence, contrary to the provisions of 23 Vict. c. 27, s. 19; secondly, for having, as trustees as aforesaid, on the 17th March 1885, sold one pint of beer by retail, without having an Excise licence, contrary to the provisions of 4 & 5 Will. 4, c. 85, s. 17; thirdly, for having, as trustees as aforesaid, sold a gill of port wine, contrary to the statute in that behalf; fourthly, for having, as trustees as aforesaid, sold two cigars without having a licence, contrary to the provisions of 6 Geo. 4, c. 81, s. 26. The justices convicted the appellants in the several penalties of 25*l.*, 10*l.*, 10*l.*, and 25*l.* and costs, and in default of payment adjudged distress for payment, and, in default of sufficient distress, imprisonment for the several terms of two months, one month, one month, and two months respectively. The material point raised by the justices in the case submitted to us is this: Even assuming (about which hereafter) that the relation of master and servant, or principal and agent, existed between the appellants and the steward of the club, who was the person who actually sold the articles in question to other than members or affiliated members of the club, can the appellants be convicted when they proved, as they did in the present case, to the satisfaction of the justices, that the steward, in selling the articles as and where he did, acted in direct contravention of the *bonâ fide* orders given by the appellants, and in direct violation of the rules of the club, and without the knowledge or assent, direct or indirect, of the appellants thereto. Such, however, was the contention of the Crown. It certainly sounded to us as novel; but it was insisted that such was the effect of the statutes, and it was said that there were authorities in favour of the contention. It becomes, therefore, necessary for us to examine them. It was very frankly admitted by Mr. Wright, on behalf of the Crown, that, if the proceeding in hand had been a prosecution for a crime, the prosecution could not be maintained; but he said that the statutes in question did not constitute the selling of the articles a crime, but only prohibited their sale by a penalty enforceable by distress and subsequent imprisonment in default of distress; and that the conviction could be upheld. He said that the statutes above mentioned enacted that "every person who should sell liquors or cigars without a licence was liable to the penalties therein prescribed." So far he is correct. He then said that it was immaterial whether the appellants knew, or did not know, whether the articles were being sold; if sold, they were by one who stood in the relation of servant or agent to the appellants; and he said that the authorities covered that proposition. That, however, is not the question now to be determined. The question is, whether a master or principal is liable when the servant or agent sells in direct contravention of the *bonâ fide* orders given, and without the knowledge or assent, direct or indirect, of the master or principal. The following were the cases cited: In the first place, he gave us the case, in 1824, of *Rex* v. *Marsh* (2 B. & C. 717), where it was held that, in an information under 5 Anne, c. 14, s. 2, against a carrier for having game in his possession as carrier, it was not necessary to prove that the carrier had the game in his possession knowingly; and therefore, he argued, it was not necessary to establish in the present case that the appellants knew that the steward was making the sales. In our judgment all that was decided in that case was that, upon proof given that the carrier had the game in his possession, a *primâ facie* case was made out, and that it lay upon him to rebut that case, which he could do by establishing that the game was not put into his waggon with his assent, or was put in contrary to his orders. This case, as it appears to us, instead of establishing that for which it was cited, shows how a *primâ facie* case may be rebutted, as rebutted it was in the case in hand. The next case cited was that of *Attorney-General* v. *Siddon* (1 Cr. & J. 220; 1 Tyrwh. 41), in the year 1830, in which it was held that a master was liable for penalties under the Smuggling Act (57 Geo. 3, c. 123), s. 13, for the illegal act of his servant in concealing smuggled goods, the master being absent at the time when the act was done. The judgment of the court proceeded upon the grounds, as stated by Alexander, C.B., "that whatever a servant does in the course of the employment with which he is intrusted, and as part of it, is the master's act." "The legal presumption is so," says the Chief Baron, "unless the contrary be shown." In the present case, it was shown that the appellants did not authorise the acts of the steward, and the case, therefore, is no authority for the proposition put forward, but is a cogent authority against it. The next case was that of *Davies* v. *Harvey* (30 L. T. Rep. N. S. 629; L. Rep. 9 Q. B. 433), where it had been held that a guardian of the poor was properly convicted for furnishing for his profit goods to be given in parochial relief, although he had no knowledge that the goods were to be given in parochial relief. This case was decided upon the ground that, although the defendant did not know for what purpose the goods were required, yet that his partner, did, and that the goods were supplied by the partner within the scope of the partnership authority, for the profit of both partners. This case does not help the Crown; for, in the present case, the articles were manifestly sold beyond and without the scope of the authority given. The case of *Mullins* v. *Collins* (29 L. T. Rep. N. S. 838; L. Rep. 9 Q. B. 433) was next cited. In that case it was held that a licensed victualler was liable to be convicted under 35 & 36 Vict. c. 94, s. 16, for the act of his servant knowingly supplying liquor to a constable on duty. All that this case decided was that a licensed victualler was liable for the act of his servant within the scope of his employment; but it is no authority whatever for the liability of the master for the act of his servant outside the authority given. It was then urged that the case of *Condy* v. *Le Cocq*

(51 L. T. Rep. N. S. 265; 13 Q. B. Div. 207) having held that the master under the same statute was liable, even though neither master nor servant knew that the constable was on duty, that therefore it was an authority on behalf of the Crown. It was upon this case, as we are informed, that the justices to a great extent relied when they convicted the appellants. We cannot follow their *ratio decidendi*. Even assuming that the case was not decided upon the special wording of sect. 16 of 35 & 36 Vict. c. 94, which it was, how does the fact of neither master nor servant knowing that the constable was on duty establish that the master is liable where a servant acts in direct contravention of the orders given? It does nothing of the kind. The above were the authorities alleged to cover the Crown's contention in this case. It is manifest that they do not. As to the point urged, that the money taken by the steward for the articles sold went into the coffers of the club, and not into the steward's pocket, we may say that that would have been an ingredient for the justices to take into their consideration when determining whether the steward, when he sold, was acting in reality in contravention of the orders given. But, inasmuch as the justices have determined, upon the facts proved before them, that the steward had orders from the appellants not to serve anyone but members and affiliated members of the club, and that they were *bonâ fide* orders, and that he transgressed them, and as they convicted the appellants because they were legal owners of the property of the club and members of the committee, this point is of no avail to the Crown. We give no judgment upon the point as to whether the steward was servant or agent of the appellants; for it is not material now to do so. We give judgment for the appellants with costs; and the conviction must be quashed.

Conviction quashed.

Solicitor for appellants, *E. Newman.*

Solicitor for the Crown, *Solicitor for Inland Revenue.*

June 23 *and* 24, 1886.

(Before Lord COLERIDGE, C.J. and MATHEW, J.)

HOPE *v.* EVERED. (*a*)

Malicious prosecution—Search-warrant—Reasonable and probable cause for suspicion—Judicial function of magistrate—Criminal Law Amendment Act 1885 (48 *&* 49 *Vict. c.* 69), *s.* 10.

By sect. 10 *of the Criminal Law Amendment Act* 1885 *it is enacted that, "if it appears to any justice of the peace, on information made before him on oath by any parent, relative, or guardian of any woman or girl, or any other person who, in the opinion of the justice, is bonâ fide acting in the interest of any woman or girl, that there is reasonable cause to suspect that such woman or girl is unlawfully detained for immoral purposes by any person in any place within the jurisdiction of such justice, such justice may issue a warrant authorising any person named therein to search for, and, when found, to take to a place of safety such woman or girl. . . . . "*

Held, that such section vests in the justice a judicial as well as a ministerial function, and that if the justice, upon the bonâ fide information of an applicant, decides that there are reasonable grounds for suspicion, and issues a search-warrant, no action for malicious prosecution will lie against such applicant for having given the information to the justice.

THIS was a motion to set aside a verdict and judgment entered for the plaintiff, or for a new trial. The statement of claim stated that on the 17th Oct. 1885 the defendant maliciously and without probable cause made a complaint and information on oath before a justice of the peace, that there was then reasonable cause to suspect that one Mary Frances Evered, a daughter of the defendant, was unlawfully detained for immoral purposes within the meaning of sect. 10 of the Criminal Law Amendment Act 1885, by one Gerard Hope, the plaintiff's son, and upon such complaint and information caused and procured the said justice to grant a warrant, directed to certain peace officers, whereby, after reciting that it appeared to the said justice that there was then reasonable cause to suspect that the said Mary Frances Evered was then unlawfully detained for immoral purposes at St. Peter's Vicarage, the residence of the plaintiff, within the meaning of the said Act, by one Gerard Hope, of the said vicarage, the said justice commanded the said peace officers, with necessary and proper assistants, to enter, if need be, by force, in the daytime into the said vicarage, there to search for the said Mary Frances Evered, and, if she could be found, to deal with her according to the said Act. That, by virtue and under colour of the said warrant, and by pretext of the execution thereof, and without reasonable or probable cause, and without the leave or licence and against the will of the plaintiff, certain peace officers, on the 17th Oct. 1885, searched the plaintiff's dwelling-house and trespassed upon the same. That, on the 17th Oct. 1885, the defendant falsely and maliciously spoke and published of and concerning the plaintiff the words following, that is to say, "I am the mother of Mary Frances Evered, a girl under the age of eighteen, namely, seventeen, and I have reasonable cause to suspect that she is now unlawfully detained for immoral purposes at St. Peter's Vicarage by William Hope (meaning the plaintiff), and is so detained against my will." The plaintiff claimed damages.

The action was tried before Manisty, J. and a special jury, and the learned judge, having held that there was an absence of reasonable and probable cause for the defendant's act, left the question of malice to the jury, who found for the plaintiff with 20*l.* damages, upon which judgment was entered for the plaintiff.

By sect. 10 of the Criminal Law Amendment Act 1885:

If it appears to any justice of the peace, on information made before him on oath by any parent, relative, or guardian of any woman or girl, or any other person who, in the opinion of the justice, is *bonâ fide* acting in the interest of any woman or girl, that there is reasonable cause to suspect that such woman or girl is unlawfully detained for immoral purposes by any person in any place within the jurisdiction of such justice, such justice may issue a warrant authorising any person named therein to search for, and, when found, to take to and detain in a place of safety such woman or girl until she can be brought before a justice of the peace; and the justice of the peace before whom such woman or girl is brought may cause her to be delivered up to her parents

(*a*) Reported by F. A. CRAILSHEIM, Esq., Barrister-at-Law.

or guardians, or otherwise dealt with as circumstances may permit and require.

A woman or girl shall be deemed to be unlawfully detained for immoral purposes if she is so detained for the purpose of being unlawfully and carnally known by any man, whether any particular man or generally, and

(*a*) Either is under the age of sixteen years; or

(*b*) If of or over the age of sixteen years and under the age of eighteen years, is so detained against her will, or against the will of her father or mother or of any other person having the lawful care or charge of her;

(*c*) If of or above the age of eighteen years is so detained against her will.

Buszard, Q.C. and *W. Graham* moved to enter judgment for the defendant or for a new trial.—This action will not lie. There is no cause of action unless it can be shown that the defendant intentionally and *malâ fide* misled the justice. But the statements of the defendant in the information she gave the justice are admittedly true. There was no absence of reasonable and probable cause; but if there was such absence, the onus was on the plaintiff to prove it, under sect. 10 of the Criminal Law Amendment Act 1885. It is the duty of the magistrate to inquire and to judge whether the information is *bonâ fide*, and whether there is reasonable and probable cause. His duty under the Act is judicial as well as ministerial, and if he erroneously decides that there was reasonable and probable cause, and grants a warrant, then, unless the applicant wilfully misled him, there is no remedy against anyone. As soon as the applicant has satisfied the justice, she is no longer responsible for the issue of the warrant. Here there is no specific charge against the plaintiff, nor against anyone else, the words used by the defendant being that she "now has reasonable cause to suspect" that her daughter is detained. There is a broad distinction between an application for search merely on suspicion and an application where an offence is charged:

Wyatt v. *White*, 29 L. J. 193, Exch.

In that case it was held that there was reasonable and probable ground for search, but none for suspecting a theft to have been committed by the plaintiff. With reference to the facts, the defendant clearly had good grounds for believing that her daughter was in that house, and the justice having in his discretion acted upon her information, which is not suggested to have been *malâ fide*, it is submitted that judgment ought to be entered for the defendant.

Hextall (*Lawrance*, Q.C. with him) for the plaintiff.—It is submitted that the mere fact of the justice having a judicial, as well as a ministerial, function to perform, under sect. 10 of the Criminal Law Amendment Act 1885, does not disentitle the plaintiff to bring this action:

Cooper v. *Booth* (cited as *Boot* v. *Cooper* in 1 Term Rep. 585), 3 Esp. 135.

That case certainly was decided under a statute (10 Geo. 1. c. 10, s. 13) which did not in such clear language as is used in the Criminal Law Amendment Act 1885 provide that the Excise Commissioners should exercise a judicial, and not merely a ministerial, authority; but it is submitted that the words of the finding show that such was considered to be the case. It was there found that the warrant was granted, the Excise Commissioners being satisfied that the suspicion was reasonable. It is therefore submitted that the jury having in this case found an absence of reasonable and probable cause for the issue of the search-warrant, the action will lie against the defendant.

Buszard, Q.C. in reply.

Lord COLERIDGE, C.J. (after having stated the facts of the case).—This case is in some respects an important one, being, as far as I am aware, the first case in which the procedure under the Criminal Law Amendment Act 1885 has been made the subject of a civil action. I think, from the evidence, that the defendant might reasonably have believed, not only that her daughter was in the vicarage, but that the plaintiff knew her to be there, and that he was concealing and hiding her from her natural guardian; and I think a mother might reasonably be pardoned, taking all the facts of the case into consideration, for supposing the girl to be there for a wrong, and possibly for an immoral, purpose. She, therefore, takes advice, and the result is that she lays the information, in which we find that she says that she has reasonable cause to suspect that her daughter is being unlawfully detained for immoral purposes at St. Peter's Vicarage. Enough appears upon the face of the information to make it very reasonable that the justice should have acted as he did. If I have stated the facts accurately, who can say that there was an absence of reasonable and probable cause when the defendant applied for this warrant, which was not directed against the plaintiff, but which was a warrant to search his house, to see if her daughter was there? Upon that ground alone it would seem that this matter must end, on the ground that there was no evidence of absence of reasonable and probable cause for the defendant's suspicions. But in my judgment the matter does not stay here, because we have to deal with an Act of Parliament—passed, in a sense, in a high-handed way—undoubtedly giving unusual powers, but pointing at an evil which the Legislature thought sufficiently important to be met by this enactment. Now, sect. 10 of the Act in question provides that [Reads it.] The Act of Parliament, therefore, casts on the magistrate—and, if this legislation is to be effective, most properly casts upon him—the onus of its being made to appear to him that there is reasonable and probable cause to suspect that the woman or girl is being detained for immoral purposes. If the person who puts the law in motion only states his grounds to the magistrate, and says that he or she has reasonable grounds for suspecting that a woman or girl is being detained in a certain place for immoral purposes, and if the magistrate believes the story, and thinks that the person is acting *bonâ fide*, and that there are grounds for the suspicion, then in my judgment this is an answer to any action of this sort. The magistrate is to act judicially. I do not, however, for a moment suggest that if a person acts in a false and fraudulent manner, or for purposes of malice or oppression, and the magistrate is persuaded that there are reasonable grounds for granting a search warrant, an action would not lie. But if the applicant is acting *bonâ fide*, and if the matter is stated fully and fairly to the magistrate, and he comes to the conclusion that there are reasonable grounds for issuing the warrant, then the course taken by the magistrate is a complete answer to any proceeding of this sort. Although it may sometimes happen that

parents are unreasonably anxious, and occasionally the wrong house may be searched, what the Legislature considered to be the salutary operation of this Act is not to be checked by actions of this description. Otherwise no one would be safe in putting this section of the Act in force. It is not as if the liberty of the subject were infringed by such a search, but it is simply with the object that what in the view of the Legislature is a great good may be effected, that there may from time to time be a search of a house which may turn out to have been groundless. But, both upon the facts and upon the true construction of the statute, I am of opinion that there was no ground for leaving this case to the jury, and the verdict must, therefore, be set aside.

MATHEW, J.—I quite concur. With great respect to my brother Manisty, I must differ from him. The learned judge ruled that there was no evidence of reasonable and probable cause for the action of the defendant, and that ruling gave the sole evidence of malice upon which the jury acted. The effect of that is, that the defendant must have been desirous of injuring the plaintiff, and with that object obtained the search warrant. But it is not suggested that the defendant was not all the time acting *bonâ fide*, or that she made any untrue statement to the magistrate. I am satisfied that the learned judge ought to have told the jury that the onus lay upon the plaintiff of showing that the defendant acted without reasonable and probable cause. It has been suggested that this case ought to be tried again; but, in my opinion, there is no ground for such a course. The facts are fully before us, and those facts, as well as the statute, are wholly against the contention of the plaintiff. There was no absence of reasonable and probable cause, and, therefore, no evidence of malice. Judgment must, therefore, be entered for the defendant.

Judgment for the defendant.

Solicitor for plaintiff, *E. Warriner*, for *Mole* and *Stone*, Derby.

Solicitors for defendant, *Cowdell* and *Co.* for *C. K. Eddowes*, Derby.

Friday, July 2, 1886.

(Before POLLOCK, B. and CAVE, J.)

PARKER (app.) *v.* INGE (resp.). (*a*)

Nuisance—Abatement—Demised premises—Order on owner to abate nuisance—Inability of owner to enter on demised premises—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 91, 94, 95, 96, 98.

A nuisance having arisen, from the defective construction of a structural convenience, upon certain premises which were demised to a tenant for a term of years at an annual rent which was paid to and received by the owner of the said premises on his own account, and the only power of entry given by the terms of the lease to such owner being for the purpose of viewing the condition of the said premises:

Held (reversing the decision of the justices), that the justices have jurisdiction, under sect. 96 *of the Public Health Act* 1875, *to make an order on the owner to abate the nuisance within a time specified, and to do any works necessary for that purpose, although the owner may have no power of entry for such purpose by the terms of the lease by which the premises were demised.*

If, in such circumstances, the owner can satisfy the court that he has used all due diligence to carry out such order of the justices within the meaning of sect. 98 *of the Act, but has failed, then it is competent to the local authority to enter and execute the necessary works.*

THIS was a case stated by justices of the peace in and for the borough of Birmingham, under the Summary Jurisdiction Act 1879, s. 33.

1. The matter in question came before a court of summary jurisdiction at Birmingham, on the 26th March 1886, on a summons taken out by the appellant, John Parker, inspector of nuisances for the borough of Birmingham, acting as the urban sanitary authority of the said borough, against the respondent, under sect. 91 and the following sections relating to nuisances, contained in the Public Health Act 1875.

2. The appellant, in his said complaint, charged that a nuisance existed in a certain house and premises, No. 65, Bull-street, Birmingham; that the nuisance arose from the defective construction of the drains, which were so foul as to be a nuisance and injurious to health, and that the said nuisance was caused by the act or default of the respondent. The appellant therefore asked the magistrates to make an order on the respondent, under sect. 96 of the said Act, requiring him to abate the nuisance, and for that purpose to execute certain works specified in the notice which had been served on him by the appellant. Upon the hearing, all parties being present, the justices dismissed the complaint, and declined to make the order asked for by the appellant.

3. The appellant, being desirous of questioning the determination of the justices, on the ground that it was erroneous in point of law, duly applied, pursuant to sect. 33 of the Summary Jurisdiction Act 1879, to the justices in writing, to state and sign a special case for the opinion of this court, and, in compliance with the said application and the provisions of the said statute, the following case was duly stated.

4. Upon the hearing of the complaint, the following facts were proved by the appellant, and not disputed by the respondent: (1) That the said house and premises were occupied by Alfred Loader as tenant. at a yearly rent, being assignee of a lease, and that this rent was paid to and received by the respondent on his own account. (2) That the said house and premises were, at the time of the service of the notice hereinafter mentioned, and up to the hearing of the summons, in such a state as to be injurious to health and unfit for human habitation, and that such nuisance arose from the defective construction of a structural convenience. (3) That, on or about the 27th Jan. 1886, the mayor, aldermen, and burgesses, as the urban sanitary authority, served a notice on the respondent, pursuant to sect. 94 of the Public Health Act 1875, requiring him to abate the said nuisance within seven days from the service of such notice, and for that purpose to execute certain works specified in such notice. (4) That the respondent had not complied with the requisitions of such notice. (5) That the works required to be executed by the appellant

(*a*) Reported by F. A. CRAIGHEIM, Esq., Barrister-at-Law.

were necessary and proper for the abatement of the nuisance.

5. By a local Act (46 & 47 Vict. c. lxx., s. 13) it is enacted that a notice given by the mayor, aldermen, and burgesses under sect. 94 of the Public Health Act 1875, requiring any person to abate a nuisance, may prescribe the description of the work required to be done, or of the materials to be used, or of the acts required to be done, and anything so prescribed shall be deemed to be a requisition of the notice within the meaning of the said Public Health Act 1875.

6. The premises in question were demised to a tenant for a term of twenty-one years at an annual rent; and by the terms of the lease the tenant was liable to repair the premises, and the only power of entry given by the lease to the respondent during the continuance of the term was as follows: "And it shall and may be lawful for the said George Inge, his heirs or assigns, or his or their agent or agents, with or without workmen or others, twice or oftener in every year during the continuance of this demise to enter and come into and upon the said demised premises, and there to view, search, and see the state and condition thereof, and of all decays and wants of reparation then and there found, to give and leave notice in writing at or upon the said demised premises to and for the said R. (the tenant), his executors, administrators, or assigns, to amend and repair the same within the space of three calendar months thence next ensuing, within which time he and they shall and will repair and amend the same accordingly."

7. The appellant contended that by virtue of the Public Health Act 1875, s. 4, the respondent was "the owner" of the premises within the meaning of sect. 94 of the same Act; that, as the nuisance arose from the want or defective construction of a structural convenience, the notice (in accordance with the first proviso in sect. 94 of the Public Health Act) was properly served on the respondent, as such owner, and that the respondent was the person on whom an order ought to be made, requiring him to comply with the requisitions of the notice, and to abate the nuisance. It was further contended by the appellant that no lease or agreement between owner and tenant could affect the responsibility of owners in a case where the nuisance arises from the want or defective construction of any structural convenience, and that, if an order of the court had been made, directing the respondent to enter on the premises to execute the works, it would have given him full authority to enter on the premises for the purpose, notwithstanding the provisions of the lease.

8. On the part of the respondent, it was contended that he was not the "owner" within the meaning of sect. 4 of the Public Health Act 1875; that, by sect. 94 of the Public Health Act 1875, the person liable is "the person by whose act, default, or sufferance the nuisance arises or continues," and that the respondent was not such a person, and that it is only "if such person cannot be found" that the notice is able to be served upon an owner or occupier, and that therefore, as such person can here be found, the respondent was not responsible. It was further contended that, if the notice was properly served on the respondent, he was wrongly summoned under sect. 95, because he had not "made default," inasmuch as, under the lease, he had no power to enter upon the premises, and no order of the court had been made authorising him to do so; that, by the terms of the lease, the tenant or occupier, and not the owner, was liable to execute the works necessary to abate the nuisance; but that, in any event, as the respondent had no power under the lease to enter for the purpose of executing the works, and that, if he did so enter, he would be committing a trespass, the court had no power to order him to execute these works, which necessitated an entry upon the premises.

9. The justices, being of opinion that the contentions of the respondent were right, gave their determination against the appellant in manner before mentioned.

10. The question submitted for the court was, whether, on the facts stated, the respondent was liable to be called upon to abate the nuisance by the execution of the works specified in the notice. If the court should be of opinion that the respondent was not so liable, then the order and determination of the justices was to stand; but if it should be of opinion that he was liable, then the case was to be remitted to the justices, with the opinion of the court thereon.

By sect. 94 of the Public Health Act 1875:

On the receipt of any information respecting the existence of a nuisance, the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose: Provided

First, that where the nuisance arises from the want or defective construction of any structural convenience, or where there is no occupier of the premises, notice under this section shall be served on the owner;

Secondly, that where the person causing the nuisance cannot be found, and it is clear that the nuisance does not arise or continue by the act, default, or sufferance of the owner or occupier of the premises, the local authority may themselves abate the same without further order.

By sect. 95:

If the person on whom a notice to abate a nuisance has been served makes default in complying with any of the requisitions thereof within the time specified, or if the nuisance, although abated since the service of the notice, is, in the opinion of the local authority, likely to recur on the same premises, the local authority shall cause a complaint relating to such nuisance to be made before a justice, and such justice shall thereupon issue a summons requiring the person on whom the notice was served to appear before a court of summary jurisdiction.

Arthur Charles, Q.C. (*Sutton* with him) for the appellant.—By sect. 94 of the Public Health Act 1875 there is a duty imposed upon the owner of premises under certain circumstances to abate a nuisance, and to execute such works and to do such things as may be necessary for that purpose. A nuisance arising from the defective construction of a structural convenience cannot be abated without entry. There is a similar provision with regard to nuisances arising from the defective construction of structural works contained in sect. 21 of the Sanitary Act 1866 (29 & 30 Vict. c. 90). In *Cook* v. *Montagu* (26 L. T. Rep. N. S. 471; L. Rep. 7 Q. B. 418) it appears that, if the appellant had been owner of the premises demised, he would have been liable to repair the

defective works. This seems to be assumed in the judgment.

Jelf, Q.C. (*Lyttleton* and *W. Rose Smith* with him) for the respondent.—There has been no default on the part of the owner, because, in order to execute the works, it would have been necessary for the respondent to commit a trespass by entering upon the premises. Default on the part of the owner is a condition precedent to the jurisdiction of the justices to issue a summons under sect. 95 of the Public Health Act 1875. The point now before the court was not decided in the case of *Cook* v. *Montagu* (26 L. T. Rep. N. S. 471; L. Rep. 7 Q. B. 418). An order upon the respondent to abate the nuisance would be bad, because the execution of the work would involve the committal of a trespass:

The Mayor of Scarborough v. *The Rural Sanitary Authority of Scarborough*, 34 L. T. Rep. N. S. 768; L. Rep. 1 Ex. Div. 344.

They also cited.

Reg. v. *Trimble*, 36 L. T. Rep. N. S. 508.

POLLOCK, B.—I am of opinion in this case that the respondent is liable to abate the nuisance by executing the works specified in the notice, and therefore the case must be remitted to the justices. The following is the only real point as to which any serious doubt could arise. It was said that the statute was not applicable to a case of this kind, where the owner against whom the summons is taken out, having let the premises to a tenant, has not the immediate possession of them, and that in such circumstances he could not enter in order to abate the nuisance. It appears to me that, giving a reasonable construction to the Act, and remembering the difficulty to be overcome by it, the proceeding was here properly taken against the respondent as owner, and that, whether or not he had a legal right to enter to abate the nuisance, the justices should have made an order upon him to abate the nuisance. That depends upon the construction of sect. 94 of the Public Health Act 1875. That section provides that. [Reads it:] In the first proviso there are two distinct branches, the first applying to a nuisance arising from a structural convenience, and the second to the case where there is no occupier of the premises. Now, in this case, it was proved that there was a nuisance arising from the defective construction of a structural convenience. In that event, the local authority is to serve on the owner a notice requiring him to abate the nuisance. Then sect. 95 provides that, if the person on whom a notice to abate a nuisance is served makes default in complying with any of the requisitions thereof within the time specified, the local authority shall cause a complaint relating to such nuisance to be made before a justice, who shall thereupon issue a summons requiring the person on whom the notice was served to appear before a court of summary jurisdiction. It is said that it is hard to say that the man who is the owner of premises, but who has no right to go upon them, has made default in complying with the requisition of the notice. I do not say that there might not in some cases be ground for that difficulty, but in ninety-nine cases out of a hundred it would not arise. So far as the convenience of the parties is concerned, I cannot imagine a tenant declining to allow his landlord to go upon the premises to abate that which is a nuisance. It is not until actual default is found that a person comes within the provisions of sect. 98 of the Act, which enacts that "any person not obeying an order to comply with the requisitions of the local authority or otherwise to abate the nuisance, shall, if he fails to satisfy the court that he has used all due diligence to carry out such order, be liable to a penalty not exceeding 10*s.* per day during his default; and any person knowingly and wilfully acting contrary to an order of prohibition shall be liable to a penalty not exceeding 20*s.* per day during such contrary action; moreover, the local authority may enter the premises to which any order relates and abate the nuisance, and do whatever may be necessary in execution of such order, and recover in a summary manner the expenses incurred by them from the person on whom the order is made." Reasonable discretion may be given to those who have to carry out this order, and therefore it may be presumed that, if an owner came forward and said that he had done his best to enter upon the premises, but had been prevented, the local authority would say that it appeared that the owner had used all due diligence in carrying out the order, and would proceed against the proper person. For these reasons, it appears to me that this case ought to be remitted to the justices, with the expression of our opinion.

CAVE, J.—I am of the same opinion. The language of the Act is quite clear. The local authority, when they get information of the existence of a nuisance, are to serve a notice upon the person through whose act, default, or sufferance the nuisance continues. Where a nuisance is caused by such an act as the tipping of rubbish, the person by whose act, default, or sufferance it is caused is to be summoned. Supposing that, as in this case, the nuisance is caused by bad drainage, the nuisance thus caused arises, in one sense, from the act of the person who uses the defective drainage, for, as long as no water is poured down, it is probable that no nuisance will arise. Therefore, it is hard to summon an occupier, who can only help himself by incurring expenses to which he should not be put, and therefore the landlord must be liable. Therefore, where there is a nuisance caused by the defective construction of a structural convenience, notice ought to be served upon the owner of the premises. There is no provision in the Act for serving it otherwise than upon the owner, so that that is the only way of stopping the nuisance. Therefore, there is a strong argument to show that the Legislature intended that steps should be taken against the owner. Then the question is, what are the steps to be taken? First, a complaint is to be made before a justice by the local authority, and then, if the court is satisfied that a nuisance exists, an order is made upon the owner requiring him to comply with the requisitions of the notice. Then if he does not obey the order, and fails to satisfy the court that he has used all diligence to carry out the order, he is liable to a penalty. I think the owner can come and say that he did not comply with the notice of the local authority and the order of the court because his tenant refused to allow him to enter upon the premises; and I think that in such circumstances the court would, in all probability, say that they were satisfied

with that statement, and that he had used due diligence in carrying out, or attempting to carry out, the order. In such a case it would be competent to the local authority themselves to enter and abate the nuisance. But if you stop at a point where the order cannot be made upon the owner or upon anyone else, then the local authority have no power to do the work themselves, and consequently the work cannot be attended to at all. That construction of the Act is too unreasonable to be adopted. It was argued that in the case of *The Mayor of Scarborough* v. *The Rural Sanitary Authority of Scarborough* (34 L. T. Rep. N. S. 768; L. Rep. 1 Ex. Div. 344) it was held that the local authority could not order a person to abate a nuisance on the land of someone else, because that would be to order him to commit a trespass. But the report of that case is short, and it probably does not, I think, state all the facts, and all that the judges said. When the Act authorises the local authority to take certain specific steps, it naturally intended that in such circumstances no objection would be made; and it is provided that if objections are made, then the local authority have power to enter and do the necessary work themselves. I confess I cannot understand the case of *The Mayor of Scarborough* v. *The Rural Sanitary Authority of Scarborough*, and I think that it must be misreported. The language of the Act is so clear and intelligible, that I think this case must be remitted to the justices. *Case remitted.*

Solicitors for appellant, *Sharpe, Parkers*, and *Co.*, for *E. O. Smith*, Birmingham.

Solicitor for respondent, *Spencer Whitehead*, for *Milward* and *Co.*, Birmingham.

July 13 *and* 14, 1886.

(Before WILLS and GRANTHAM, JJ.)

REG. on the prosecution of THE NATIONAL LIBERAL LAND COMPANY LIMITED v. THE INHABITANTS OF THE COUNTY OF SOUTHAMPTON.(a)

Bridge—County, liability of, to repair—Acquiescence necessary—Bridge not built in existing highway — Roadway over and approaches — Structural part—County of a town—Statute of Bridges (22 *Hen.* 8, *c.* 5)—*Highway Act* 1835 (5 *& 6 Will.* 4, *c.* 50), *s.* 21.

The prosecutors, who owned land on the east side of a river, made a road across such land to the river, and built a bridge across such river, so as to connect such road with an existing highway on the west side of the river. They then dedicated to the public both the bridge and the road on the day on which the bridge was opened, and the public used such bridge. The middle line of the river formed the boundary between the county of Southampton (commonly called Hampshire) and the county of the town of Southampton. The prosecutors indicted the inhabitants of the county of Southampton for non-repair of the bridge and approaches thereto.

Held, that the county was not liable to repair the bridge, as it was not a bridge "broken in a highway," within the meaning of the Statute of Bridges (22 *Hen.* 8, *c.* 5), *which applied only to bridges built in the line of an existing highway. Moreover, there was no evidence of acquiescence by the county in the building and dedication of the bridge, without which the county could not be liable.*

Held also, that, under sect. 21 *of* 5 *& 6 Will.* 4, *c.* 50, *the county could be liable for the repair only of the structural parts of a bridge built since that Act, and that the roadways leading to and passing over the bridge were repairable by the parish.*

Held also, that a corporate county of a town or city was under the same obligations, and under the same liability to repair bridges within its limits, as a county in the ordinary sense of the term.

THESE were cross motions to make absolute rules *nisi* which had been obtained by the prosecutors and the defendants respectively, to set aside the verdicts obtained upon certain counts of the indictment, and for a new trial.

The case was tried before Stephen, J., and a Special Jury, at the Bristol Assizes, on the 10th Feb. 1886. The indictment was preferred against the inhabitants of the county of Southampton (commonly called Hampshire) for the non-repair of the Cobden Bridge, which crosses the river Itchen, and the approaches thereto. The first count of the indictment charged the defendants with non-repair in respect of the whole of the bridge and the approaches thereto, which were alleged to be ruinous, broken, dangerous, and in great decay for want of upholding, maintaining, amending, and repairing the same. The second count charged the defendants with not repairing the approaches on both sides of the bridge. The third count charged the defendants with not repairing the eastern half of the bridge, and the eastern approach; and the fourth count charged the defendants with not repairing the eastern approach. The third count further alleged that the bridge was not within any city, but that it was within the county of Southampton. The facts which appeared at the trial before Stephen, J., were as follows: On the 13th July 1882 the National Liberal Land Company (the prosecutors in this case), which possessed certain lands on the county or eastern side of the river Itchen, which they had laid out as a building estate, wishing to connect their estate with the town of Southampton, bought of the Crown a piece of the foreshore of the river Itchen, on which to place the piles and supports of a bridge proposed to be constructed by them across the river. The conveyance by the Board of Trade, on behalf of the Crown, contained a reservation of full and free right for the Crown, and for all persons by the Crown's permission (which permission was to be assumed to have been granted unless the contrary were shown), to ride, drive, walk, or otherwise pass to and fro over, and to fish and bathe upon the premises thereby granted, and all right of way, and access to and over the premises then existing, by means of any public road, footpath, or bridge. There was also reserved to the Crown and the Board of Trade full right to enter on the premises and remove therefrom all buildings, works, or erections which might have become dilapidated or abandoned, or which might have been constructed without consent or approval, or which might, in the opinion of the Board of Trade be injurious to navigation or the public interest, and to restore the site to the former or proper condition thereof. There was also a proviso that, if the Crown wished it, it might repurchase the

(a) Reported by F. A. CRAILSHEIM, Esq., Barrister-at-Law.

foreshore. The bridge was opened on the 27th June, 1883. Up to the date of the opening of the bridge, no public road on the eastern (or county) side of the river Itchen had led to the place where the bridge now stood, but upon the day upon which the bridge was opened, a road, called the Cobden Avenue, which had been made by the prosecutors, leading from the other end of their property to the bridge, was also opened. On the western (or town) side, the bridge was approached by a previously existing highway, leading from the town of Southampton to the river. Upon the day upon which the bridge was opened, both the bridge and the new Cobden Avenue were dedicated to the public by the National Liberal Land Company, but the roadway did not become a highway repairable by the inhabitants at large until the 14th May 1885, when it was taken over under the 36th section of the Highway Act, 1835 (5 & 6 Will. 4, c. 50), and thus it was dedicated to the public at large. That was after the present indictment had been preferred. By a charter of 25 Hen. 6 the town of Southampton was created a county corporate. Previous to that it had formed part of the county of Hampshire. Thus the western half of the bridge was situated in the county of the town of Southampton, the middle line of the river being the boundary, and the eastern half in the county of Hampshire. It was held by Stephen, J. at the trial, that the county was not responsible for the repair of the part of the bridge which was within the limits of the county of the town, and he therefore directed the jury to find a verdict of not guilty on such counts of the indictment as related to the western half of the bridge, and the western approach thereto. He also directed a verdict of not guilty on the fourth count, which charged the county in respect of the non-repair of the eastern approach to the bridge, on the ground that the only want of repair proved was to the surface of the roadway, and that sect. 21 of the Highway Act 1835 (5 & 6 Will. 4, c. 50) imposed the responsibility for want of repair to the roadway passing over and leading to bridges built since that Act upon the parish, and not upon the county. On the third count of the indictment, which charged the county in respect of the non-repair of the structure of the eastern half of the bridge, the learned Judge left it to the jury to say whether there had been a dedication of the bridge to the public as a free bridge, with the assent and acquiescence of the Crown, and directed them, if they found in the affirmative, to give a verdict of guilty upon that count. The jury found a verdict of guilty, and the learned Judge then directed a verdict of guilty to be entered on the third count, and a verdict of not guilty on the first, second, and fourth counts of the indictment.

A rule *nisi* was obtained by the defendants, to set aside the verdict obtained for the Crown on the third count of the indictment, and for a new trial, on the ground (*inter alia*) that the learned judge ought to have directed a verdict of not guilty on the third count, because—(*a*) There was no evidence that the Crown dedicated or intended to allow the prosecutors to dedicate the bridge in question to the public in perpetuity; (*b*) The conveyance of the 18th July 1882, by the Board of Trade to the prosecutors, conclusively showed that no dedication in perpetuity of the bridge in question was intended to be made by the Crown, or could be made by the prosecutors; (*c*) There was no evidence that the bridge in question was a bridge "broken in a highway," within the meaning of the Statue of Bridges (22 Hen. 8, c. 5).

A cross rule *nisi* was also obtained by the prosecutors to set aside the verdict of acquittal on the rest of the indictment, and for a new trial on the grounds (*inter alia*), that the learned judge misdirected and non-directed the jury by not leaving to them the question, whether as a fact the county of the town of Southampton was a bridge repairing county or town, and that he misdirected them on the construction of sect. 21 of the Highway Act 1835 (5 & 6 Will. 4, c. 50).

Bucknill, Q.C. and *A. Glen* (*Pitt Lewis*, Q.C. with them), for the Crown.—It is submitted that the bridge in question, and the approaches thereto, ought to be repaired by the county. The Crown, by granting the conveyance of the foreshore on which the bridge was to be built, expressly sanctioned the dedication. The land was dedicated by the Crown for public use, and therefore the Crown is bound by the dedication made by the prosecutors. If the Crown were to re-enter in accordance with their rights under the conveyance, they would take back their property subject to the rights of the public to have a road across the river. The test whether a bridge is repairable by the county is user by the public. It was proved at the trial that this bridge was extensively used by the public:

Rex v. *Inhabitants of County of Glamorgan*, 2 East, 356, note;
Rex v. *West Riding of Yorkshire*, 2 East. 353, note.

The county does not escape liability under sect. 5 of 43 Geo. 3, c. 59, because the bridge was erected to the satisfaction of the county surveyor. Notice was duly sent to the county surveyor in pursuance of that section. By sect. 21 of the Highway Act 1835 (5 & 6 Will. 4, c. 50), it is enacted that, "If any bridge shall hereafter be built, which bridge shall be liable by law to be repaired by and at the expense of any county, then and in such case all highways leading to, passing over, and next adjoining to such bridge, shall be from time to time repaired by the parish, person, or body politic or corporate, or trustee of a turnpike road, who were by law, before the erection of the said bridge, bound to repair the said highways. Provided, nevertheless, that nothing hereinafter contained shall extend, or be construed to extend, to exonerate or discharge any county or any part of any county, from repairing or keeping in repair the walls, banks, or fences of the raised causeways and raised approaches to any such bridge, or the land arches thereof." Under this section the county are clearly bound to execute all structural repairs to the bridge, and it is submitted that the repair of the highways leading to and passing over the bridge is not thrown upon the parish or local authority, because this section can only apply to cases where a bridge has been built at a place where there was a previous liability to keep the highway in repair. Here there was no highway till the bridge was built, and, therefore, it is not open to the defendants to take advantage of this section. The preamble to the Statute of Bridges (22 Hen. 8, c. 5), enacts

that the justices of peace in every shire of this realm, franchise, city, or borough . . . shall have power to inquire, hear, and determine . . . all manner of annoyances of bridges broken in the highways . . .." By sect. 3. "In every such case the said bridges, if they be without city or town corporate, shall be made by the inhabitants of the shire or riding within which the said bridge decayed shall happen to be, and if it be within any city or town corporate, then by the inhabitants of every such city or town corporate where such bridge shall happen to be . . ." To come within the terms of this Act, it is only necessary that the bridge should be on a highway. It is submitted that it is not necessary that, to make the county liable, it should be a bridge joining two pre-existing highways, nor need there be any act of acquiescence by the county in the building of the bridge:

Rex v. *Inhabitants of West Riding of Yorkshire*, 2 East, 342.

In his judgment in this case Lord Ellenborough, C.J. says: "By the common law counties are chargeable with the repair of bridges." . . . . "I only rely on the using of the bridge by the public so far as to show that it does not appear to have been treated as a nuisance, but to have been acquiesced in by the public. But if the public lie by without objection, and make use of it for some time, it is evidence that they adopt the Act; and the bridge, becoming a public benefit, the burden of repair ought properly to fall upon the public:"

Rex v. *Inhabitants of County of Glamorgan*, 2 East, 356, note;
Rex v. *Inhabitants of County of Bucks*, 12 East, 192.

They also cited

Rex v. *Inhabitants of Ecclesfield*, 1 B. & A. 358;
Reg. v. *Inhabitants of Dorset*, 45 L. T. Rep. N. S. 308;
Rex v. *Sir H. Spiller*, Sty. 108;
Rex v. *Norwich*, 1 Str. 177;
Reg. v. *New Sarum*, 7 Q. B. 941.

Charles, Q.C. (*J. V. Austin* and *Sclater-Booth* with him) for the defendants.—The real intention of sect. 21 of the Highway Act 1835 (5 & 6 Will. 4, c. 50), although its language may at first present a difficulty, is to transfer the burden of repairing the roadway to the highway authority, *i.e.*, the parish, whether the roadway passes over the bridge or lead to or from it. This is not a bridge "broken in a highway" within the meaning of the Statute of Bridges (22 Hen. 8, c. 5). In order to bring a bridge within the statute, and make the county liable, it must have been built in an existing highway. In *Rex* v. *Inhabitants of St. Benedict* (4 B. & Al. 447) it was held that user by the public was not sufficient evidence of dedication to the public; and that in order to make a parish liable to repair a road, there must be evidence that the parish had acquiesced in the dedication. In his judgment Bayley, J. says: "In the case of bridges there is always what is to be considered as an acquiescence by the county. The county is not liable except for bridges made in highways: the making of the bridge, and thereby obstructing the road while the bridge is making, may be treated as a nuisance, and the county may, if it think fit, stop its progress by indictment, and the forbearing to prosecute in that way is an acquiescence by the county in the building of the bridge." But in this case it would have been impossible for the county to have preferred an indictment or to have taken any steps at all to prevent the building of the bridge, because at the time the bridge was being built it was not in a highway at all. If they wanted to throw the repair on the county, the prosecutors ought to have dedicated the highway on the eastern side of the river to the public at large before they made the bridge. The following cases were cited or referred to:

Rex v. *Inhabitants of County of Bucks*, 12 East, 192;
Rex v. *Inhabitants of West Riding of Yorkshire*, 5 Burr. 2594;
Rex v. *Inhabitants of West Riding of Yorkshire*, 2 East, 342;
Reg. v. *Inhabitants of the Isle of Ely*, 15 Q. B. 827;
Reg. v. *Pearce*, 5 Q. B. Div. 386.

Glen in reply.

Wills, J.—In this case the Crown has indicted the inhabitants of the county of Southampton (commonly called Hampshire) for the non-repair of a bridge over the river Itchen. The circumstances under which the indictment was preferred were these: In ancient times the county of Southampton extended to the west as well as to the east of the Itchen, and included that which since a charter of Henry VI. has been the corporate county of the town of Southampton. The bridge in question crosses the river Itchen, and one half of it is within the limits of the present county of Southampton (*i.e.*, Hampshire), and the other half of it is within the limits of the County Corporate of Southampton. The indictment, which was preferred at the instance of the National Liberal Land Company Limited, contained four counts. The second and the fourth related to the non-repair of the approaches to the bridge, but upon them no question arises at present. The first count charged the inhabitants of the county with being liable to repair the whole of the bridge; the third charged them in respect of the eastern half of the bridge. Now, a verdict of guilty was found by the jury upon the third count only, and it is upon this that the defendants have obtained a rule *nisi* to set aside the verdict and for a new trial. Inasmuch as this question on the third count is the most serious and important, I propose to deal with it before considering the other points which have been argued before us. It is contended by the Crown that there is a liability upon the county to repair the bridge, or, at any rate, that portion of it which is within the county as indicated, and upon the two following grounds: (1) They contend that the common law liability is upon the county to repair the bridge under the circumstances of its construction and dedication; and (2) that even if that is not established there is a liability on the county to repair it under the provisions of the Statute of Bridges (22 Hen. 8, c. 5). Though these two propositions are closely connected, I do not think that they are identical; but, if the common law liability is shown, it will help very materially to the construction of the statute. We must therefore first of all consider what is the common law liability of the county to repair bridges. It appears that the condition of public utility must be unquestionably satisfied. That that is satisfied in the case now before us there is no question, but Mr. Charles, on behalf of the defendants, has urged upon us that there is a further condition necessary, namely, that the bridge must be found to be beneficial to the public as well as used by them,

and, further, that it is also necessary that the county should have acquiesced in the building of the bridge, and in its dedication to the public. On the other side, the contention is that mere use by the public is sufficient to cast the burden of repair upon the county. Undoubtedly, if the liability of the county in this case were exactly analogous to that of the parish to repair highways before the passing of the Highways Act 1835, then proof of mere user by the public would have been sufficient to cast the burden on the county. But the numerous authorities which have been elaborately discussed and commented on seem all to lay down as an essential condition of the common law liability that there should have been acquiescence on the part of the county. That this was the view of Lord Ellenborough, C.J. and of Bayley, J. is absolutely clear from the cases of *Rex* v. *Inhabitants of St. Benedict* (4 B. & Al. 447) and *Rex* v. *Inhabitants of the County of Bucks* (12 East, 192). But what is still mor significant to my mind than these express declarations, is the manner in which Lord Ellenborough refers to certain evidence as material as to whether the statute of Hen. 8 applied or not. The expressions used by him act unintelligibly unless his opinion was that acquiescence by the public was necessary to establish their liability at common law to repair. He uses such expressions as "the public lying by," and "making no objection," in more than one passage when on the subject of a bridge about to be erected in a highway. The public could not lie by unless they had the power of objecting, and they could not object unless the construction of the bridge amounted to a nuisance. The building of a bridge, moreover, could not be a nuisance unless it was in a line with an existing highway. Lord Ellenborough evidently considered that the statute of Hen. 8 only applied to the case of a bridge constructed in the line of an existing highway. When he speaks of a bridge under such circumstances he treats it as necessary to the acquiescence of the public that the bridge should be between two parts of an existing highway, because he refers to ferries being interrupted by the construction of such bridges, and that could not take place without the acquiescence of the public. If there was no acquiescence on the part of the public, then there was a state of things rendering the persons who were building the bridge liable to an indictment. I am, therefore, very clearly of opinion that at common law the burden of the repair of a bridge could not be cast upon the county, unless the public had acquiesced in the construction. Bayley, J. refers to this as "undoubted law." It is true that the case of *Rex* v. *Inhabitants of St. Benedict* (4 B. & Al. 447) was decided with reference to a parish, but the dictum of the learned judge in that case is only one of a long series of like expressions made use of by eminent judges at a time when the principles of common law were more closely studied than now, when statutory obligations are more generally in question. Moreover, it appears, after careful inquiry by counsel on both sides and by ourselves, that there is no reported instance of a successful indictment of a county for the non-repair of a bridge constructed by a private individual, unless such bridge stood in the line of a public highway as used before the bridge was built, the bridge in such a case being substituted for a public ferry or ford. Counsel appearing on behalf of the Crown were invited to produce such a case, but failed. In every case in which a county has been held liable to repair a bridge constructed by a private individual, such bridge was built in substitution for a ford in a line with a public highway or between highways. It is of great importance to maintain this protection to counties, for the reason that the statute 43 Geo. 3, c. 59, which limits the liability of the county to repair to cases in which the county surveyor was satisfied with the construction of the bridge (as he was in this case), contains no provisions as to the power of the county to reject the bridge or as to its adoption by a vestry or other similar body. The Highway Act 1835 (5 & 6 Will. 4, c. 50) affords no analogy to a case like this, because that statute deals with highways in the acceptance of which the parish has a voice, and as to the adoption of which the vestry has the power of determining. Here the county has no choice in the matter. The statute which affords the existing protection to counties, so far as regards the structure of bridges, is 43 Geo. 3, c. 59, s. 5, but in it there is no mention of acquiescence, and I cannot help thinking that such protection would have been unnecessary, because the burden of repairing could not, by common law, have been thrown on the county unless there had been acquiescence by the county, in addition to the condition of public utility being satisfied. I do not think that the mere fact that the public use a bridge to any extent is necessarily any evidence of assent by the county, because there can be no assent unless there exists some legal power of expressing opposition. Where a man builds a bridge on his own land and then dedicates it to the public, the county has no means of objecting or of expressing its dissatisfaction. Acquiescence by the county must be proved by some other evidence than that there was mere user by the public. Now I come to the Statute of Bridges (22 Hen. 8, c. 5), which, although it is in archaic language, is none the less expressive. The preamble describes the annoyance caused by bridges broken in highways, and then describes the remedy. "Broken" means out of repair, and applies to bridges in highways. It is perfectly clear from the language used by Lord Ellenborough, C.J. and by other eminent judges in the cases which I have already referred to, that they considered this statute applicable only to bridges built in the line of an ancient highway. It would be difficult to press within that limit a bridge built as the one now in question, for the purpose of establishing communication with a highway on one side of the river, and dedicated to the public concurrently with a new road on the other side. If everything that has been done here was done by the National Liberal Land Company on their own land and within their own land, to throw the liability of repairing the bridge on the county would be to deprive them of the protection to which they are entitled by the common law, and the language of the statute of Hen. 8 makes this clear. That statute refers to bridges built in an existing highway, and not to bridges to be constructed at any time hereafter in other places than these. I think that light is also thrown on the meaning of the statute of Hen. 8 by sect. 21 of the Highway Act 1835 (5 & 6. Will. 4, c 50). That section says that "If any bridge shall here-

after be built, which bridge shall be liable by law to be repaired by and at the expense of any county, or part of any county, then and in such case all highways leading to, passing over, or next adjoining to such bridge shall be from time to time repaired by the parish, person, or body politic or corporate, or trustee of a turnpike road, who were by law before the erection of the said bridge bound to repair the said highways: provided, nevertheless, that nothing hereinafter contained shall extend, or be construed to extend, to exonerate or discharge any county, or any part of any county, from repairing or keeping in repair the walls, banks, or fences of the raised causeways and raised approaches to any such bridge, or the land arches thereof." That section in itself may perhaps not be quite intelligible, because the language in the two parts does not fit. In its most literal sense it would seem to mean that in the case of all bridges hereafter to be built, certain provisions are to apply, but which cannot apply in the case of a bridge to be thereafter built and connected with a new highway, because the liability to repair the highways and the approaches to the bridge is confined to those who were already "before the erection of the said bridge bound to repair the said highways." Inasmuch as a bridge and a highway may be constructed together, as was done here, in such a case it would be impossible to say that any person was bound to repair the roadways. Some difficulty may arise on either interpretation of this section; but I think the way in which it is framed arises from the fact that the framer was familiar with the statute of Hen. 8, which refers to bridges built in the line of existing highways. I think that is the origin of the curious language found in this section; and, upon consideration of all these points, I think that the defendants are right in their contention of non-liability in this case; and I am satisfied from the authorities that the statute of bridges is merely declaratory of the common law. I am, therefore, of opinion that the rule *nisi* obtained by the defendants must be made absolute. It is not necessary to discuss the other points which we have heard argued by Mr. Charles. But the cross rule obtained by the prosecutors has also been argued at great length. The prosecutors complain that the learned judge at the trial misdirected the jury upon the construction he put upon the charter of Henry VI., and by not leaving to the jury whether as a fact the county of the town of Southampton was a bridge-repairing county or town, and also that he misdirected them on the construction of sect. 21 of the Highway Act 1835 (5 & 6 Will. 4, c. 50). Now, as I understand the construction which the learned judge put upon the charter of Henry VI., which constituted the town of Southampton a county, it is a county with all the ordinary incidents of a county. One of these incidents is the repair by the county of its own bridges. That seems both by common law and by statute to be one of the ordinary liabilities incurred by counties. The consequence is that the county of Southampton proper, and the county of the town of Southampton on the other side of the river, are each liable to repair their own half. I cannot see on what principle it can be argued that, in constituting the town a county, the charter of Henry VI. did not constitute it a county like any other county with all a county's ordinary obligations. Certainly in the case of *Rex* v. *Norwich* (1 Str. 177) the contrary was laid down. There the question was whether a bridge which, at the time of the making of the statute 22 Hen. 8, c. 5, was within the county of Norfolk, but which was, at the time of the action, within the county of the city of Norwich (the county of the city having since the passing of the statute been enlarged so as to take in the said bridge), was repairable by the county of Norfolk or by the county of the city of Norwich, and the county of the city was held liable. Thus in that case it was evidently considered that a county of a town or city was equally liable with a county proper, and under the same obligations as any other county. Then it is said that the jury were misdirected upon the construction of sect. 21 of the Highway Act 1835 (5 & 6 Will. 4, c. 50). It is necessary that I should express an opinion on the subject. It is argued on behalf of the Crown that the effect of that section is to throw the expense of repairing the approaches to this bridge, as well as that of repairing the bridge itself, upon the inhabitants of the county. That, however, does not appear to me to be the true construction of the section. What seems to me to be the effect of the section taken as a whole is, that the structural or artificial parts of the bridge, such as the stone or ironwork, are to be repaired by the county, and that includes 200ft. on either side, but that the surface of the approaches, and highways, and the road on the bridge are repairable by the authority charged with the repair of highways, that is the parish, if the roads approaching the bridge are repairable by the parish. The road on the bridge, exclusive of the stonework, is to be repaired by the local authority. Upon the authorities it is quite clear that the county is not bound to repair the approaches to the bridge. For these reasons the verdict passed for the county was right, and cannot be disturbed, and the result of this motion will therefore be that the rule *nisi* obtained by the defendants will be made absolute, and the cross rule *nisi* obtained by the Crown will be discharged.

GRANTHAM, J.—I am of the same opinion. This is a case of considerable importance, and all the authorities on the subject have been fully and exhaustively gone into. The case resolves itself into three parts. The first question is, whether a large part of the county of Hampshire having been severed by the charter of Henry VI., and constituted a county corporate, the county corporate so formed is entitled to have the bridges within its limits repaired at the expense of the original county. On that point I will only say that I entirely agree with what has been said by my brother Wills, and that the mere fact of the word "shire" having been used in the statute of 22 Hen. 8, whereas the word "county" is used elsewhere, is perfectly immaterial. The next question that arises is whether or not the effect of sect. 21 of 5 & 6 Will. 4, c. 50, is to limit the liability of counties to the repair of the structure of the bridge, and to leave the liability of repairing the road over the bridge upon the local authority. I have no doubt in my mind that such was the intention of the Legislature, and I entirely concur also with what has been said on this point by my learned brother. At the time when the statute of Hen. 8 was passed there probably was not the same opportunity of getting

roads repaired as there exists now, and it was likely that builders of bridges would content themselves with building the bridge, but would not pay so much attention to the approaches to it. It is clear upon the authorities that the framers of the statute of Hen. 8 intended so to limit the liability of the county, and their object was that bridges should not be left useless simply because those who had built them did not maintain them. Therefore, as to the General Highway Act of 5 & 6 Will. 4, c. 50, I cannot see that there is any doubt but that the object of sect. 21 was to throw the cost of repair of the surface of the roads on the parish, and the expense of repairing the structural parts of the bridge merely on the county. With regard to the third and last point, as to the meaning of the words "broken in a highway" in the statute 22 Hen. 8, c. 5, on the whole I am of opinion that the construction put upon them by Mr. Charles is right, and that they refer to bridges broken or out of repair in the line of highways which existed at the time the bridge was built. When we come to examine the authorities, and to look at the arguments upon which the decisions were given, then it is clear that, to throw the liability on the county, it is not sufficient to show user by the public and dedication by the builder only, because in all those cases it appears that the bridges in question were bridges which had been built in existing highways. This bridge was built by private speculators in 1883, and it would be hard if in three years from that time an expense, which might be that of rebuilding the bridge, were to be thrown upon the county. Consequently the defendants' rule must be made absolute, and the prosecutors' rule discharged.

Rules absolute and discharged accordingly.

Solicitor for the prosecutors, *F. A. A. Rowland.*

Solicitor for the defendants, *H. Sowton*, for *T. B. Woodham*, Winchester.

July 27 *and* 28, 1886.

(Before DENMAN, J.)

OSBORNE *v.* MILMAN. (*a*)

*Prison—Criminal prisoner—Committal to prison of unqualified person acting as solicitor—Misdemeanant of the first division—*6 *&* 7 *Vict. c.* 73, *ss.* 2, 32; 23 *&* 24 *Vict. c.* 127, *s.* 26; 28 *&* 29 *Vict. c.* 126, *ss.* 4, 67; 40 *&* 41 *Vict. c.* 21 *Vict. c.* 21, *s.* 41.

A person who is committed to prison under 6 *&* 7 *Vict. c.* 73, *s.* 32, *and* 23 *&* 24 *Vict. c.* 127, *s.* 26, *for acting as a solicitor while being unqualified, is not a criminal prisoner or a person convicted of crime within* 28 *&* 29 *Vict. c.* 124, *s.* 4, *so as to be subjected to the treatment resulting from being placed on the criminal side of the prison.*

Such person is committed to prison under a rule or order of the High Court of Justice within the meaning of 40 *&* 41 *Vict. c.* 21, *s.* 41, *which provides that a person so imprisoned shall be treated as a misdemeanant of the first division within the meaning of* 28 *&* 29 *Vict. c.* 126, *s.* 67.

THIS was an action tried before Denman, J., without a jury, in which the plaintiff claimed damages for false imprisonment and trespass. The amount of damages was agreed at 50*l.*, if the plaintiff should be held entitled to judgment.

The facts and arguments appear sufficiently in the judgment of the learned judge.

By 6 & 7 Vict. c. 73, s. 2:

No person shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit, or defend any action, suit, or other proceeding in the name of any other person or in his own name in Her Majesty's High Court of Chancery or Courts of Queen's Bench, &c. . . . . or act as an attorney or solicitor in any cause, matter, or suit, civil or criminal, to be heard, tried, or determined before any justice of assize, oyer and terminer, or gaol delivery. . . . . unless such person shall have been, after the passing of this Act, admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor, pursuant to the directions and regulations of this Act, and unless such person shall continue to be so duly qualified and on the roll at the time of his acting in the capacity of an attorney or solicitor as aforesaid.

By sect. 32:

If any attorney or solicitor shall wilfully and knowingly act as agent in any action or suit in any court . . . . for any person not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be anyways made use of in any such action, suit, or matter upon the account or for the profit of any unqualified person, or send any process to such unqualified person, or do any other act thereby to enable such unqualified person to appear, act, or practise in any respect as an attorney or solicitor . . . . knowing such person not to be duly qualified as aforesaid, and complaint shall be made thereof in a summary way to any of the Superior Courts wherein such attorney or solicitor has been admitted, and proof made thereof upon oath to the satisfaction of the court that such attorney or solicitor hath wilfully and knowingly offended therein as aforesaid, then and in such case every such attorney or solicitor so offending shall and may be struck off the roll, and for ever after disabled from practising as an attorney or solicitor; and in that case, and upon such complaint and proof made as aforesaid, it shall and may be lawful to and for the said court to commit such unqualified person so acting or practising as aforesaid to the prison of the said court, without bail or mainprise, for any term not exceeding one year.

By 23 & 24 Vict. c. 127, s. 26:

Every person who acts as an attorney or solicitor contrary to the enactment in section two of the first hereinbefore mentioned Act . . . without being qualified so to act, shall be deemed guilty of a contempt of the court in which the action . . . . in relation to which he so acts is brought . . . . and may be punished accordingly.

By 28 & 29 Vict. c. 126, s. 4:

"Criminal prisoner" shall mean any prisoner charged with or convicted of a crime.

By sect. 67:

In every prison to which this Act applies, prisoners convicted of misdemeanour and not sentenced to hard labour shall be divided into at least two divisions, one of which shall be called the first division; and whenever any person convicted of misdemeanour is sentenced to imprisonment without hard labour it shall be lawful for the court or judge before whom such person has been tried to order, if such court or judge think fit, that such person shall be treated as a misdemeanant of the first division, and a misdemeanant of the first division shall not be deemed to be a criminal prisoner within the meaning of this Act.

By 40 & 41 Vict. c. 21, s. 41:

Any person who shall be imprisoned under any rule, order, or attachment for contempt of any court shall be in like manner treated as a misdemeanant of the first division within the meaning of the said section of the said Act.

By rule 24 of the Prison Rules 1878:

The foregoing rules relating to misdemeanants of the

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

first division shall (to the exclusion of any other rules applicable exclusively to any particular class of prisoners) apply also to (*a*) any prisoner committed under any rule, order, or attachment for contempt of court.

Wildey Wright and *H. C. Richards* appeared for the plaintiff, and cited, in addition to the above statutes, the case of *Reg.* v. *Buchanan* (8 Q. B. 883).

Sir *Charles Russell* (A.-G.) and *R. S. Wright* appeared for the defendant, and cited the following authorities:

Re Hardwick (a Solicitor), 49 L. T. Rep. N. S. 584; 12 Q. B. Div. 148;
Tomlin's Law Dictionary, s. v. Convict;
Wharton's Law Lexicon, s. v. Crime and Conviction;
4 Bl. Comm. 5;
Stephen's Summary of Criminal Law, p. 1;
Stephen's Digest of Criminal Law, p. 8;
Stephen's History of Criminal Law, p. 1.

Wildey Wright in reply.

July 28.—DENMAN, J.—The question for decision in this case is, whether the defendant, the governor of Holloway Prison, was justified in treating the plaintiff as a "criminal prisoner," or (to use the definition of sect. 4 of the Prisons Act 1865, 28 & 29 Vict. c. 126) a prisoner "convicted of a crime." It was agreed that, if he was not, judgment should be given for the plaintiff for 50*l.* damages and costs; otherwise judgment for the defendant with costs. The prisoner was committed to Holloway Prison under a warrant issued in pursuance of an order of the Queen's Bench Division of the High Court of Justice, dated the 28th Nov. 1883, by which, after reciting a hearing upon certain affidavits and upon a notice of motion, that certain persons might be punished under the 6 & 7 Vict. c. 73, and 23 & 24 Vict. c. 126 (they, for having, then being certificated solicitors, allowed the plaintiff to practise in their names, and the plaintiff for having so practised, being an unqualified person), it was ordered that they should be struck of the rolls, and that the plaintiff be committed to the custody of the governor of Her Majesty's Prison, Holloway, for six months, pursuant to the statutes in that case made and provided. The plaintiff having been arrested in pursuance of this order, was taken to Holloway Goal, and, on his arrival, protested against being placed on the criminal side, and subject to certain treatment to which he would not have been subjected if treated as a prisoner merely. The governor, the defendant, considering the point, came to the conclusion that he ought to be placed on that side and treated as a convicted criminal prisoner not sentenced to hard labour for the period mentioned in the order of the court. By sect. 2 of 6 & 7 Vict. c. 73, it was enacted that no person should act as an attorney or solicitor without being duly qualified; and by sect. 32 of the same Act it was enacted that, if any attorney or solicitor should knowingly act as agent for any unqualified person, he might be struck off the rolls; and then followed the provision—and in that case, and upon complaint in a summary way and proof on oath, it shall be lawful to and for the said court to commit such unqualified person to the prison of the said court without bail or mainprise, for any term not exceeding one year. The plaintiff was undoubtedly committed under the powers of these two sections, and it is equally free from doubt, unless the case of *Reg.* v. *Buchanan* (8 Q. B. 883) was wrongly decided, which I cannot assume, that if the case had arisen immediately after the passing of that Act he would have been liable to have been indicted for a misdemeanour, notwithstanding the summary proceedings authorised by sect. 32, and notwithstanding that by sects. 35 and 36 of that Act there were special provisions that a person so acting should be incapable of recovering his fees, and that his offence should be deemed a contempt of court, and be punished accordingly. The last-named sections were repealed by the Statute Law Revision Act of 1874, but apparently only for the reason that in the meantime had been passed the Solicitors Act 1860 (23 & 24 Vict. c. 127), which, by sect. 26, provides to the same effect. The question is whether, under these enactments and the enactments and rules relating to prisons, the plaintiff became a "convicted criminal prisoner" by reason of the committal above described. I am of opinion, notwithstanding the powerful argument of the Attorney-General to the contrary, that he did not. I do not say that, if instead of proceeding summarily under the Act, the parties complaining of the plaintiff's conduct had indicted him for a misdemeanour, as in *Reg.* v. *Buchanan* (8 Q. B. Div. 883), and he had been convicted of a misdemeanour, he would have been liable to be dealt with as he has; but, where no indictment is preferred, nor any proceeding which, by statute, is made to authorise a "conviction" in the ordinary sense of the word as applied to felonies or misdemeanours, whether punishable by indictment or by magistrates under some statute, I do not think that any person imprisoned by any court can be held to be a convicted "criminal prisoner" within the meaning of sect. 4 of the Prisons Act 1865 (28 & 29 Vict. c. 126). Several definitions of the word "crime" were referred to by the Attorney-General in the course of the argument, one by Stephen, J. in his History of Criminal Law, which, read by itself, would go further than I am prepared to indorse; but I do not understand that learned judge to be there intending to say anything contrary to what he says at the beginning of chap. 2, art. 15, of his Digest of the Criminal Law, under the heading of "Classification of Crimes:" "Every crime is, either treason, felony, or misdemeanour;" and it is in this sense that I think the word is used in sect. 4 of the 28 & 29 Vict. c. 126, and I cannot hold that there has been a conviction of the plaintiff of any such offence, though it is possible that the facts of the case might have warranted such a conviction. Then, inasmuch as the plaintiff was not, in my opinion, a criminal prisoner within the meaning of the Act, it follows from the admission made at the trial that the plaintiff is entitled to judgment. There is another ground on which I think he is so entitled. Sect. 67 of the Act of 1865 contains a provision for the classification of misdemeanants not sentenced to hard labour into two classes, according to the order of the judge who tries them, and empowers the judge to order such persons to be treated as misdemeanants of the first division, and a misdemeanant of the first division shall not be deemed a criminal prisoner within the meaning of this Act. The subsequent Act (40 & 41 Vict. c. 21, s. 41) provides that any person who shall be imprisoned under any rule, order, or attachment for contempt of any court, shall be in like

manner treated as a misdemeanant of the first division within the meaning of the said sect. 67 of the Act of 1865. It may be doubtful whether the plaintiff was, strictly speaking, imprisoned for contempt of court, because the order under which he was imprisoned does not so describe the cause of his committal. But if not, it appears to me that, at any rate, he was imprisoned under a rule or order of the High Court of Justice, and that this is sufficient to bring him within sect. 41 of the later Act. I do not read these words so as to restrict the rules or orders referred to necessarily to cases of contempt of court, still less to "attachments" for contempt of court. But, if it were necessary, I see no difficulty in holding that this was an imprisonment under a rule or order for contempt of court, inasmuch as the 26th section of 23 & 24 Vict. c. 127, enacts that any person who acts as the plaintiff acted "shall be deemed guilty of a contempt of court, and may be punished accordingly," *i.e.*, as for a contempt of court. But, whatever be the exact construction of the later Prisons Act, I do not think that the committal of the prisoner under the order of the Queen's Bench Division made him a criminal prisoner within the definition of the Prisons Act 1865 (28 & 29 Vict. c. 126), and I therefore give judgment for the plaintiff for 50*l.* and costs.

Judgment for plaintiff.

Solicitor for the plaintiff, *J. P. Godfrey.*

Solicitors for the defendant, *Hare* and *Co.*, agents for *Solicitor to the Treasury.*

June 8 *and Aug.* 12, 1886.

(Before Lord Coleridge, C.J. and Cave, J.)

Reg. *v.* The Justices of the Central Criminal Court. (*a*)

Criminal law — Practice — Larceny and false pretences — Property sold — Order for restitution of proceeds — 24 & 25 Vict. c. 96, ss. 1 and 100 — Jurisdiction of Criminal Court — Certiorari.

The court before which a conviction takes place within the terms of 24 & 25 Vict. c. 96, s. 100, has jurisdiction to entertain an application for the restitution of the proceeds of the goods as well as of the goods themselves, and the objection that the order made on such application is wrong in point of law cannot be taken on an application for a certiorari to quash the order on the ground of excess of jurisdiction.

If such proceeds are in the hands of the criminal or of an agent who holds them for him, the application should be granted; but if the person holding the proceeds does not hold them for the criminal, the application should not be granted.

This was a rule calling upon the justices of the Central Criminal Court to show cause why an order made by them on the 8th March 1886 should not be brought up to the Queen's Bench Division and quashed on the ground of excess of jurisdiction.

On the 10th Feb. 1886 one Allen Foisard, *alias* Jules Maloche, was indicted at the Central Criminal Court for unlawfully obtaining by false pretences from Francois de Greve eighteen bales of flax with intent to defraud and attempting to obtain 150 bales with a like intent.

It appeared from the evidence then given that Francois de Greve, a flax merchant at Eclos, in Belgium, received a letter signed Maloche, and, in pursuance of the order contained therein, believing it to be an order from a good firm with a warehouse at the Liverpool-street station of the Great Eastern Railway, sent eighteen bales of flax to J. Maloche at that station, and the delivery order to 43, Barbican, the residence of a tobacconist, who by arrangement received letters at that address for the prisoner. The prisoner obtained delivery of the goods on producing the delivery order, and indorsing it with the name "J. Maloche," and signing the same name in a book, and immediately conveyed them by the Great Northern Railway to Hull, where he appeared on the next morning with a Frenchman whom he introduced to a member of one of the principal firms of flax merchants and commission agents there as a flax merchant from Lille. The prisoner, apparently acting as interpreter for the other man, commissioned the agent to sell the flax, whereupon the agent made an advance of 72*l.* by cheque to the man accompanying the prisoner, who indorsed it and cashed it. The agent subsequently sold the flax for about 115*l.*, from which expenses had to be deducted. At the time of the trial the agent held the difference between the advance and the price realised, and no objection was at any time taken to his part in the matter.

The prisoner having been convicted, an application was made to the court on behalf of the prosecutor for the restitution of the proceeds of the sale of the flax by the agent to the prosecutor, and the Court thereupon made an order reciting that on the 8th Feb. 1886 one Allen Foisard, otherwise Jules Maloche, was convicted of unlawfully obtaining on the 16th Dec. 1885 by false pretences from one Francois de Greve eighteen bales of flax, and that it had been made to appear to the court that the said bales were on the 1st Jan. 1886 in the possession of Corrie, Hanson, and Co., flax merchants, of Hull, who in the said month of January sold the same for 108*l.*, and ordering Corrie, Hanson, and Co. to restore and deliver to Greve the said sum of 108*l.*

An application was thereupon made to the Queen's Bench Division on behalf of Corrie, Hanson, and Co. for a rule *nisi* calling upon the justices of the Central Criminal Court to show cause why a writ of *certiorari* should not issue to bring up the order so made to be quashed on the ground of excess of jurisdiction. This rule was granted and now came on for argument.

Abrahams showed cause against the rule:—The order made by the justices was within their jurisdiction to make, and was quite correct. The case comes within the decision of the Court of Appeal and the House of Lords in *Cundy* v. *Lindsay* (34 L. T. Rep. N. S. 314; 36 L. T. Rep. N. S. 345; 38 L. T. Rep. N. S. 573; 1 Q. B. Div. 348; 2 Q. B. Div. 96; 3 App. Cas. 459), where the whole subject of the passing of the property in these cases was discussed. There a person of the name of A. Blenkarn wrote to the plaintiffs, and ordered goods of them signing his name in such a manner as to be mistaken for Blenkiron. There was a respectable firm of that name, and

(*a*) Reported by Joseph Smith, Esq., Barrister-at-Law.

the plaintiffs, believing that they were dealing with that firm, forwarded the goods to Blenkarn. The defendants afterwards purchased the goods from Blenkarn, and it was there held that the property in the goods had never passed from the plaintiffs, and that they were enabled to recover the value of them from the defendants. This case is analogous. There was no place of business at 43, Barbican, and there was no contract, and the property in the goods never passed. [Cave, J. —In that case they believed they were contracting, and intended to contract, with a respectable firm which actually existed. With whom did they intend to contract here?] With a merchant carrying on business at 43, Barbican, who did not exist. As far as the advance by the broker is concerned, the case of *Reg.* v. *Stanoliffe* (11 Cox, 318), is in point. There it was held that the 100th section of 24 & 25 Vict. c. 96 applied to cases of false pretences as well as felony; and the fact that the prisoner parted with the goods to a *bonâ fide* pawnee does not disentitle the original owner to the restitution of goods. Hayes, J. there said: "It would appear from the cases of *Scattergood* v. *Sylvester* (15 Q. B. 506) and *Horwood* v. *Smith* (2 T. R. 750) that even where stolen property was parted with by the thief in market overt the property was revested in the original owner on conviction. In such cases the ownership was transferred quite as effectually by the sale in market overt as could be done by the sale or pawn of goods obtained by false pretences; the cases are therefore quite analogous. The statute revested the property in the goods in the original owner, and he was therefore entitled to his order." [Cave, J.—That case goes too far, and it draws no distinction between sales and pledges. The law is clearly laid down in *Moyce* v. *Newington* (39 L. T. Rep. N. S. 535; 4 Q. B. Div. 32). There W. purchased and obtained delivery of certain sheep from the defendant by false pretences. The plaintiff purchased the sheep from W., and paid W. for them without knowledge of the fraud, the defendant having done nothing in the meantime to avoid the contract between himself and W. The defendant, finding the sheep on the plaintiff's premises, retook possession of them. W. having been convicted of obtaining the sheep by false pretences on the prosecution of the defendant, it was held that the effect of 24 & 25 Vict. c. 96, s. 100, was not to revest the property in the sheep in the defendant as against the plaintiff, who had acquired a good title to them before the conviction, and consequently that the defendant was liable in an action by the plaintiff for the value of the sheep. I do not see any reason why this rule should apply to purchasers only, and not to partial transfers.] The case falls within *Higgons* v. *Burton* (26 L. J. 342, Ex.), where it was decided that when a party has obtained goods by false pretences without any contract of sale to himself, as when he falsely and fraudulently represents that another person has authorised him to purchase the goods, the original owner can recover the goods from a party to whom they have been sold or pledged by the person who fraudulently obtained them before any notice of the fraud or any disaffirmance of the transaction by the real owner. [Cave, J.—Only the possession, and not the property, passed there.] It is contended that the property did not pass here. Further, this is a rule for a writ of *certiorari* on the ground of excess of jurisdiction. There was clearly jurisdiction to make the order. [Cave, J.—Can the court give itself jurisdiction by finding the facts wrongly? Lord Coleridge, C.J.—The two principles have always seemed to me to be mutually destructive: first, that when an order of justices is returned, and the proceedings are regular in practice, and the case is one over which the justices had jurisdiction, the court will not hear affidavits impeaching their decision on the facts, nor if they return the evidence will it review their judgment thereon (*Reg.* v. *Bolton*, 1 Q. B. 66; 4 P. & D. 679); and, secondly, that the justices cannot give themselves jurisdiction by finding the facts wrongly. Here I do not see how we can question the finding of the court.]

Wilberforce in support of the rule.—The order of the justices was bad on the face of it. The decision of the court below in *Lindsay* v. *Cundy* (34 L. T. Rep. N. S. 314; 1 Q. B. Div. 348), that the definition of property in 24 & 25 Vict. c. 96, sect. 1, did not apply to the word "property" in the 100th section, was never questioned by the Court of Appeal or House of Lords, who reversed the court below on other grounds. That being so, it was not in the power of the justices to make this order. [Lord Coleridge, C.J.—If the court had jurisdiction to enter on the inquiry, can we disturb their decision?] If this court cannot review an erroneous decision of the justices the aggrieved party has no remedy.

Abrahams in reply, as to the power of the court to order the restitution of the proceeds of the property, cited

Reg. v. *Corporation of London*, 27 L. J. 231, M. C.;
The New Zealand and Australian Land Company v. *Ruston*, 43 L. T. Rep. N. S. 478; 5 Q. B. Div. 474;
Kaltenbach v. *Lewis*, 58 L. T. Rep. N. S. 787; 10 App. Cas. 617.

Cur. adv. vult.

Aug. 12.—The judgment of the Court (Lord Coleridge, C.J. and Cave, J.) was delivered by

Lord Coleridge, C.J.—In this case Mr. Wilberforce obtained a rule calling on the justices of the Central Criminal Court to show cause why an order of theirs, made on the 8th March last, should not be brought up and quashed for want of jurisdiction. The order in question recited that, on the 8th Feb. 1886, one Allen Foisard, otherwise Jules Maloche, was convicted of unlawfully obtaining, on the 16th Dec. 1885, by false pretences, from one Francois de Greve eighteen bales of flax, and that it had been made to appear to the court that the said bales were, on the 1st Jan. 1886, in the possession of Corrie, Hanson, and Co., flax merchants, Hull, who in the said month of January sold the same for 108*l.*, and ordered Corrie, Hanson, and Co. to restore and deliver to Greve the said sum of 108*l.* This order was made under the 24 & 25 Vict. c. 96, s. 100, which enacts that "if any person guilty of any such felony or misdemeanour as is mentioned in this Act in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattels, money, valuable security, or other property whatsoever, shall be indicted for such offence by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be re-

stored to the owner or his representative; and in every case in this section aforesaid the court before whom any person shall be tried for any such felony or misdemeanour shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner." By sect. 1 of the same Act it is enacted that "the term property shall include every description of real and personal property, money, debts and legacies, and all deeds or instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and shall also include not only such property as shall have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise." The first point taken was, that this definition did not apply to the word "property" in the 100th section, and consequently that the justices had no jurisdiction to order restitution of the proceeds of the flax. In support of this contention the case of *Cundy* v. *Lindsay* (*ubi sup.*) was cited. That case, however, decided nothing as to the jurisdiction of the Central Criminal Court. What it did decide was that, where goods have been obtained by false pretences and sold to an innocent purchaser who has resold them before the conviction of the criminal, the interpretation clause does not so apply to the 100th section as to give the prosecutor a title to the produce of the goods in the hands of an innocent person who has bought and resold the goods before the conviction. There are several cases, such as that of *Harris* (Noy, 128), and that of *Hanberrie* (cited in *Holiday* v. *Hicks*, Cro. Eliz. 661), and *Reg.* v. *Powell* (7 C. & P. 640), which show that under both the 21 Hen. 8, c. 11, and the 7 & 8 Geo. 4, c. 29, s. 57, which are similar in terms to the 24 & 25 Vict. c. 96, s. 100, the courts before which the prisoners have been convicted of larceny have been in the habit of ordering restitution either of the goods stolen, or of their proceeds, according to circumstances. The second objection was, that the order was wrong in point of law; but that is an objection which can only be taken by way of appeal, and not upon an application for a *certiorari* on the ground of excess of jurisdiction. An application for the restitution of property stolen, or obtained by false pretences, is rightly made to the court before which a felon or misdemeanant is convicted; and, if the goods have been sold, an application may be made for the restitution of the proceeds, which, if they are in the hands of the criminal or of an agent who holds them for him, should be granted. If the person holding the proceeds does not hold them for the criminal, the application should not be granted; but the fact that the court may have come to a wrong decision does not establish an excess of jurisdiction. It is a very common mistake to suppose that it does; but, where a court has jurisdiction to entertain an application, it does not lose its jurisdiction by coming to a wrong conclusion, whether it is wrong in point of law or of fact. Before parting with the case, it may be as well to observe that, although the conviction took place on the 8th Feb., the order in question was not made till the 8th March. No objection was taken to the order on this ground; and it is possible that the application may have been made on the 8th Feb. and postponed to the 8th March on the application of Messrs. Corrie, Hanson, and Co. We only desire to guard against this case being cited as an authority for any other position than this, that the court before which a conviction takes place within the terms of 24 & 25 Vict. c. 96, s. 100, has jurisdiction to entertain an application for the restitution of the proceeds of the goods as well as of the goods themselves. Neither must it be supposed that we hold the order which was made in this case to have been rightly made in point of law. The rule must be discharged with costs.

Solicitors for the original owner, *Abrahams, Son, and Co.*

Solicitor for the purchaser, *Oldman.*

Friday, Nov. 6, 1885.

(Before DAY and SMITH, JJ.)

WALLS (app.) *v.* THOMAS (resp.). (*a*)

Coal Mines Regulation Act 1872 (35 *& 36 Vict. c.* 76), *ss.* 25 *and* 51—*General Rules under sect.* 51—*Rule* 8, *sub-sect. f* 2 (*b*)—*Shot firing with gunpowder — Withdrawing men from mine before shot fired—Failing to withdraw them an offence under the Act—"Mine or part of the mine"—Rules to be observed "as far as is reasonably practicable"— Meaning of those words in sect.* 51.

By sub-sect. f 2 (*b*) *of rule* 8 *of the General Rules, which, under sect.* 51 *of the Coal Mines Regulation Act* 1872, *are to be observed "as far as is reasonably practicable" in every mine to which the Act applies, "gunpowder or other inflammable or explosive substance shall only be used in the mine underground when the persons ordinarily employed in the mine are out of the mine, or out of the part of the mine where it is used." By sub-sect. g of the same rule, "where a mine is divided into separate panels, with independent ventilation to each panel, the provisions of this rule respecting gunpowder, &c., shall apply to each such panel in like manner as if it were a separate mine"; and by sect.* 25 *of the Act "part of a mine," worked separately and having independent ventilation, is to be deemed to be "a separate mine."*

A mine was divided into three "districts," with separate ventilation to each, and in one of them shots were fired by exploding gunpowder whilst a number of men were at work in such "district." Upon an information being thereupon laid charging the manager of the mine (the respondent) with an offence under sect. 51, *the magistrate found as a fact that there was no danger to any of the said men, as they were not at the time the shots were fired in the "part of the mine" where the firing took place; and, being of opinion that the respondent was not guilty of an offence under rule* 8, *sub-sect. f* 2 (*b*) *of sect.* 51, *he dismissed the information.*

Held, by Day and Smith, JJ., on appeal: (1.) *That the magistrate's decision was erroneous, as an offence was committed against the statute. The words "out of part of the mine" in sect.* 51, *do not mean out of dangerous proximity to or out of the*

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

neighbourhood of the firing spot, but out of the entire "panel" or "district" or "statutable part," which under sect. 25 is deemed to be a "separate mine."

(2.) *The words "as far as is reasonably practicable" in the same section refer to any physical or mechanical difficulty there may be in observing the rules, and not to any question of more or less profit accruing to the mine-owner from his observing or disregarding them as the case may be.*

THIS was a case stated by the stipendiary magistrate for the district of Pontypridd, in the county of Glamorgan, the material statements in which are as follows:—

At a petty sessions holden at Pontypridd, on the 10th Feb. 1885, six informations were preferred by the appellant against the respondent for offences alleged to have been committed by him, on the 17th Nov. 1884, against the provisions of rule 8, sub-sect. *f*, of the General Rules (sect. 51) of the Coal Mines Regulation Act 1872 (35 & 36 Vict. c. 76), by using gunpowder in a coal mine, or part thereof, within three months after inflammable gas had been found to be issuing so freely in the mine that it showed a blue cap in the flame of a safety lamp, when the persons ordinarily employed in the mine, or that part thereof, remained in the mine or part thereof.

Sect. 51 of the above-mentioned Act enacts that

The following general rules shall be observed as far as is reasonably practicable in every mine to which this Act applies: . . . .

Rule 8. Gunpowder or other explosive or inflammable substance shall only be used in the mine underground as follows: . . .

(*f*) It shall not be taken into, or be in the possession of any person in any mine except in cartridges, and shall not be used, except in accordance with the following regulations, during three months after any inflammable gas has been found in any such mine, namely:

(1) A competent person, who shall be appointed for the purpose, shall, immediately before firing the shot, examine the place where it is to be used, and the places contiguous thereto, and shall not allow the shot to be fired unless he finds it safe to do so, and no shot shall be fired except by or under the direction of a competent person, who shall be appointed for the purpose.

(2) If the said inflammable gas issued so freely that it showed a blue cap on the flame of the safety lamp, it shall only be used (*a*) either in those cases of stone-drifts, stone-work, and sinking of shafts in which the ventilation is so managed that the return air from the place where the powder is used passes into the main return air-course, without passing any place in actual course of working; or (*b*) where the persons ordinarily employed in the mine are out of the mine, or out of the part of the mine where it is used.

(*g*) Where a mine is divided into separate panels in such manner that each panel has an independent intake and return air-way from the main air-course and the main return air-course, the provisions of this rule with respect to gunpowder or other explosive or inflammable substance shall apply to each such panel in like manner as if it were a separate mine.

The following facts were either proved or admitted:

5. The respondent is the certificated manager of the Ynishir coal mine and colliery, situated at Ystradyfodwg, in the county of Glamorgan, within the mines inspection district of South Wales, and was such manager during three months previous to the 17th Nov. 1884; and the appellant is Her Majesty's Inspector of Mines for the said district.

6. The Ynishir Colliery is a coal mine or mines within the meaning of the Coal Mines Regulation Act 1872, and is owned and occupied by the Ynishir Colliery Company.

7. The seams of coal worked are the 2 feet 9 inches and the 4 feet, both steam coals giving off explosive gas in the usual quantities in seams of that sort, which is considerable. The mine is divided into three districts, viz., the "north side," the "south side," and the "Troedyrhiw."

8. The ventilation of the said colliery is effected by means of a downcast shaft, by which air descends into the colliery, and an upcast shaft by which the air ascends out of the colliery to the surface. From the bottom of the downcast shaft a main intake air-way is constructed, from which a separate "split" or division of air is taken to ventilate each of the three districts. Each "split" of air is in the usual manner (by means of air-tight doors, canvas or brattice doors, partly air-tight, and sheets) made to traverse and ventilate the whole of the roadways and working places of its respective district; the split of air is then returned into the main return airway, by means of which it is taken through the upcast shaft to the surface. A split of air is taken into the north side (4 feet) seam, and after it has proceeded round and ventilated that seam in that district, is carried into the workings in the 2 feet 9 seam before it is returned into the main return air-way.

A plan of the workings in the north side district was used at the hearing before the magistrate, and accompanies the case, upon which the various points hereinafter mentioned were marked.

10. The colliery is worked upon what is called the "long wall system," that is, by means of working places or stalls cut into the coal itself. The whole of the coal is worked out, and as the coal is cut away and removed rubbish is filled into the place from which it has been worked, except where a roadway or passage is left for the purpose of passing to and fro or carrying the coal from or the rubbish to where the coal is being cut.

11. On the 17th Nov. 1884, and for three months previously to that day, inflammatory gas, issuing so freely that it showed a blue cap on the flame of the safety lamp, had been found in the colliery, in a hole in the roof at a spot called "Thomas Hopkins' heading."

12, 13. In a main roadway (which was not a stone-drift, stone-work, or a sinking of shafts) cut through the 4 foot coal in the north side district, for about a week previous to the 17th Nov. 1884, there had been "a squeeze,"—that is, the roof of the roadway had been sinking, and it became necessary, for the maintenance and user of the roadway and for the working of the colliery, that the "squeeze" should be removed; for this purpose six shots were fired at point A. on the 17th Nov. 1884, between 12.30 a.m. and 5.30 a.m., by exploding charges of gunpowder placed in holes drilled in the roof for the purpose.

14. There were eighty-seven men working in the north side district at the time the shots were fired, such men being the persons ordinarily employed in the mine during the night turn.

16. The roofs of the roadway in the 4 foot seam in the north side district are of hard rock and

difficult to work, and when a "squeeze" in this kind of roof occurs, it appeared to the magistrate to be reasonable and expedient, having regard to the proper working of the colliery, and to the fact that several shots in succession may be necessary, that the shots for the purpose of bringing down such squeeze should be fired whilst the men ordinarily employed in the mine at the time of such firing are in the mine, but at such a distance from the place where such shot firing occurs as to ensure their safety.

18, 19, 20. At the time the shots were fired, two men, ordinarily employed in the mine, were working at Scott's stall, and the air which passed point A, and afterwards passed through "Hopkins' heading," passed inwards by Scott's stall, and thence in the direction of and ultimately into the main return air-way. The rest of the eighty-seven men were working farther off from A than Scott's stall. "Hopkins' heading," where the gas was found, was 250 yards from A, where the shots were fired, and the nearest point where any men were actually working at the time of the firing was at Scott's stall, some fifty yards farther from A than "Hopkins' heading."

21. The fireman who fired the shots examined "Hopkins' heading" before firing, and found it in its usual condition as to gas, but there was inflammable gas in the heading showing a blue cap on the flame of the safety lamp.

22, 24. The magistrate found as a fact that there was no danger to the eighty-seven persons employed at the time in the colliery in firing the shots at A, and that it was proved to his satisfaction that there were no practical or usual means for detecting the presence of inflammable gas, except by its showing a blue cap on the flame of a safety lamp, and thereupon he dismissed the informations and stated the above case on the application of the appellant.

The principal question for the court was whether, upon the above facts, the respondent was guilty of an offence under rule 8, sub-sect. *f*, 2 (*b*) of sect. 51 of the Coal Mines Regulation Act 1872.

Another question stated by the magistrate for the court's opinion was, whether, when a colliery or mine is not divided into parts or panels, under sect. 25, it is necessary, under the general rule 8, sub-sect. *f*, paragraph 2, of sect. 51, that the men ordinarily employed in the mine should be gotten out of it, "although it be not reasonably practicable to get them out consistently with the reasonable and practicable conduct and carrying on of the mine as a profitable concern.

R. S. Wright and *E. Thomas* for the appellant.—The magistrate's decision was wrong. It is clear, on the facts stated in the case, that under sub-sect. or rule 8 of sect. 51, an offence had been committed. By sect. 25 a "part of a mine" worked separately and having an independent system of ventilation, is to be deemed to be "a separate mine;" and the provisions of the rule as to the use of gunpowder must therefore apply to such "part" as if it were a separate mine; and the words "part of a mine" in sect. 51, rule 8 (*b*), must therefore have the same meaning given to them as in sect. 25. The words "reasonably practicable" in sect. 51 do not mean what the magistrate evidently considered they meant, nor are they to be limited, as he limited them, as meaning "reasonable and practicable conduct in carrying on the colliery as a profitable business concern." The object of the Act, which is to protect as far as possible the lives and limbs of the miners, must not be defeated by reason only that to effect that object would cause some expense or pecuniary loss to the mine-owners. In no other sense of the term was there any difficulty or impracticability, mechanical or engineering, in obeying the rule.

H. D. Greene (with him was *T. W. Lewis*) for the respondent.—It was found, as a fact, that there were no men in that part of the mine where the shot firing took place, and the magistrate was justified in finding that, as the men were working at a distance of some 300 yards from the spot A, none of them had been in any danger. The words "reasonably practicable" apply to the whole of sect. 51 and the rules thereunder, and it is expressly found in the case (paragraph 16) that firing the shots whilst the men were in the mine, but at a safe distance from the firing spot, was "reasonable and expedient, having regard to the proper working of the colliery." The object of the Act is effected by removing the men from dangerous contiguity to the firing spot, and to get all the men out of a mine whenever a shot is to be fired, which in the case of these squeezes occurs frequently, would very materially and seriously obstruct and hinder the working of a mine, and would, in many cases, make it impossible to work the mine at all. Moreover, the words "part of a mine" in this sub-section are used in a popular sense with no absolutely definite meaning beyond "in the neighbourhood" of the danger point.

E. Thomas replied.

DAY, J.—I am clearly of opinion that the learned stipendiary magistrate was wrong in his construction of the statute, and in his application of it to the facts of the case. By sect. 25 of the Act it is provided that the owner of a colliery may divide his mine into parts. It says: "Where two or more parts of a mine are worked separately the owner or agent of such mine may give notice in writing to that effect to the inspector of the district, and thereupon each such part shall, for all the purposes of this Act, be deemed to be a separate mine." Where, therefore, thereafter the word "mine" alone without more is used in the Act, it may be taken to apply to one "part of the mine," as distinguished from another part. So that, even if the subsequent sect. 51, with which we are now dealing, rule 8, subdivision *f* 2, and (*b*) had not contained the words "part of a mine," I should still have read them into it, and have held that, if a mine is divided into parts under sect. 25, then, although the only words in sect. 51 were "the men are to be out of the mine," the statute would have been complied with if they had been out of that part of the mine in which the shot was fired; because, where a mine is divided in that way into parts under the statute, and so is separately worked, each part constitutes, and is to be deemed to be, a separate mine. But the Legislature have not, as I think it would have been better if they had, adapted the language of sect. 51 to that of the previous sect. 25, and had in the subsequent section made use of the word "mine" only, and had left the words "part of a mine" out of that section altogether; because, read by the light of sect. 25, that would clearly mean out of that "part of a mine" which by that

section had been previously declared to be a separate mine. I cannot, however, agree with the argument of the learned counsel for the respondent, that because the language of sect. 51 in that respect varies from that of sect. 25, therefore "part of a mine" is distinguishable, and must mean something different from "mine." That is, I think, a fallacious argument. The words "part of a mine" in sect. 51 mean any part into which under sect. 25 a mine may be divided and separately worked so as to become a "separate mine," and were probably introduced into the section out of a too abundant caution, which often leads to the raising of doubts and difficulties which would otherwise never have arisen. Having by sect. 25 provided that "part of a mine" shall under given circumstances be a "mine" for all the purposes of the Act, it was no doubt unnecessary to insert the words "part of a mine" in sect. 51. But we must look at what was the real object and purpose of the Legislature in passing this Act. It was to protect the miners and underground workers from accidents by providing a certain fixed rule of action, and not leaving the matter to the discretion of the owner or manager of the mine, who might or not be on the spot at the moment, but providing as far as it is possible so to do, against danger, even though it might not be inevitable. The section says "out of the mine or out of the part of the mine where gunpowder is used." Now what construction is to be put upon the words "part of the mine" here? Assume for a moment that sect. 25 had not been enacted. Mr. Greene has argued that what is meant is, that the men should be removed out of the immediate neighbourhood of the danger; that is to say, out of that particular part, using the words in their most popular sense, where the shot is to be fired. I do not think that that is so, or that it would at all effect the object of the Legislature, or meet the mischief against which the Act was intended to provide. It is well known that the risk of injury from explosions is, to a great extent, though not uniformly, coincident in point of extent with the system of ventilation. Large mines are frequently divided into different districts or parts, with a separate and distinct system of ventilation to each part, and a danger in one part will not necessarily occasion danger in another part. It seems to me that the words "part of a mine" here mean "part of a mine" considered as a separate mine, with reference to its ventilation; and I am fortified in that view by the language of sub-sect. *g* of rule 8 of sect. 51, which provides that "Where a mine is divided into separate panels in such manner that each panel has an independent intake and return airway from the main course and the main return aircourse, the provision of that rule with respect to gunpowder or other explosive or inflammable substance shall apply to each such panel in like manner as if it were a separate mine." So that a separate panel, in the sense of a portion of the mine having separate ventilation, is to be dealt with as if it were a separate mine; and therefore, where miners are required to be out of the mine, it is sufficient that they should be out of the particular panel, supposing the mine to be divided into panels. No doubt here, the spot where the men were working and that where the shot was fired were two different points, some three hundred yards apart from each other in the same panel with one and the same system of ventilation. According, therefore, to my understanding and construction of this Act of Parliament, they were in the same part of the mine. Why should the Legislature put it alternatively, "out of the mine or out of the part of the mine," &c., if it would be sufficient to avoid the statutory offence that the men should merely not be in the neighbourhood of or in dangerous contiguity or proximity to the firing spot? To say that the mine-owner shall be liable to a penalty if the men are not, under certain circumstances, out of the mine, but that he shall not be liable to one if they remain in the mine, but not in the immediate neighbourhood of the danger, would be a ridiculous construction, and one far too vague to put upon an Act of this description. We must seek a clearer and more definite one when dealing with a statute like this, and I unhesitatingly construe "part of a mine" as meaning a part having a separate and distinct system of ventilation, and which is by the statute constituted a separate mine, although called only a "part of a mine." That being so, and assuming that gunpowder was fired whilst there were miners at work in that part of the mine, we have next to ascertain whether an offence has been committed by a violation of any of the general rules under sect. 51. That section says those rules are to be observed "so far as is practicable in every mine to which the Act applies." Now, many of the provisions of these rules are affirmative, and some affirmative enactments may not always and under all circumstances be practicable, and I can readily understand, therefore, the Legislature's providing that, where such enactments or provisions are not really practicable, no penalty should be incurred through their not being carried into effect. But a different consideration applies altogether with respect to negative enactments. Ordinarily speaking, negative enactments are reasonably practicable, because it is always possible to do nothing, or not to do a thing that is forbidden to be done. No doubt, as Mr. Greene suggested, an extraordinary case may arise, such as the saving of human life by a violation of the rules. But such a case as that cannot, in my opinion, be taken into consideration. Generally speaking, negative enactments can be complied with, and the magistrate has in this case taken a view of the reasonable practicability of these rules which is entirely erroneous; and the sooner mine-owners and other people connected with mines disabuse themselves of the notion which the magistrate appears to have entertained the better it will be. With the object and for the purpose of protecting life in collieries the Legislature has enacted that certain things shall not be done, and the magistrate seems to have taken the view which has also been strongly urged before us to-day that, if the doing the thing which is forbidden to be done would yield a profit to the mine-owner, then it is a thing which he may do. The magistrate actually suggests with regard to this question of reasonable practicability of getting the men out of the mine before a shot is fired, that it is not reasonably practicable to get them out consistently with the reasonable and practicable conduct and carrying on of the colliery as a profitable business concern." Now, with the question of carrying on the colliery

"as a profitable business concern" we have nothing to do; that is for the Legislature to consider. Turning this enactment into an affirmative one, the Act says, "Whenever a shot is fired get the men out of the mine before it is fired." What is there that is not "reasonably practicable" in that? What mechanical or other difficulty of any sort was there in getting these men out before the shot was fired? None whatever. It is clear that they could have been gotten out before a shot was fired; or, in other words, no shot should have been fired before they were gotten out. To my mind the offence has been committed, and the magistrate has erred in his construction of the statute, and in his application of it to the facts of the case The case therefore must go back to him.

SMITH, J.—I am also of opinion that the magistrate should have convicted in this case. The point is not a large one, but it is, as Mr. Greene has said, a very important one, important to two classes of persons, the workers in the collieries, and also, no doubt, to the mine-owners. It may, for aught I know, be inconvenient to get the men out of a mine before a shot is fired, but the question is, what does the statute say? I quite agree that this Act was passed for the purpose of preventing accidents to the working men, and the question we have to decide is, what is the true construction of sub-sect. (*b*) of sub-sect. 2 of sub-sect. 8 of sect. 51 of the 35 & 36 Vict. c. 76. That looks very formidable, but there is not much difficulty in it when one gets rid of the multiplicity of sub-sections into which the Act is divided. The main question is, what is the true meaning of this paragraph: "Gunpowder shall only be used when the persons ordinarily employed in the mine are out of the mine, or out of that part of the mine where it is used." Now, what do the words "out of the mine," &c., mean? If they mean only out of the neighbourhood of the spot where gunpowder is used, I cannot see why the Legislature should have inserted the first alternative, "out of the mine." If the prohibition were meant to be, "a shot is not to be fired whilst the men are in contiguity to the place where it is fired," what need was there to say, "it is not to be fired if the men are not out of the mine?" The one includes the other. It seems to me that there must be some interpretation of the words other than that suggested on the part of the respondent. It must not be forgotten that sub-sect. 2 is dealing with the case where "inflammable gas is issuing so freely that it shows a blue cap on the flame of the safety lamp," thus indicating a high state of inflammability. Then sub-paragraph (*b*) says, "Gunpowder shall only be used when the persons ordinarily employed in a mine are out of the mine." Now in the Coal Mines Regulation Act the Legislature is dealing with whole mines, and with mines cut up into statutable parts—because, by sect. 25, for ventilation and other purposes, a mine may be cut up and divided into twenty or more parts at the will and pleasure of the owner—provided only that the Home Secretary, if he thinks that the owner is thus opening a door or loophole of escape from the regulations of the Act, may object to such division. A "part of a mine," therefore, being thus recognised by the statute, it seems to me that it was necessary to insert the words "out of the part of the mine," &c.; for, otherwise, if a mine were thus divided into parts, and the section had stood with only the words "out of the mine," then, whenever a shot was fired in either part of the mine so divided, all the men would have to be gotten up out of both parts. It was necessary, therefore, to provide expressly for getting them out of that part only in which a shot was to be fired, meaning the statutable divided part, and not merely the part contiguous to the firing point. It was pointed out by Mr. Thomas that these rules speak of "places contiguous to the place where the shot is fired" (rule 8, sub-sect. *f* (1); and it is true that in sub-sect. *g* it is stated that a mine may be divided into "panels," and that when it is so divided, the provisions with regard to gunpowder shall apply to each such "panel" as if it were a separate mine. Now, not being an expert in mining matters, I can see no difference between "panels" and "parts." It in clear that, under the statute, each "part of a mine statutably divided is to be deemed to be a separate mine," and so in the same way each "panel" with separate ventilation is to be deemed a separate mine. The true construction of this statute is, as it seems to me, that, unless the mine is divided into "parts" or "panels," in which case each part or panel is, in pursuance of the statute, to be deemed a separate mine, whenever a shot is fired all the men must be out of the mine altogether. We were pressed by Mr. Greene with the phraseology of the various sub-sections of sect. 51, from which he argued that it was clear that the word "part" was not used in the sense in which the court is now construing it in other branches of the section. However that may be, I am certain that in sub-sect. 5 it is used in the sense and with the meaning which we are now putting on it in the sub-section under consideration. Sub-sect. 5 says, "A station or stations shall be appointed at the entrance to the mine or to different parts of the mine." That is very reasonable, and means that an undivided mine is to have one station, and that where a mine is cut up into statutable parts, there must be a station to each such part. Whether or not the same construction is to be put upon sub-sect. 6, I will not say, because that is not now before us, and I have not formed an opinion upon it; but I am perfectly clear, and my brother Day agrees with me, that in sub-sect. 5 the word "part" means "statutable part" under sect. 25. Now, supposing this mine were one whole entire mine, and not divided into parts or panels, and that the several districts that have been referred to were not statutable parts, it would follow that the persons ordinarily employed in the mine must have been out of it when the shot was fired, and therefore these eighty-seven men should have been out of the mine altogether at the time of firing. If it should hereafter turn out that this north side, with which we are now concerned, does really form a "panel" or "part," within sect. 25, then, if these men had been out of that "panel" or "part," that is, out of the north side, although they might have been underground in some other "part," "panel," or "district," there would have been no breach of the statute. There is only one other point to be noticed. Sect. 51 commences by saying that the general rules are to be observed "so far as is reasonably practicable," and it has been argued that these words "so far as is reasonably practicable" must be

read in to each of the several provisions under that section. I will read them in here, yet that will not obviate the absolute necessity of the men being out of the mine at the time in question. The magistrate went wrong in saying that the getting them out would be an injury to the working of the mine as a profitable business concern, inasmuch as loss of time and expense would be incurred in getting them out and bringing them in again. But that is not at all the meaning of "reasonably practicable" in this instance. Those words mean, "when you can get them out," and there is no pretence for saying that that could not easily have been done. I am of opinion, therefore, that there ought to have been a conviction in this case.

Judgment for the appellant. Case remitted to the magistrate.

Solicitor for the appellant, *The Solicitor to the Treasury*, by *Lewis* and *Williams*, Merthyr Tydvil, as agents.

Solicitors for the respondent, *Ullithorne, Currey*, and *Villiers*, agents for *Simons* and *Plews*, Merthyr Tydvil.

Friday, Nov. 26, 1886.

(Before Stephen and Smith, JJ.)

The Leamington Priors Gas Company (apps.) *v.* Davis (resp.). (*a*)

Gasworks Clauses Act 1847 (10 & 11 *Vict. c.* 15), *ss.* 38 *and* 49—*Gasworks Clauses Act* 1871 (34 & 35 *Vict. c.* 41), *ss.* 1, 3, 35—*Leamington Gas Act* 1865 (28 *Vict. c. cxxviii.*), *ss.* 3, 38—*Effect of subsequent general Act upon prior special Act—Penalty for not keeping and selling copy of annual statement of accounts in accordance with provisions of Gasworks Clauses Act* 1871.

By sect. 38 *of the Gasworks Clauses Act* 1847, *certain provisions were made as to preparing and auditing the yearly accounts of gas companies. By sect.* 49 *of the same Act, nothing therein or in the special Act contained is to exempt the undertakers from any general Act relating to gasworks passed in any future session of Parliament.*

By sect. 3 *of the Leamington Gas Act* 1865 (*the special Act by which the appellant company was incorporated*), "*The Gasworks Clauses Act* 1847 *shall be incorporated with and form part of this Act except in so far as any of the clauses of the Gasworks Clauses Act* 1847 *may be varied by or are repugnant to the provisions of this Act.*"

By sect. 32 *of the said special Act of* 1865, "*In lieu of the account prescribed by the* 38*th section of the Gasworks Clauses Act* 1847, *an account in the form and containing the particulars specified in the schedule to this Act shall be made . . . . . ;*" *and then follow special provisions as to balancing, publishing, and transmitting to the clerk of the peace a copy of such accounts under a penalty.*

By sect. 1 *of the Gasworks Clauses Act* 1871, "*The Gasworks Clauses Act* 1847 *and this Act shall be construed together as one Act, and the provisions of this Act shall be held to repeal and supersede such of the provisions of that Act as are inconsistent with this Act;*" *and by sect.* 3, "*The provisions of this Act shall apply to every gas undertaking authorised by any special Act hereafter passed . . . . ;*" *and by sect.* 35 *a penalty is imposed,* (1) *where the undertakers do not fill up and forward to the proper authority, on or before a certain date, an annual statement of accounts made up in the form specified in the Act of* (1871); *and,* (2) *where the undertakers fail to keep copies of such annual statement of accounts, and sell the same to any applicant at a fixed price for such copy.*

The appellants had been convicted and fined under sect. 35 *of the Gasworks Clauses Act* 1871, *upon an information charging that they did not keep and sell to the respondent, who applied for the same at their office, a copy of the last annual statement of accounts made up at the times and in the form and containing the particulars specified in the schedule of the Act of* 1871.

Held (*quashing the conviction*), *that sect.* 35 *of the Gasworks Clauses Act* 1871 *did not apply to the appellant company, but that they were subject to the provisions of sect.* 32 *of the special Act of* 1865.

The Dudley Gaslight Company *v.* Warmington (44 *L. T. Rep. N. S.* 475; 50 *L. J.* 69, *M.C.*) *distinguished.*

This was a case stated by Justices of the Peace for the borough of Royal Leamington Spa, under the statute 20 & 21 Vict. c. 43.

1. At a petty sessions, held on the 19th March 1886, in and for the said borough, an information was taken and heard, wherein the appellants were charged by the respondent for that they, on the 19th Jan. 1886, unlawfully did not keep and sell to the respondent, who then applied for the same at their offices, a copy of the last annual statement of accounts of the said company, made up at the times and in the form and containing the particulars specified in sched. B. of the Gasworks Clauses Act 1871 (34 & 35 Vict. c. 41).

2. It was proved and found as a fact that the respondent did, on the 19th Jan. 1886, apply at the office of the appellants for a copy of the last statement of accounts made up as required by sect. 35 of the Gasworks Clauses Act 1871, and tendered the proper fee for the same, and that the appellants had made default in furnishing the same, believing that they were not required to comply with the provisions of that section of the said Act, but with the provisions of their special Act in accordance with which the appellants' accounts have hitherto been made up, the 30th June being the date fixed by resolution of the company as that up to which the appellants' accounts are made up in each year.

3. The Leamington Priors Gas Company was incorporated by a special Act of Parliament passed in 1865 (28 Vict. c. cxxviii.).

By sect. 3 of the last-mentioned Act it was enacted that (among other Acts):

The Gasworks Clauses Act 1847 shall be incorporated with and form part of this Act, except in so far as any of the clauses of the Gasworks Clauses Act 1847 may be varied by or are repugnant to the provisions of this Act.

4. By sect. 38 of the Gasworks Clauses Act 1847 (10 & 11 Vict. c. 15) it is enacted:

With respect to the yearly receipt and expenditure of the undertakers, that the undertakers shall in each year after they have begun to supply gas under the provisions of this or the special Act, cause an account in abstract to be prepared of the total receipts and expenditure of all rents or funds levied under the

(*a*) Reported by F. A. Crailsheim, Esq., Barrister-at-Law

powers of this or the special Act for the year preceding, under the several distinct heads of receipt and expenditure, with a statement of the balance of such account duly audited and certified by the chairman of the undertakers, and also by the auditors thereof, if any, and a copy of such annual account shall be transmitted free of charge to the clerk of the peace for the county in which the gasworks are situate . . . . on or before the 31st day of January in each year, under a penalty of 20*l*. . . . . and the copy of such account shall be kept by him, and be open to inspection on payment of one shilling for each inspection.

5. By sect. 32 of the appellants' said special Act of 1865, it is provided that:

In lieu of the account prescribed by the 38th section of the Gasworks Clauses Act 1847, an account in the form and containing the particulars specified in the schedule to this Act shall be made up to the day at which the books of the company shall be balanced in each year, and shall be published for two successive weeks in some newspaper published and circulating in the county of Warwick within three months thereafter, and a copy of the said account shall within the same period be transmitted free of charge to the clerk of the peace for the county of Warwick, under a penalty of 20*l*. for each default, and a copy so sent shall be kept by the clerk of the peace, and shall be open to inspection by all persons at all reasonable hours on payment of one shilling for each inspection, but no other fee of any kind shall be chargeable in respect of the said account.

6. By sect. 49 of the Gasworks Clauses Act 1847, it is enacted that:

Nothing herein or in the special Act contained shall be deemed to exempt the undertakers from any general Act relating to gasworks . . . . which may be passed in the same session in which the special Act is passed or any future session of Parliament.

7. By sect. 1 of the Gasworks Clauses Act 1871 it is enacted that:

The Gasworks Clauses Act 1847 and this Act shall be construed together as one Act, and the provisions of this Act shall be held to repeal and supersede such of the provisions of that Act as are inconsistent with this Act.

Sect. 3 of the same Act states that:

The provisions of this Act shall apply to every gas undertaking authorised by any special Act hereafter passed, or by any provisional order made under the authority of the Gas and Waterworks Facilities Act 1870, save where the said provisions are expressly varied or excepted by any such special Act or provisional order.

8. By sect. 35 of the Gasworks Clauses Act 1871, it is provided that:

The undertakers shall fill up and forward to the local authority of every district within the limits of the special Act on or before the 25th day of March in each year an annual statement of accounts made up to the 21st day of December then next preceding as near as may be in the form, and containing the particulars, specified in schedule B. to the Act annexed.

And it is further enacted that:

The undertakers shall keep copies of such annual statement at their office, and sell the same to any applicant at a price not exceeding one shilling for each such copy, and in case the undertakers make default in complying with the provisions of this section they shall be liable to a penalty not exceeding 40*s*. for each day during which such default continues.

9. It was contended on behalf of the appellants that they were bound to conform to the provisions of their special Act as to accounts, and that the 35th section of the Act of 1871 did not apply to their undertaking.

It was contended on behalf of the respondent that the Act of 1871 must be held to repeal the provisions of the special Act, so as to oblige the appellants to conform to the provisions of the 35th section of the 1871 Act.

10. The justices, being of opinion that the contention on behalf of the respondent was right, convicted the appellants, and inflicted a fine of 2*l*. and costs.

The question for the court was, whether sect. 35 of the Gasworks Clauses Act 1871 applied to the appellant company so as to require them to keep their accounts in the form given in the schedule to the said Act, and to furnish copies; or whether the provisions of the appellants' special Act as to accounts prevailed, so as to require the appellants to keep their accounts in the form given in the schedule to the said special Act.

If the court should be of opinion that the said conviction was legally and properly made, and that the appellants were liable to keep their accounts under sect. 35 of the Act of 1871 as aforesaid, then the said conviction was to stand; but if the court should be of opinion otherwise, then the said information was to be dismissed.

Shiress Will, Q.C. for the appellants.—It is submitted that sect. 35 of the Gasworks Clauses Act 1871 does not apply to the appellant company. The question is, whether this case is governed by *The Dudley Gaslight Company* v. *Warmington* (44 L. T. Rep. N. S. 475; 50 L. J. 69, M. C.) That case is clearly distinguishable, because in this case the mode in which the accounts are to be kept and taken is provided for by sect. 32 of the special Act of 1865. [He was stopped.]

Noble (*Dugdale*, Q.C. with him), for the respondent, was called upon by the Court.—It is submitted that sect. 49 of the Act of 1847 was incorporated in the private Act of 1865. Sect. 3 of the private Act incorporates the Act of 1847, except in so far as the Act of 1847 is varied by or repugnant to the provisions of the private Act, and sect. 49 of the Act of 1847 is not inconsistent with anything in the private Act. The effect of that section was to make subsequent general Acts applicable to and binding upon existing companies which had incorporated in their special Acts the Act of 1847. Therefore, the provisions of the special Act of 1865 are repealed, and the appellants are bound to conform to the provisions of sect. 35 of the Act of 1871. The Act of 1871 being inconsistent with both the earlier Acts of 1847 and 1865, must be taken to repeal them:

The Dudley Gaslight Company v. *Warmington*, 44 L. T. Rep. N. S. 475; 50 L. J. 69, M. C.

The Act of 1871 was intended to supply new and better machinery for keeping and publishing gas accounts. It is, therefore, submitted that the justices were right, and that the conviction ought to be upheld.

STEPHEN, J.—I think it quite clear that our decision in this case must be in favour of the appellants, although the contention on behalf of the respondent was one which could be very fairly argued. The first Act to be considered is the Gasworks Clauses Act 1847 (10 & 11 Vict. c. 15), and sect. 38 provides that "the undertakers shall, in each year after they have begun to supply gas under the provisions of this or the special Act, cause an account in abstract to be prepared of the total receipts and expenditure of all rents or funds levied under the power of this or the special Act for the year preceding . . . .

and a copy of such annual account shall be transmitted free of charge to the clerk of the peace for the county in which the gasworks are situated . . . . and the copy of such account shall be kept by him and be open to inspection on payment of one shilling for each inspection." By sect. 49 it is enacted that "nothing herein or in the special Act contained shall be deemed to exempt the undertakers from any general Act relating to gasworks . . . . which may be passed in the same session in which the special Act is passed or any future session of Parliament." Then by the special Act passed in 1865 (28 Vict. c. cxxviii.), s. 3, it is enacted that "The Gasworks Clauses Act 1847 shall be incorporated with and form part of this Act, except in so far as any of the clauses of the Gasworks Clauses Act 1847 may be varied by or are repugnant to the provisions of this Act." Therefore this special Act of 1865 is not excluded from the provisions of the Act of 1847, except as regards sect. 38 of the latter Act, which, so far as the appellant company is concerned, has been superseded by sect. 32 of the special Act of 1867, which prescribes a new form of account to be used "in lieu of the account prescribed by the 38th section of the Gasworks Clauses Act 1847." Then by sect. 1 of the Gasworks Clauses Act 1871, it is enacted that "the Gasworks Clauses Act 1847 and this Act shall be construed together as one Act, and the provisions of this Act shall be held to repeal and supersede such of the provisions of that Act as are inconsistent with this Act." I think there is no doubt but that sect. 49 of the Gasworks Clauses Act 1847 is included in the Act of 1871. However, I do not think that it follows that, where special provisions have been made by a private gasworks Act, inconsistent with the provisions of the general Act, such special provisions are to be altered or superseded by the terms of the Act of 1871. I quite feel the weight of the argument submitted to us on behalf of the respondent, but I do not feel any doubt as to the way in which the statutes ought to be understood. The case of *The Dudley Gaslight Company* v. *Warmington* (44 L. T. Rep. N. S. 475; 50 L. J. 69, M. C.) is easily distinguishable from the present case. That was a case where there were no special provisions as to accounts contained in the special Act, and there it was held that the Gasworks Clauses Act 1871, being a general Act relating to gasworks, applied to the private Act in that case, which was a special Act incorporating the Gasworks Clauses Act 1847. But here the special provisions as to accounts contained in sect. 32 of the Act of 1865 prevented the incorporation into it of sect. 38 of the general Act of 1847. Therefore I think that sect. 35 of the Gasworks Clauses Act 1871 does not apply to the appellant company, but that they are bound by the provisions of their special Act with reference to accounts. This appeal must be allowed and the conviction quashed.

Smith, J.—I am of the same opinion. I just wish to add that the great distinction between this case and that of *The Dudley Gaslight Company* v. *Warmington* (*ubi sup.*) is to be found in the fact that in the special Act incorporating the company in that case there were no special provisions corresponding to those in sect. 32 of the Act of 1865.

Conviction quashed.

Solicitors for the appellants, *Gregory, Rowcliffes,* and *Co.*, for *Wright* and *Hassall*, Leamington.

Solicitor for the respondent, *Henry Tyrrell*, for *H. C. Passman*, Leamington.

Friday, Nov. 26, 1886.

(Before Stephen and Smith, JJ.)

The Owens College (apps.) *v.* The Overseers of the Poor of Chorlton-upon-Medlock (resps.). (*a*)

Rating—Rateable value—Test—Union Assessment Committee Act 1862 (25 *&* 26 *Vict. c.* 103), *s.* 15.

Certain college buildings, which had been built for educational purposes, had been assessed to the poor rate upon an estimate of the lowest capital sum upon which premises, providing similar accommodation, could be erected.

Held, that this, although properly relevant as evidence, did not constitute the test of the rateable value of such buildings. In arriving at the gross annual rental which a hypothetical tenant might reasonably be expected to give from year to year for the premises, which was the only test of their rateable value, the possible competition of the occupying owner must be taken into account.

This was a case stated by consent and by order of Grantham, J., pursuant to the provisions of 12 & 13 Vict. c. 45, s. 11, for the opinion of the Queen's Bench Division.

1. The appellants were the Governors of Owens College, Manchester, who had been incorporated under the name of "The Owens College," pursuant to the 7th section of the Owens Extension College (Manchester) Act 1870 (33 & 34 Vict. c. ii.), as modified by the 4th section of the Owens College Act 1871 (34 & 35 Vict. c. cxlvii.). The said two Acts of Parliament, together with the parts of the will (dated the 31st May 1845) of John Owens, and the other documents set forth in the schedules to the said Acts respectively, were, if necessary, to be referred to by either party upon the argument.

2. The respondents were the overseers of the poor of the township of Chorlton-upon-Medlock, in the city of Manchester, in which the Owens College is situated.

3. On the 26th March 1885 a poor rate for the said township was made by the said overseers, which, so far as it affected the applicants, was as follows:

No. of Assessment.	Name of Occupier.	Name of Owner.	Description of Property.	Gross Estimated Rental.	Rateable Value.	Poor Rate at 4s. 10d. in the £.
7888	The Owens College.	The Owens College.	College Buildings.	£ 3833	£ 3285	£793 17s. 6d.

The appellants objected to this rate, on the ground that they were over-rated, and failed to obtain any relief.

4. The appellants, being dissatisfied with the mode adopted by the said respondents in estimating the net annual value of the said college,

(*a*) Reported by F. A. Crailsheim, Esq., Barrister-at-Law.

desired to obtain the opinion of the High Court thereon, and, for the purposes of this case, it was admitted that all necessary notices of objection and appeal had been given.

5. The property in question consists of certain land (less than ten acres in extent) situate in and adjacent to Oxford-street, Manchester, and acquired by the appellants by purchase, pursuant to the 9th section of the Owens Extension College (Manchester) Act 1870, as a site for the college and college buildings, with necessary and proper lecture-rooms, libraries, lavatories, museums, and other rooms and buildings for educational purposes, offices, outbuildings, approaches, and appurtenances, erected and provided by the appellants pursuant to the 10th section of the said Act. By the 13th section the appellants were authorised to hold lands in addition to those for the time being forming the site of the college, not exceeding at any one time 200 acres in extent. By the 16th section they were empowered to grant leases of any parts of the lands for the time being vested in them, "except the site of the college and its appurtenances;" and by the 17th section they were empowered to sell, exchange, or otherwise dispose of any lands vested in them "and not being the site or part of the site of the college, and not being otherwise required for the purposes thereof."

6. The said college and its appurtenances have been erected, and are maintained by the appellants under the provisions of the two Acts of Parliament hereinbefore mentioned, and in pursuance of or in accordance with the will of the said John Owens and the other documents contained in the schedule to the said Acts respectively, as a college wherein young persons may receive instruction in such branches of learning and science as are usually taught in the English Universities, subject to the following, as a fundamental condition, namely, that the students, professors, teachers, and other officers and persons connected with the institution shall not be forced to make any declaration as to, or submit to any test of their religious opinions, and that nothing shall be introduced in the matter or mode of education or instruction in reference to any religious or theological subject which shall be reasonably offensive to the conscience of any student, or of his relations, guardians, or friends, under whose immediate care he shall be.

7. The land forming the site of the said college and its appurtenances was purchased by the appellants for 25,774*l.* The college buildings have been erected by them at a cost of 125,245*l.*

8. The said site and buildings are well suited for the purposes to which they are applied, the latter having been designed and erected for the express purpose of providing the requisite accommodation for an extensive college affording education of the kind usually provided in English Universities.

9. The expenses of the college are defrayed partly from endowments bequeathed or subscribed from time to time, and partly from fees received from students, the said fees being insufficient to meet the expenditure to the extent of one half the total sum, whilst the expenditure for the last financial year exceeded the income from all sources by 496*l.* The accounts of the college for the year ending the 31st July 1884 show the following income from all sources, and also the expenditure for that year, without making any entry in the expenditure account for rent or otherwise for the occupation or use of the said college buildings and appurtenances, viz.:—

Income.	£	s.	d.
From rent, interest, and dividends upon invested capital derived from endowments	4,824	13	11
Students' fees	12,700	15	0
From interest and dividends upon endowments for special purposes	8,119	2	6
Total income	25,644	11	5
Balance, being excess of expenditure over income	496	7	2
	26,140	18	7
Expenditure.			
To annuitant under will of John Owens	19	11	8
To educational staff, salaries and fees	16,700	2	10
To general management expenses, viz., salaries, wages, rents, taxes, insurance, fittings, furniture, books, stationery, printing, law, coals, gas, water, repairs, &c.	3,249	5	10
To departmental expenses, viz., physics, engineering, chemistry, zoology, geology, botany, mineralogy, medical, astronomical, pathological, surgical, library, museums, gymnasium, cricket, evening classes	5,970	3	5
To sundries	201	14	10
Total expenditure	£26,140	18	7

10. The probable average annual cost of the repairs, insurance, and other expenses necessary to maintain the said college in a state suitable for occupation by the appellants is 550*l.*

11. The said college could not be carried on as a collegiate institution for affording instruction to young persons in such branches of learning and science as are now or may hereafter be usually taught in English Universities at a profit (in a commercial sense) to the proprietors. The necessary annual expenses of such an institution in the locality (whether subject to the special conditions and restrictions imposed by the said Acts and the documents contained in the schedules thereto or not) would always considerably exceed the amount to be derived from students' fees.

12. The college buildings having been constructed and arranged with a special view to their present uses are adapted only for such or analogous uses. If (not being wanted by their present owners) they and the land on which they stand were in the market to be let to a solvent tenant from year to year, they would not command, if their use was restricted to educational purposes, a gross rental of more than 1000*l.* per annum and their rateable value on that basis would not exceed 833*l.* 6*s.* 8*d.* If let for any purposes to which (without considerable structural alterations) they are capable of being turned, they would not let for more than 1300*l.* per annum gross annual rental, and their rateable value (on that basis) would not exceed 1083*l.* 6*s.* 8*d.*

13. The site now occupied by the college buildings was, prior to 1870, when it was purchased by the appellants, covered with property, the gross rental of which was about 1271*l.*, and the appellants, although they contend that, as a matter of law, they should be rated at a nominal sum, inasmuch as the college buildings are incapable of yielding a profit if occupied for their present purposes, and under the conditions to which the appellants are subject, are willing

to be rated on the gross estimated rental of 1300*l.* above mentioned, and at a rateable value, of 1083*l.* 6*s.* 8*d.*, so as to make good the property displaced.

14. The appellants further contend that, if rateable at anything beyond a nominal amount, they ought not to be rated upon any greater gross estimated rental than 1000*l.*, or, in the alternative, the 1300*l.* for which the premises might be expected to let as mentioned in the 12th paragraph of this case.

15. The respondents contend that the value to be ascertained is the existing value of the occupation to the existing occupier, and that in the case of property in the actual occupation of a tenant for whose peculiar wants it has been constructed, it is erroneous, in estimating the value, to exclude from view the needs of the actual tenant, and to inquire what rental the property would command if such actual tenant no longer required it. It is found as a fact that the assessment appealed against has been arrived at by taking the sum of 76,047*l.* as the capital value of the buildings, which is the lowest sum for which (at the present prices, which are lower than the actual prices at the time when the buildings were erected) buildings could be erected to provide accommodation equal to the existing accommodation, excluding any expenditure upon ornament or necessary additions.

16. The respondents, without prejudice to their right to contend that a higher assessment based on the actual cost of the said land and buildings as stated in the 7th paragraph of this case might have been sustainable, contend that in taking the gross annual value of the buildings at 4 per cent. upon the lowest cost for which they could be provided, they are applying a reasonable test of their actual value to the existing occupiers, who would have to expend, or pay to a contractor, as large or a larger sum in order to obtain the accommodation they require and enjoy. It is to be taken as found as a fact for the purposes of this case, that if the principles of valuation adopted by the respondent are such as can be justified, the valuation itself is correct.

17. The court was to have power to draw inferences of fact.

The question for the opinion of the court was whether either of the contentions of the appellants set forth in the 13th and 14th paragraphs of the case as to the principles upon which their said college buildings and their appurtenances should be valued, was correct. If the court should answer this question in the affirmative, then the gross estimated rental was to be reduced to 1300*l.*, and the rateable value to 1083*l.* 6*s.* 8*d.* If the court should answer the said question in the negative, then the rate appealed against was to remain unaltered.

18. Judgment in accordance with the decision of the court, subject to appeal, was to be entered on the motion of either party at the quarter sessions of the said city of Manchester next, or next but one following the final decision.

Smyley, for the appellants, cited in the course of his argument

Assessment Committee of the Altrincham Union v. *The Cheshire Lines Committee*, 15 Q. B. Div. 597;
Greig v. *University of Edinburgh*, L. Rep. 1 H. of L. Sc. 348;
Mersey Docks v. *Cameron*, 12 L. T. Rep. N. S. 643; 11 H. of L. Cas. 443.

Hopwood, Q.C. (*Coghill* with him), for the respondents, cited

Reg. v. *The School Board for London*, 55 L. J. 38, M. C.

Symley, in reply, stated that, although for the purposes of the present decision, the appellants abandoned the contention that Owens College ought to be rated at the nominal sum, they reserved the right of arguing that point at another time, if it should be thought necessary.

Stephen, J.—In this case it does not appear to to me to be necessary to give a lengthy judgment. The question as to what is and what is not the test of rateable value has been fully discussed. My opinion is, that the test to be applied has been in many instances considerably misused, but the true and only test is the one imposed by sect. 15 of the Union Assessment Committee Act 1862 (25 & 26 Vict. c. 103), and it is in these words: "The gross estimated rental for the purpose of the schedule to this Act shall be the rent at which the hereditament might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rentcharge, if any." That, in my opinion, is the only test to be applied in estimating the rateable value of buildings. I do not mean to say that questions as to the cost of erecting the buildings and the like are not admissible as evidence. On the contrary, I think that such questions are properly relevant, and that evidence should be given of them when the question is tried before the sessions or other tribunal. But I think there is a great distinction between matters of evidence and the test of rateable value, and what the latter should be is clearly laid down by the Union Assessment Committee Act 1862. The evidence is various, and is derived from various sources, Now, to come to the case before us. The question is primarily one of principle, and it is whether Owens College ought to be rated according to the principle contended for by the appellants, or according to that contended for by the respondents. It will be necessary, first of all, to consider paragraphs 12, 13, and 14 of the case, and they state that: [Reads them.] That is the view of the appellants, and with regard to it, for the purposes of this decision, I think the contention that they ought to be rated at a merely nominal value has been abandoned, although the right of arguing it is reserved. I do not think that such a contention if put forward would be a good one, but that is not the question at present before the court, and we therefore do not propose to say anything more about it now. The view of the respondents is stated in paragraph 15 of the case, and it is that: [Reads it.] Then the respondents go on to say, that in taking the gross annual value of the buildings at 4 per cent. upon the lowest cost for which they could be provided, they are applying a reasonable test of their actual value to the existing occupiers. Now, the question to be decided by us is, whether the principles contended for by the appellants, which I have already read, are correct. My opinion is that, upon the whole, they are correct. I am not sure, however, that either of the principles contended for by the appellants states the whole of the case correctly, but substantially the view which the appellants set forth is the proper one to be acted upon. It appears that, in arriving

at such a view, 1300*l.* is taken to be the rent at which the premises might be expected to let if let for any purposes to which, without considerable expense, they are capable of being turned. The respondents argue that, supposing the premises to be offered upon lease, the possible competition of the occupier himself must not be excluded. I think that is correct, but I say we must take it that he would only act as a reasonable man, and that he would not bid a higher rent than the ordinary prudent purchaser would bid. I suppose the competition would be conducted upon the ordinary commercial principles, and then I do not see why Owens College should be rated at more than the actual value of the place, or why it should be rated at a higher value than would be given by a person capable of using the buildings for purposes to which they can be turned without structural alteration. The rent which would be given by such purchaser would probably be about 1300*l.* I think that the question put to the court ought to be answered in the affirmative, and that the gross estimated rental ought to be reduced to 1300*l.*, and the rateable value to 1083*l.* 6*s.* 8*d.* I do not think that the case of *Reg.* v. *The School Board for London* (55 L. J. 33, M. C.), referred to on behalf of the respondents, is in point.

SMITH, J.—The question raised by this case is, whether the rateable value of Owens College, Manchester, ought to be 1083*l.* 6*s.* 8*d.* as contended for by the appellants, or 3285*l.* as contended for by the respondents. We have not at present to decide the point whether this college ought to be freed from rates altogether, as not being capable of beneficial occupation. But, admitting it be capable of beneficial occupation, how is the amount of that beneficial occupation to be ascertained? The proper test to be applied in answering that question is, what rent a hypothetical tenant would pay from year to year: (*Mersey Docks* v. *Cameron*, 12 L. T. Rep. N. S. 643; 11 H. of L. Cas. 443.) What a hypothetical tenant would give has always been the test, and in considering what he would be likely to give, the occupying owner must always be taken into account; that was decided in the case of *Reg.* v. *The School Board for London* (55 L. J. 33, M. C.) The test may be what amount of rent the occupying owner would be willing to pay from year to year. Now we have to consider, what the hypothetical tenant of Owens College would give, and, from the case, it is clear that if the buildings and the land on which they stand were in the market to be let from year to year, they would not command, if their use was restricted to educational purposes, a gross rental of more than 1000*l.* per annum. If let for any purpose to which, without considerable structural alterations, they are capable of being turned, they would not let for more than 1300*l.* per annum gross annual rental. That means that a tenant, including the occupying owner, could not be found who would give more than 1000*l.* or 1300*l.* per annum gross annual rental, according as the premises let were restricted to be used for educational purposes or not. But the respondents do not agree with this, and they say that, as the appellants, if they were to build the college now, would have to spend at least 76,000*l.* in erecting the buildings, they must be taken to be ready to pay a gross annual rental of 3833*l.*, being 4 per cent. upon the capital which, at the lowest computation, would have to be expended. The test, however, is not the amount of capital expended on the buildings, but what the occupying owner would give. It is no test to take the gross annual value of the buildings at 4 per cent. upon the lowest cost for which they could be provided. There is no doubt that the occupying owner must always be taken into account in estimating the rateable value of buildings; but all the cases stop short at saying that it is a test to take 4 per cent upon the cost of building as the gross annual value. Interest on capital expended is no test at all, although the amount of capital expended may be given in evidence before the magistrates. I am therefore of opinion that, inasmuch as it is found that 1300*l.* would be the gross annual rental of the building, if let for any purpose which would not require considerable structural alterations, the rateable value of Owens College should be 1083*l.* 6*s.* 8*d.*, and therefore this appeal must be allowed.

Appeal allowed.

Solicitors for the appellants, *Bower, Cotton*, and *Bower*, for *Aston* and *Harwood*, Manchester.

Solicitors for the respondents, *Hopwood* and *Sons*.

Monday, Dec. 6, 1886.

(Before DENMAN and HAWKINS, JJ.)

NICHOLSON v. THE ASSESSMENT COMMITTEE OF THE HOLBORN UNION. (*a*)

Rating — Poor rate — Occupation — Middlesex Sessions House—Buildings used for public purposes.

By an Act passed in 1777 (18 *Geo.* 3, *c.* 67), *commissioners were appointed for building a new Sessions House, with all necessary accommodation, for which purpose they were empowered to purchase a piece of ground which would form a convenient site for the buildings. Such Sessions House was not to be rated or assessed at a higher rate or assessment than the piece of ground so purchased, and the buildings thereon, if any, were rated or assessed in* 1777, *at which date the assessment was at a gross value of* 135*l.*, *and a rateable value of* 113*l.*

In 1877 *adjoining land was conveyed to the use of the clerk of the peace and his successors for ever, in trust for county purposes, and the justices erected thereon additions and enlargements to the Sessions House.*

From the time when the original buildings had been erected, the rate had been paid at the assessment of 1777, *but after the enlargement of the premises in* 1879, *the assessment was raised to a gross value of* 610*l.* *and a rateable value of* 509*l.*

It was found upon the case that the whole of the Sessions House, including the additions and enlargements, was occupied and used solely for the administration of justice and the discharge of the public business of the county. An official, connected with the business of the sessions, occupied certain rooms in the building, and resided there with his family.

Held (allowing the appeal), that the justices were not liable to be assessed to the poor rate in respect of the premises in question, which were exempt,

(*a*) Reported by F. A. CRAILSHEIM, Esq., Barrister-at-Law.

and that the case came within the principle of the decision in Coomber *v.* The Justices of the County of Berks (50 *L. T. Rep. N. S.* 405; 9 *App. Cas.* 61).

Held, also, that neither the provisions of the Act of 1777, *nor the fact that the rate had for many years been paid at the valuation named in that Act, debarred the justices from contesting the rateability.*

Special case stated pursuant to sect. 40 of the Valuation (Metropolis) Act 1869, by order of Field, J.

1. This is an appeal by the clerk of the peace on behalf of the justices for the county of Middlesex against the assessment of the Sessions House, situate at Clerkenwell-green, within the metropolis, as defined by the Valuation (Metropolis) Act 1869, and comprised in the valuation list for the parish of St. James and St. John, Clerkenwell, as approved by the respondents, who are, by virtue of the said Act, the assessment committee, having jurisdiction in that behalf.

2. By an Act 18 Geo. 3, c. 67, it was, amongst other things, provided that from and immediately after the passing of that Act such persons as for the time being should be in the commission of the peace for the county of Middlesex should be and were thereby constituted commissioners for building a new sessions house for the said county, for which purpose they were empowered to purchase such one or more piece or pieces of ground as they or any seven of them should judge to be a convenient site for such new session house.

3. The said Act further provided that it should be lawful for the said commissioners, or any seven of them,

To cause a new sessions house, with all proper and necessary apartments and offices, to be erected on such piece or pieces of ground for the use of the said county of Middlesex, and for other good and necessary purposes for the better performance of the King's service in the said county; as also to fit up and provide for all necessary accommodations the same session house in a suitable manner, and to contract and agree with any person or persons for the building, fitting up, and providing with all necessary accommodations such new house as to them, the said commisioners, or any seven of them, should from time to time seem meet; which new session house, so to be erected in manner aforesaid, with its appurtenances, should not be rated or assessed for or towards the payment of the sewers tax, land tax, or any public, parochial, or other rate or tax whatsoever, assessed or to be assessed by authority of Parliament or otherwise howsoever, at or for a higher rate or assessment than what the piece or pieces of ground and buildings (if any) thereon, to be purchased for the erection of such new session house, was or were rated or assessed, or did pay to such several rates or taxes in the year 1777.

4. In pursuance of the powers of the said Act land was purchased by the said commissioners at Clerkenwell-green, and a sessions house erected thereon. The assessment in the year 1777 of the land so purchased to the several rates and taxes mentioned in the said Act was as follows: Gross value 135*l.*; rateable value 113*l.*

5. The accommodation afforded by the said Sessions House having in course of time become inadequate for the public business of the county, the justices entered into negotiations with the Metropolitan Board of Works for the acquisition of additional land with a view to the enlargement of the buildings. By the Metropolitan Board of Works (Various Powers) Act 1875, s. 27, the said board were authorised to grant for and to the use of the justices certain land therein described adjoining the Sessions House, and it was provided that the said land should vest in the body, or officer, or person in whom the Sessions House was vested, and should go along with and be deemed part of the appurtenances of the Sessions House. Sect. 28 of the said Act, so far as the section is material to this special case, provided that

Notwithstanding anything in sect. 12 of the Metropolitan Street Improvement Act 1872, it shall not be obligatory on the board to throw into the new street in Clerkenwell such parts of the properties therein mentioned as are as aforesaid on the said deposited plans, but the board may sell and convey the same to or for the use of the justices of the peace for the county of Middlesex for the purposes of the said county at a price to be agreed on between the board and the justices, or in default of agreement to be settled by arbitration in manner provided by the Lands Clauses Consolidation Act 1845 and Acts amending the same, and the justices may pay to the board the price agreed on or settled by arbitration as aforesaid out of the county rates of the county of Middlesex, and may mortgage the county rates of the said county for the purpose of raising the price so agreed upon or settled by arbitration as aforesaid, and may appropriate and use the land when conveyed for building purposes.

6. In pursuance of the said sections land was on the 5th Oct. 1877 appropriated and granted and conveyed by the said board to the use of the clerk of the peace for the said county (being the officer in whom the Sessions House was vested) and his successors for ever, in trust for the purposes of the county, and as to so much of the said land as was conveyed under the power given to the said board by the said 27th section, so that the said land might go along with and be deemed part of the appurtenances of the said Sessions House.

7. Upon the land so conveyed in pursuance of the said sections the justices erected additions and enlargements to the Sessions House.

8. The whole of the Sessions House, including the said additions and enlargements, is occupied and used by the justices, their officers, clerks, and servants, solely and exclusively for the administration of justice, the performance of the Queen's service, and the discharge of the public business of the county.

9. Certain rooms in the Sessions House are and have been for many years assigned by the justices to a joint clerk of committees to the justices and keeper of the Sessions House. As keeper of the Sessions House he is obliged to reside on the premises, and occupies by himself and his family (in addition to two offices) a sitting room and six bedrooms.

10. The acting joint clerk of committees to the justices is permitted by the justices to occupy in the Sessions House an office in which to discharge his duties as such clerk.

11. The justices do not receive from the said keeper or acting joint clerk, in respect of their said occupation, any rent or other consideration beyond the performance of the duties of their respective offices.

12. From and after the erection of the Sessions House until the year 1879, the assessment thereof for the poor rate and for other purposes was after the same rate at which the ground whereon the Sessions House was erected, was assessed in the

year 1777, namely, gross value 135*l.*; rateable value 113*l.* In the year 1879, by a provisional valuation list, made under the Valuation (Metropolis) Act 1869, the assessment was increased in respect of the additions and enlargement to the Sessions House which had been made to gross value 800*l.*; rateable value 667*l.* The justices objected before the assessment committee to the increased assessment, who reduced the amounts to the following sums: namely, gross value 465*l.*; rateable value 388*l.* These figures were made up by adding to the old assessment of 1777, in respect of the said additions and enlargements 330*l.* to the gross value, and 275*l.* to the rateable value. The justices did not appeal to the assessment sessions.

13. On the 1st June 1885 notice was served on the clerk of the peace by the overseers that, in the new valuation list prepared pursuant to the Valuation (Metropolis) Act 1869 for the parish of St. James and St. John, Clerkenwell, the gross value and the rateable value of the Sessions House were respectively assessed at 600*l.* and 500*l.*

14. Notice of objection to the said assessment was duly given by the appellant on behalf of the justices to the respondents, the assessment committee for the Holborn Union, within whose district the Sessions House is situated.

15. The objection of the justices had been considered, but not finally decided by the respondents at the time when, in pursuance of the Valuation (Metropolis) Act 1869 and the Acts incorporated therewith, it became necessary to deposit or redeposit the said valuation list. The respondents accordingly, in order to afford an opportunity for a further consideration of the matter, increased the assessment of the Sessions House to a gross value of 610*l.*, and a rateable value of 509*l.*, and the said list was redeposited with the assessment so increased. The appellant thereupon, on behalf of the justices, duly gave notice of objection to the said assessment, on the ground that the Sessions House was not rateable property within the meaning of the Valuation (Metropolis) Act 1869, and on the further ground that, if rateable at all, the said premises could not be lawfully assessed at a higher rate than the assessment of 1777. The respondents on the 27th Oct. 1885 confirmed the assessment of 610*l.* and 500*l.* respectively, and the valuation list as finally approved by the respondents was duly sent to the overseers.

16. The appellant, on behalf of the said justices, and in pursuance of sect. 32 of the Valuation (Metropolis) Act 1869, has appealed against the decision of the respondents to the Court of General Assessment Sessions, and the notice of appeal and the recognisance prescribed by the said Act and by the orders made thereunder have been duly served and entered into by the appellant. The corrections which the appellant desires to have made on the said valuation list, as stated in his notice of appeal, are as follows, namely, that the hereditament being the Sessions House at Clerkenwell-green, be eliminated from the said valuation list, on the ground that the same does not come within the description of "rateable property," the subject of the Valuation (Metropolis) Act 1869; and further, that if the said Sessions House be held to be liable to assessment, the gross and rateable values thereof ought to be reduced to the amount of 135*l.* and 113*l.* respectively.

17. After the said notice of appeal had been given, it was ordered by Field, J., by consent of the parties and in pursuance of sect. 40 of the Valuation (Metropolis) Act 1869, that this special case be stated for the opinion of the Queen's Bench Division of the High Court of Justice.

18. Either party was to be at liberty to refer to any of the above-mentioned Acts, conveyances, or other documents as part of this case.

The questions for the opinion of the court were:

1. Whether the said Sessions House came within the description of rateable property, the subject of the Valuation (Metropolis) Act 1869.

2. Whether, if rateable, the said Sessions House could be lawfully rated at a higher assessment than a gross value of 135*l.* and a rateable value of 113*l.*

R. S. Wright for the appellant.—It is submitted that the Sessions House, being occupied and used solely and exclusively for the administration of justice, the performance of the Queen's service, and the discharge of the public business of the county, ought to be entirely exempt from assessment to the poor rate. To make premises such as those in question rateable at all, there must be some person residing there, and having such an occupation as would make him liable to the poor rate in respect therof:

Reg. v. *The Justices of Worcestershire*, 11 A. & E. 57; *Hodgson* v. *The Local Board of Health of Carlisle*, 8 E. & Bl. 116.

In *Coomber* v. *The Justices of the County of Berks* (50 L. T. Rep. N. S. 405; 9 App. Cas. 61), the justices, in the exercise of statutory powers, erected assize courts, with the usual offices, and accommodation for constables living there, and for prisoners. The buildings formed one block, and were used for public purposes and for the administration of justice, and no rent or profit was received or made in respect of the buildings, or any part of them, and there it was held that income tax was not payable in respect of the buildings. It is submitted that precisely the same principle applies here, and that the decision of the House of Lords in that case is conclusive here in favour of the appellant. A public officer, employed by the Crown in the public service, occupying premises belonging to the Crown for the purpose of performing such service, is not rateable to the poor rate in respect of such occupation, although it constitutes part of the emolument of his office; reasonable accommodation for his family will not affect such exemption:

Reg. v. *Stewart*, 8 E. & Bl. 360; 27 L. J. 81, M. C.

The rule has been clearly laid down by Blackburn, J. that where property is occupied for the purposes of the government of the country, including under that head the police, and the administration of justice, no one is rateable in respect of such occupation. And this applies also to property occupied by local police, to county buildings occupied for the assizes and for the judges' lodgings, or occupied as a County Court, or for a gaol:

Mersey Docks v. *Cameron*, 12 L. T. Rep. N. S. 643; 11 H. of L. Cas. 464, 465; 35 L. J. 10, M. C.

That rule has also been adopted by Lord Watson in his judgment in *Coomber* v. *The Justices of the*

County of Berks (50 L. T. Rep. N. S. 405; 9 App. Cas. 61.) For the purposes of rating, public business of the county is equivalent to the business of the Crown. In any case it is submitted that the statute of 18 Geo. 3, c. 67, limits the assessment to the amounts therein specified.

Poland (*Castle* with him), for the respondents.—This case is distinguishable from those cited by the other side, because the Sessions House in question is used for the discharge of public business, which places it in the same position as that occupied by municipal buildings. It is true that certain Crown property is not rateable, and the reason of such exemption appears to be that the Crown is not mentioned in the Act for the Relief of the Poor, 43 Eliz. c. 2. But such exemption, it is submitted, applies only to what is strictly speaking Crown property. The occupation by the keeper of the Sessions House and his family is a beneficial occupation, which is taken into consideration in fixing his salary. The true construction of 18 Geo. 3, c. 67, is that a parliamentary contract has been made to the effect that the Sessions House is to be rateable. The amounts therein specified relate to the Sessions House built in accordance with that statute, but the limit named does not apply to additional land since taken over and built upon. Such additions are rateable to the full value.

The following cases were cited and referred to:

Reg. v. *The Overseers of Manchester*, 3 E. & Bl. 336; 23 L. J. 48, M. C.;

Reg. v. *The Governors of the Foundling Hospital*, 25 L. T. Rep. N. S. 562; L. Rep. 7 Q. B. 83.

R. S. Wright, in reply.

DENMAN, J.—After hearing the argument in this case, in which Mr. Wright very clearly brought before us all the authority which can be considered closely to bear upon the questions raised by the case, and in which we have also had the advantage of hearing all that the ingenuity of Mr. Poland can suggest on the other side, it appears to us that it is impossible to distinguish this case in principle from the authority relied on by the appellant, namely, the case of *Coomber* v. *The Justices of the County of Berks* (*ubi sup.*). In that case, as reported in 9 Q. B. Div. 17, when it first came before the Divisional Court, it appears that the question was whether the buildings in which the assizes are held at Reading, for the county of Berkshire, with the surrounding accommodation, were rateable buildings. Without going minutely into the description of the buildings there, the case states, amongst other things, that there was a resident constable there, who was the keeper of the hall, and it appears from that and other cases, that it does not matter that such person living there should be a married man with a family, unless the occupation were more than could reasonably be expected for the proper accommodation of the person who occupies the place for the purposes for which he is resident there, if the occupation is such as in substance, in other respects, comes within the exemption from rateability which applies to buildings generally, which are in accordance with the description of such buildings as are in question in the present case. In *Coomber* v. *The Justices of the County of Berks* (*ubi sup.*) it was found that the use of the buildings was solely official, and it was also found and stated when the case was in the Court of Appeal, that the ground of the decision was that, although the buildings were not Crown property in the fullest and strictest sense of the words, still it was property which was in the nature of Crown property, because it was occupied solely, for all practical and for all substantial purposes, for public services in connection with the government of the country, as much as if it had been solely and entirely occupied for the administration of justice. In the House of Lords, Lord Blackburn went very fully and very exhaustively through the cases on the subject, and he intimated doubts, or what amounted nearly to doubts, if not quite, whether it might not have been an open question, capable of further and closer argument, whether such buildings as county halls occupied for the purposes of the assizes, and for other kindred purposes, would have been within the exemption but for a series of decisions which had held that property of that nature and analogous to it, was property practically within the rule that Crown property was not to be rated. He held, in substance, that where a duty was cast upon the county in aid of the general government of the country through the justices, such buildings were property which was occupied for the business of the justices keeping the peace of the county, and doing their duty in the county in aid of the general business of the country; he held that such buildings as those were exempt from being rated to the poor rate. The judgments of Lords Watson and Bramwell are entirely in accordance with that of Lord Blackburn, although perhaps they do not go so far in expressing any doubt as to the law upon the subject. The principle, as expressed by Lord Bramwell, is that the buildings were occupied in respect of public functions. Now, that might possibly be too large a description with reference to some conceivable function of the justices, but I fail to find that, under the general statement which we have in this case, namely, that this Sessions House is occupied and used by the justices in the discharge of the public business of the county, the case as stated goes at all beyond the case in which it was held by so many learned judges that the exemption from rateability applied. The justices of the peace have many functions which they have derived from the earliest times, and their main function is the preservation of the peace of the county. Many other important duties have been imposed on them from time to time, and I do not think it is going too far to say that, in the absence of any peculiarity, all the duties performed by justices of a county would come within the definition of duties performed by the justices of the county as part of and in aid of the general government of the country. Supposing this question had arisen upon the original valuation of the Sessions House, with the same duties discharged in it as are discharged there now, and it being used for the same purposes, I think it would be impossible to distinguish it from the case of *Coomber* v. *The Justices of the County of Berks* (*ubi sup.*). In the case of *Reg.* v. *Stewart* (*ubi sup.*) it was decided that the mere fact that an official resides with his family on premises of this class will not render the premises rateable for that reason alone, if they would have been otherwise exempt. It was also there held, and, in my opinion, held rightly, that the court will not be nice to pick out any very trifling circumstance in the case which might give grounds

for a rate of a farthing, or a shilling, or a very small sum such as that, where the building in question is substantially a public one, used for public purposes, and in aid of the general government of the country. A further question has been raised upon this case, namely, how far the original Act, passed in 1777 (18 Geo. 3, c. 67), which authorised the purchase of the land for, and the erection thereon of the original Sessions House, was to be considered as limiting not only the rate thereby imposed, but further, as going beyond that and fixing it for future time. I may say at once, that if I thought the amount of the rate was fixed by that Act at all, I should be entirely with Mr. Poland in his argument that, since alterations and enlargements have been made, and the buildings have been added to on ground since acquired, the original statutory limitation would not apply to the newly existing state of things. But inasmuch as, according to the now existing state of things, the whole of the premises are occupied for purposes which make the whole of them exempt, supposing the question now arose for the first time, and that there had been no original Sessions House there at all, I should not think that the clause providing that the Sessions House was not to be assessed at a higher rate than its then value would preclude the justices, who now object to the rate, from coming forward and contending that, as the premises are not rateable at all, they have good ground for appealing against the assessment altogether. In my opinion the Sessions House is not in its nature a building which should be assessed to the poor rate at all, and therefore this appeal must be allowed. I think, upon the whole, that this case cannot be distinguished from the principle laid down in that of *Coomber* v. *The Justices of the County of Berks (ubi sup.)*. No circumstances are stated or brought forward which would take it out of the general rule as laid down in that case. Therefore I think we ought to act upon that decision and follow it, and give our judgment in favour of the appellant.

Hawkins, J.—I am also of opinion that the Middlesex Sessions House, with the additions to it, does not come within the description of rateable property, the subject of the Valuation (Metropolis) Act 1869, under which the question is put. I cannot, for my own part, distinguish the case from the authorities which have been cited, and, being bound by those authorities, I do not think it necessary to add much to my brother Denman's judgment. Mr. Poland, on behalf of the respondents, endeavoured to establish, with the aid of the statute of 1777, that it must be taken that substantially it was enacted by that Act that henceforth the Sessions House should be rateable to the extent of 135*l.* as gross value, and 113*l.* as rateable value; but I cannot accept that view of the statute. I take the meaning of that statute simply to be that, if the new Sessions House, when built and occupied, should become liable to be assessed to the rate for the relief of the poor, it should be assessed; but in that case the assessment should not exceed the sum of 135*l.* as gross value, that being the amount at which the premises which occupied the site on which the original Sessions House was built were at that time assessed. Then, with regard to the additions to the old Sessions House, I am of opinion that they stand altogether unaffected by the previous statute. It seems to me to be clear that if the Sessions House itself were rateable, its rateable value would not be limited, so far as regards the additions to it, to the sum of 135*l.* I think that in that case the assessment in respect of the additional buildings would be treated, as far as practicable, separately and apart from the original structure. If the new part was assessable at all, then the whole building would be assessed at the sum of 135*l.*, or some lesser amount, plus the rateable value of the new part. But I think, for the reasons given in the cases which have been cited, that the premises are altogether exempt from assessment, and our judgment must therefore be for the appellant.

Appeal allowed.

Solicitor for the appellant, Sir *R. Nicholson.*
Solicitor for the respondents, *E. W. James.*

CROWN CASES RESERVED.

Saturday, Dec. 11, 1886.

(Before Lord Coleridge, C.J., Denman, Hawkins, Stephen, and Day, JJ.)

Reg. *v.* Hadfield. (*a*)

Perjury—Evidence true as to one occasion attributed to another occasion — Materiality — Sufficiency of indictment—Seizure of unsound food—Public Health Act 1875, *ss.* 116, 117, 263.

H., an inspector of nuisances for the borough of S., was convicted of perjury on an indictment which alleged that, upon the hearing of an information against G. for exposing for sale a number of rabbits which were unfit for the food of man, contrary to the Public Health Act 1875, *it was a material question whether H. had duly inspected and examined the carcases of the rabbits, and whether such carcases had appeared to him to be unfit for the food of man before and at the time when he seized the same under the provisions of the Public Health Act. The indictment then alleged that H. falsely swore (amongst other things) that he had examined critically every rabbit, and set out the evidence giving the details of such examination; and further alleged that H. did not in truth examine the rabbits in the manner sworn. It appeared that upon two occasions subsequently to the time of seizure, when he had merely made a cursory examination, sufficient, however, to entitle him to seize the rabbits, he had examined them as he had sworn he had. It also appeared that, at the time of the seizure, the rabbits were, in fact, unfit for the food of man.*

Held, that, as the indictment did not allege that the evidence was given with reference to the time of seizure, and since the evidence, if taken with reference to the other occasions upon which examinations were made, was perfectly true, all the allegations might be true without H. having sworn falsely, and that, therefore, no offence was disclosed upon the indictment.

Case reserved by Wills, J. upon the trial of an indictment for perjury at the Leeds Spring Assizes 1886, which stated the following facts:—

The defendant was an inspector of nuisances for the borough of Sheffield.

(*a*) Reported by R. Cunningham Glen, Esq., Barrister-at-Law.

On the 20th Feb. 1886 a person named Grayson exposed for sale in the market at Sheffield forty-six dead rabbits intended for the food of man.

They were diseased, unsound, and unwholesome and unfit for the food of man.

The defendant looked at them, and seeing that they were unfit for human food seized them under the powers of the Public Health Act 1875, s. 116.

On the same evening, after their removal to the premises of the corporation, he examined them minutely in company with an ex-inspector of nuisances named Wood, and the next day, the 21st, he examined them again minutely, one by one, in company with Dr. White, the medical officer of health.

On the 22nd he applied to a magistrate to deal with them according to the provisions of sect. 116, and the magistrate condemned them and ordered them to be destroyed.

On the 12th March 1886 the defendant took out a summons against Grayson under sect. 117. (The material portions of the summons recited in the indictment were here set out.)

The summons was heard on the 26th March. It was upon this occasion that the defendant gave the evidence in respect of which the present prosecution arose. The following are the material parts of his evidence: "I saw forty-six rabbits on the stall skinned. The defendant (*i.e.*, Grayson) was selling them. I examined them . . . . There was inflammation of the lungs. They were unfit for human food. I said to Grayson that I should seize them . . . . I seized them and they were taken to the stores . . . . Cross-examined . . . . *I examined all the forty-six. I took them all in my hand.* Grayson did not ask me to point out what was wrong with them. Mr. Parish was brought on the scene. *I did not keep my gloves on. I took all the forty-six rabbits up to examine separately. It took me probably a quarter of an hour.* I looked to see *how they had been killed.* . . . . I went down to the stores with the rabbits . . . . *I critically examined every one* . . . . I examined the rabbits again after leaving the stall to see how they had been killed"

Dr. White was also called on the 26th March and proved that on the 21st Feb. he made a separate examination of each of the forty-six carcases, and that they were in the state described by the defendant. No evidence was given on behalf of Grayson. The justices convicted Grayson and fined him 3*d.* in respect of each rabbit.

The passages in italics are those in respect of which the jury have found that perjury has been committed.

A copy of the indictment accompanies and forms part of this case. (*a*) It contains two counts, the first alleging perjury at common law, the second alleging that the defendant wilfully and corruptly gave false evidence on an examina-

(*a*) The indictment was as follows:—West Riding of Yorkshire to wit.—The jurors, &c., present that heretofore and after the making and passing of the Public Health Act 1875, to wit, on the 20th day of February in the year of our Lord 1886, Thomas Hadfield was an inspector of nuisances in and for the borough of Sheffield in the said Riding, and that Joseph Grayson was a fish and game dealer carrying on business in the Fitzalan Market, in the said borough. And the jurors, &c., do further present that afterwards, and within six calendar months of the day of the committing of the alleged offence next hereinafter mentioned, to wit, on the 26th day of March in the year last aforesaid, the said Joseph Grayson duly appeared before Edward Tozer, esquire, and John Edward Bingham, esquire, two of Her Majesty's justices of the peace in and for the said borough, to answer before such justices a certain information and complaint against the said Joseph Grayson, then and there preferred and laid against him, and then and there depending before the said justices, for that he, the said Joseph Grayson, had within the borough aforesaid unlawfully committed an offence against the said Public Health Act 1875, to wit, that on the 20th day of February in the year of our Lord 1886, the carcases of forty-six rabbits exposed for sale on certain premises, to wit, a stall in the Fitzalan Market, in the said borough, and intended for the food of man, were inspected and examined by the said Thomas Hadfield, an inspector of nuisances for the said borough, and such carcases then appearing to the said Thomas Hadfield, as such inspector of nuisances, to be diseased, unsound, unwholesome, and unfit for the food of man, were then and there lawfully seized by the said Thomas Hadfield, as such inspector of nuisances, under and by virtue of the said Public Health Act 1875, and that the said carcases did then belong to him, the said Joseph Grayson, and that he, the said Joseph Grayson, was the person in whose possession, and on whose premises, the said carcases were so found as aforesaid, contrary to the said Public Health Act 1875, and that the said carcases were on the 22nd day of February, in the year of our Lord 1886, brought before Charles Belk, esquire, one of Her Majesty's justices of the peace in and for the said borough, and then appearing to him to be diseased, unsound, unwholesome, and to be unfit for the food of man, were by him duly ordered to be destroyed. And the jurors, &c., do further present that on the said 26th day of March in the year of our Lord 1886, the said charge and complaint against the said Joseph Grayson came in due form of law to be heard and determined by and before the said Edward Tozer and John Edward Bingham, being such justices as aforesaid, and having competent authority then and there to hear and determine the same. And the jurors, &c., do further present that, on the hearing and determination of the said charge and complaint, so depending as aforesaid before the said justices as aforesaid, the said Thomas Hadfield appeared as a witness against the said Joseph Grayson, in support of the said charge and complaint, and was then and there, in due form of law, sworn and took his corporal oath upon the Holy Gospel of God, that the evidence which he, the said Thomas Hadfield, would then and there give should be the truth, the whole truth, and nothing but the truth, so help him God, by and before the said Edward Tozer and John Edward Bingham, then and there being such justices as aforesaid, and having competent authority and jurisdiction to administer the said oath. And the jurors, &c., do further present that, upon the hearing of the said charge and complaint, so depending as aforesaid before the said justices as aforesaid, it became and was a material question whether he the said Thomas Hadfield, as such inspector of nuisances, had duly inspected and examined the said carcases of the said forty-six rabbits so exposed for sale as aforesaid, and whether such carcases had appeared to him, the said Thomas Hadfield, as such inspector of nuisances, to be diseased, unsound, unwholesome, and unfit for the food of man, before and at the time when he seized the same under the provisions of the said Public Health Act 1875. And the jurors, &c., do further present that the said Thomas Hadfield, upon his oath aforesaid, unlawfully, falsely, corruptly, and wilfully, before the justices aforesaid, did depose and swear (amongst other things) in substance and to the effect following; that is to say: "I examined them (meaning the said carcases of the said rabbits). They were merely skin and bone, scarcely any flesh. The whole of the viscera were gone, except in four cases. They (meaning the said rabbits when alive) had suffered from inflammation of the lungs. They were all pretty much alike. They had not been killed in the ordinary way. There were no traces of gunshot, dog bite, or dislocation of the neck. I examined all the forty-six (meaning all the said forty-six carcases of the said rabbits). I took them all in my hand. I did not keep my gloves on. I

tion on oath under certain provisions of the Public Health Act 1875.

The second count is framed upon sect. 263 of the said Act.

The statements of the defendant in italics would have been all true if they had been spoken with respect to the examination of the carcases which he made on the night of the 20th Feb. in company with Wood, or with respect to the examination made on the 21st Feb. in company with Dr. White. There was, however, abundant evidence that they were made not in respect of either of those occasions, but in respect of the examination which preceded the seizure, and which took place in the market. That examination was of a very cursory kind, the defendant having merely looked at the carcases and turned one or two over with his stick. The condition of the carcases was such that this cursory examination was amply sufficient to show both that they were all belonging to one lot, and in the same condition, and that they were diseased and unfit for food. It was proved and not disputed by the prosecution that the carcases, when examined on the 21st, were in such a state that they must have been in the same condition of disease and unfitness for human food on the night of the 20th.

I reserved the question whether the statements upon which the conviction has taken place being true as to everything except the occasion upon which the examination was made, and the state of the carcases having been such when the detailed examinations were made that the state of the carcases at the time of seizure must have been truly described in the defendant's evidence, the fact that the examination of the carcases was attributed to the wrong occasion was sufficiently material to support a conviction for perjury.

I also reserved the question whether, supposing that the fact of the defendant's examination of the carcases being attributed to the wrong occasion is sufficiently material to support the conviction, the allegation of materiality in the first count of the indictment is sufficient.

Mr. Lockwood, of counsel for the defendant, objected to the first count of the indictment on the ground that, "having averred that it was a material fact as to whether the examination of the carcases took place at the time when and before the defendant seized the rabbits, it does not go on to state that the examination alleged to have been referred to in the evidence of the defendant was an examination alleged by him to have taken place at the time of or before the seizure." I reserved the point.

It was contended by Mr. Barker, on behalf of the Crown, that, under the 263rd section of the Public Health Act 1875, it is not necessary that the statements in respect of which perjury is assigned should have been material.

It was contended on behalf of the prisoner that the object of that section is merely to enlarge the class of occasions in respect of which false statements upon oath may give rise to prosecutions. They also contended that the second count does not sufficiently aver that which is the substance of the offence in this case, namely, falsely attributing to one occasion that which was true of another. I reserved the points.

The question for the opinion of the court is, whether the conviction should be upheld or quashed.

No one appeared on either side.

Lord COLERIDGE, C.J.—I am of opinion that this conviction is wrong, on the ground that the indictment as stated in the case shows no offence. It states that on the 16th March one Joseph Grayson appeared before two of Her Majesty's justices of the peace to answer a certain information and complaint laid against him for having unlawfully committed an offence against the Public Health Act 1875, on the 20th Feb.; and that upon the hearing of the charge and complaint it was a material question whether the defendant, as inspector of nuisances, had duly inspected and examined the carcases of forty-six rabbits which had been exposed for sale, and whether such carcases had appeared to him to be diseased and unfit for the food of man before and at the time when he seized the same under the provisions of the Public Health Act. Now, the indictment goes on to state that the defendant made certain statements which, when one looks at the case, were all perfectly true, but were not true if taken with reference to the allegation that his evidence referred to the time when the rabbits were seized, on the 20th Feb. The indictment, however, does not allege that the statements were made with reference to the time when the rabbits were seized, and if made with reference to the night of the 20th Feb. or

took all the forty-six rabbits up to examine separately. It took me probably a quarter of an hour. I looked to see how they had been killed. I critically examined every one." Whereas, in truth and in fact, the said Thomas Hadfield did not examine the said rabbits, and did not see and ascertain upon such examination that they were merely skin and bone, and had scarcely any flesh, and that the whole of the viscera were gone, except in four cases, and that the said rabbits when alive had suffered from inflammation of the lungs, and were all pretty much alike, and that they had not been killed in the ordinary way, and that there were no traces of gunshot, dog bite, or dislocation of the neck on them. And whereas, in truth and in fact, he, the said Thomas Hadfield did not examine all the forty-six carcases of the said rabbits, and did not take them all in his (the said Thomas Hadfield's) hand, and he the said Thomas Hadfield did keep his gloves on, and did not take all the forty-six rabbits up to examine separately, and it did not take him the said Thomas Hadfield a quarter of an hour, and he did not look to see how they had been killed, and he did not critically examine every one, as he, the said Thomas Hatfield, well knew at the time when he so swore as aforesaid. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Thomas Hadfield, on the 26th day of March in the year of our Lord 1886, before the said Edward Tozer and John Edward Bingham, being such justices as aforesaid, by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely, wilfully, wickedly, and corruptly did commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of our Lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity. And the jurors, &c., do further present that the said Thomas Hadfield did, on the 26th day of March 1886, at the borough of Sheffield aforesaid, wilfully and corruptly give false evidence upon the examination on oath of him, the said Thomas Hadfield, under the provisions of the Public Health Act 1875, upon the hearing and determination of a certain information and complaint against Joseph Grayson, before the said Edward Tozer, Esquire, and John Edward Bingham, Esquire, two of Her Majesty's justices of the peace in and for the said borough and having jurisdiction in the premises, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

to the 21st Feb. the statements were all true. Therefore, every word of this indictment may be absolutely true, and yet no offence need have been committed. As to the second count, it simply says that the defendant gave false evidence upon the same occasion, and what I have already said applies equally to it. The conviction must, therefore, be quashed.

Conviction quashed.

Saturday, Dec. 11, 1886.

(Before Lord COLERIDGE, C.J., DENMAN, HAWKINS, STEPHEN, and DAY, JJ.)

REG. *v.* GUNNELL. (*a*)

Criminal law—Evidence—Disclosure in compulsory proceedings — Examinations in bankruptcy — Hearsay evidence of previous disclosure—Rumour no evidence of knowledge—24 & 25 Vict. c 96, ss. 80, 85.

Evidence of A. that B. had told him that C. had committed an offence, is inadmissible as any evidence whatever of the knowledge of B. as to the fact of C. having committed the offence; and it is therefore inadmissible as evidence of an offence, disclosed by a bankrupt in his examination in bankruptcy, having been disclosed previously to such examination, so as to disentitle the bankrupt to the protection of the proviso to sect. 85 *of the 24 & 25 Vict. c.* 96.

Evidence of the fact of a rumour is no evidence of the knowledge of a particular individual, and is not within any of the exceptions to the rule which excludes the reception of hearsay evidence.

CASE reserved by Lord Coleridge, C.J. upon the trial at Hereford, on the 2nd July last, of an indictment laid under 46 & 47 Vict. c. 52, s. 166, for which the fiat of the Attorney-General had been obtained. The case was as follows:—

The indictment charged that on the 3rd Nov. 1883 the prisoner was a trustee under the will of Sarah Taylor, deceased, of a sum of 250*l.*, for the benefit wholly of Ann Taylor, John Phillips, and Anne Elizabeth Hunt; and after the death of the said Anne Elizabeth Hunt for her issue or next of kin; and being such trustee did unlawfully and wilfully convert the said property to his own use, with intent thereby them to defraud. The indictment was framed under 24 & 25 Vict. c. 96, s. 80, and contained one count only.

It was proved that Anne Elizabeth Hunt was, in the events which had happened, entitled to the whole income of the estate of Sarah Taylor; that the prisoner was the executor and trustee under the will of Sarah Taylor, whose death, in 1876, was proved; that he had admitted that 250*l.* of Sarah Taylor's estate was at the time of the death of Sarah Taylor invested on mortgage. The mortgage was transferred to one Phillips by a deed which the prisoner executed as transferor. A cheque for 261*l.* 17*s.*, which it was proved included the 250*l.* above mentioned, was paid by the solicitor of the transferee to the prisoner, and the receipt of the cheque was acknowledged by him. A deed-poll of the 11th Dec. 1884 was proved, in which the prisoner admitted the receipt of this 250*l.*, treated it as a debt, and charged his whole property with the repayment of it *inter alia*. By this deed, however, the County and City of Worcester Bank had a first charge on all the property dealt with in it; and the prisoner's debt to the bank alone was more by 150*l.* (roughly speaking) than the whole value of the property dealt with by the deed; so that there was nothing left for Mrs. Hunt, and in fact she had lost, subject to the next statement in the case, the whole of the 250*l.* The prisoner became soon after involved in pecuniary difficulties, was made a bankrupt, and his estate paid 2½*d.* in the pound.

The public examination of the prisoner in the bankruptcy proceeding, on the 26th Nov. 1885, was put in at the trial by the prosecution. In this examination the prisoner admitted that the 250*l.*, the subject of this indictment, was used by him for the purpose of his defence in a charge preferred at the Central Criminal Court, in Dec. 1884, previous to the execution of the said deed-poll.

The prosecution further tendered the following evidence of G. F. Marshall:

I am a solicitor. On the 9th July 1885 I attended the first meeting of the creditors of Gunnell held in London.

Q.—After this meeting was anything said to you in reference to the 250*l.*, the subject of this indictment? A.—Yes.

Q.—What was said? [Question objected to.]

Prisoner's counsel: Was Gunnell present? A.—No. [Objection overruled.]

Marshall: Andrews told me that Gunnell had appropriated the sum of 250*l.*, and that he had executed a deed-poll charging certain of his property with the repayment thereof. (*a*)

On these facts I directed the jury that the prisoner was a fraudulent trustee, and that if they thought these facts proved they should find him guilty of a misdemeanour. The jury convicted the prisoner, whom I allowed to go out on bail till the opinion of the Court of Criminal Appeal could be taken upon the case. I accordingly request the opinion of the court whether Marshall's evidence was properly admitted, and whether my direction was correct in point of law.

A. Gwynne James submitted, on behalf of the defendant, that the evidence of Marshall was merely hearsay, and clearly inadmissible to prove the commission of the offence; and that it was equally inadmissible in proof of there having been any disclosure of the offence previously to the examination in bankruptcy, for it was no evidence whatever of what Andrews knew, and the defendant was therefore entitled to the protection of the proviso to sect. 85 of the 24 & 25 Vict. c. 96. (*b*) [He was here stopped by the Court.]

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

(*a*) Andrews had obtained his information by reason of his having acted as Gunnell's solicitor; and objection to his evidence being admitted was therefore allowed on the ground of privilege.

(*b*) By sect. 85 of 24 & 25 Vict. c. 96, it is enacted that "Nothing in any of the last ten preceding sections of this Act contained shall enable or entitle any person to refuse to . . . . answer any question or interrogatory in any civil proceeding in any court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanours in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act . . . . in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency."

A. T. Lawrence (with him *A. Littleton*), in support of the conviction, contended that the present case was governed by the decision in *Reg.* v. *Skeen* (8 Cox C. C. 143; 28 L. J. 91, M. C.), where it was held that evidence given before the commissioner in bankruptcy was not a disclosure within the proviso to sect. 6 of 5 & 6 Vict. c. 39. The statute 24 & 25 Vict. c. 96, s. 85, does not mean that the examination in bankruptcy must be the first disclosure by the defendant, but that it must be the first disclosure in fact, for if it is not the first the bankrupt does not do a meritorious act, and is not entitled to the protection of the Act. This was one of the instances in which hearsay evidence was admissible. It might not be strong evidence, but it was some evidence of there having been a previous disclosure. In Taylor on Evidence, 8th edit. p. 521, it is said, with regard to the practical application of the rule as to the admissibility of declarations: "Two points deserve especial attention: the first is, that declarations, though admissible as evidence of the declarant's knowledge or belief of the facts to which they relate, and of his intentions respecting them, are no proof of the facts themselves." Here all that it is necessary for the prosecution to prove is, that the defendant's offence was not a secret in 1885, and to prove that evidence of the knowledge of Andrews would be admissible. [STEPHEN, J.—Andrews may merely have been stating what was a rumour, which is one thing, but a disclosure is another, and the fact that a rumour proves ultimately to be true will not make it a disclosure.] That goes to the question of the value of the evidence, and not to the question of its admissibility. It was not asked on behalf of the defendant that the question should be left to the jury whether the disclosure at the examination was a first disclosure or not; all that was asked was whether this evidence was admissible. It was admissible as evidence, however weak, and the jury must be taken to have found that this disclosure was not a first disclosure, and the conviction was therefore right.

Lord COLERIDGE, C.J.—I am of opinion that unquestionably, according to the general rules of law, this evidence would not have been admissible for one instant, and if it had been tendered in words to show that Gunnell had appropriated the 250*l.* it clearly would not have been admissible; but it was not so tendered. It was tendered in order to show that the disclosure of his offence was not first made by him in the bankruptcy proceedings, for sect. 85 of the Larceny Act 1861 protects from penal consequences a person who reveals an offence committed against the law if he first discloses it "in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency." Now disclosure may mean a discovery of that which was not known before, or a statement of that which was known before. If it is a discovery he is protected under this section, but if it is merely a statement he is not protected by it. I am disposed to think that the word "disclosed" is rightly interpreted to mean the making known that which before was not known. Knowledge of the fact that a thing was known may be proved by a variety of means only capable of being brought to the knowledge of anyone by evidence which would not be evidence of the primary fact. Therefore I do not at all feel convinced that, by the ordinary rules under which hearsay evidence is excluded, in no cases can hearsay evidence be admissible to prove knowledge of a fact. As my learned brothers are all of opinion, however, that the evidence was inadmissible, I am not inclined to disagree with them.

DENMAN, J.—I assume, for the purposes of this case, that the prisoner might have been properly convicted had this evidence been admitted; and that the question is only as to the admissibility of the evidence. The statute upon which the matter turns is the 24 & 25 Vict. c. 96. sect. 85 of which enacts that "no person shall be liable to be convicted . . . by any evidence whatever in respect of any act done by him if he shall at any time previously to his being charged with such offence . . . have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency." Now in the present case it was proved that the prisoner had, in an examination in bankruptcy, admitted the facts which were made cogent facts to show that he was guilty of the offence with which he was charged. In order to negative the fact of the first disclosure of such offence having been made in such examination two questions were asked and were objected to. There was a solicitor of the name of Marshall who stated that he attended the first meeting of Gunnell's creditors held in London, and the following questions were asked him first: "After this meeting was anything said to you in reference to the 250*l.*, the subject of this indictment?" to which he replied, "Yes;" and second, "What was said?" Objection was then raised, and the prisoner's counsel asked whether Gunnell was present, to which the witness replied, "No." The objection being overruled, Marshall answered: "Andrews told me that Gunnell had appropriated the sum of 250*l.*, and that he had exeeuted a deed-poll charging certain of his property with the repayment thereof." Now, without at all going into the question how far that answer, if admissible, would negative the defence which was relied on, the question arises, was it competent to the prosecution by calling a witness who merely tells the court that somebody else told him that the prisoner had appropriated the money, to negative the fact that the prisoner had first disclosed his offence in the examination in bankruptcy, or whether such evidence was not open to the objection that it was hearsay evidence. It seems to me that the case of *Reg.* v. *Skeen* (*ubi sup.*) goes no further than to hold that a previous disclosure may be made out by any satisfactory proof that the thing was known before. There is to my mind a great distinction between that which is mere gossip or surmise and that which is known. It appears to me that Andrews telling Marshall that Gunnell had appropriated that sum is nothing more than if someone had been called to say that while travelling in a railway carriage he had heard someone else say that Gunnell had appropriated the money. I do not think that the mere fact that a person says a thing to another is evidence that that thing was known, or was a disclosure within this statute. I am therefore of opinion that the evidence of Marshall was inadmissible, and that the prisoner is protected by the statute.

HAWKINS, J.—I am of the same opinion. The 85th section of the 24 & 25 Vict. c. 96, after enacting that nothing in the preceding sections shall enable or entitle any person to refuse to answer any question upon the hearing of any matter in bankruptcy, provides that no person shall be liable to be convicted of any of the misdemeanours, of which the present charge is one, by any evidence whatever in respect of any act done by him if he shall at any time previously to his being charged with such offence have first disclosed the same in any compulsory examination in bankruptcy. That is to say, that in the event of a man declining to answer or make full discovery, no matter whether it may incriminate him or not, he can be compelled to make full disclosure. In the present case the prisoner was examined publicly on the 26th Nov. 1885, and upon such examination he admitted that the 250*l.*—the subject of the indictment—was used by him for the purpose of his defence at the Central Criminal Court in Dec. 1884. Now, in order to prove that that act was not disclosed for the first time in the examination, the evidence of Marshall is offered, which is that, "Andrews told me that Gunnell had appropriated the sum of 250*l.*, and that he had executed a deed-poll charging certain of his property with the repayment thereof;" and the question is, whether that evidence was admissible to prove a disclosure of the act previously to the examination. I am of opinion that it was not evidence of such a disclosure, and I confess, looking at the language of the statute. I cannot help coming to the conclusion that some tangible evidence of the matter charged against the prisoner must be shown to have been in existence before the examination took place, showing that the criminal act of the prisoner was well known before that time. Here the only evidence of any disclosure was the hearsay evidence of Andrews, who told me, after the meeting, that Gunnell had appropriated the money, says Marshall, without even giving any information as to how he had appropriated it, whether fraudulently or not. I think that evidence was clearly inadmissible, and that the conviction ought, therefore, to be quashed.

STEPHEN, J.—I am of the same opinion. The question is, whether this evidence ought to be admitted, or whether it ought to be rejected on the ground that it is hearsay evidence. I will accept, for the purposes of the case, that by a disclosure, may, or rather must, be meant the becoming known of that which was not known before; and the issue, therefore, which was to be considered was, whether the evidence of Marshall was evidence which the jury ought to have had before them in considering the question whether this matter had been disclosed before the bankruptcy proceedings. It is said it was admissible, because Andrews said something, the effect of which was to show that he knew it before the examination; and the question then is, whether the fact that a man says a thing happened is evidence that he knew that thing had happened. It is quite true that in this case the evidence of Marshall was not given for the purpose of proving that Gunnell had appropriated the sum of 250*l.*, but that it was given for the purpose of proving that Andrews knew that Gunnell had appropriated the sum of 250*l.* Now, can that be done? I say it cannot be done. The simple assertion of any man, "I know that A. B. committed a murder," is not to be taken even as evidence that he did know that A. B. committed murder. Here, the evidence of Marshall that Andrews said that Gunnell told him something is put forward to prove that Andrews knew that Gunnell had done a certain thing, and I say that that cannot be done according to the laws of evidence. This evidence, therefore, is inadmissible, and the conviction should be quashed.

DAY, J.—I concur. *Conviction quashed.*

Solicitors for the prosecution, *Free* and *Son*, Worcester, agents for the Treasury.

Solicitors for the prisoner, *Roberts*, *Barlow*, and *James*, agents for *James* and *Bodenham*, Hereford.

Saturday, Dec. 11, 1886.

(Before Lord COLERIDGE, C.J., DENMAN, HAWKINS, STEPHEN, and DAY, JJ.)

REG. *v.* JUBY. (*a*)

Bankruptcy Act 1883—*Undischarged bankrupt obtaining credit—Order for goods less than* 20*l. in value—Acceptance of delivery of goods over* 20*l. in value—*46 *&* 47 *Vict. c.* 52, *s.* 31.

The offence of obtaining credit to the extent of 20*l. or upwards by an undischarged bankrupt is committed where the bankrupt receives and keeps goods of the value of* 20*l. or upwards without paying for them, or informing the creditor of the fact of his being an undischarged bankrupt, or repudiating the contract, although the goods were sent in execution of an order for goods of a less value than* 20*l.*

CASE stated by the Recorder of Leicester as follows:

The defendant was indicted before me at the last Michaelmas Quarter Sessions for the borough of Leicester under the 31st section of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52). (*b*)

The indictment (omitting formal parts) was as follows: That heretofore and before the committing of the offence next hereinafter mentioned, to wit, on the 10th Dec. 1884, John Juby was adjudged bankrupt, and that the said John Juby at the time of the committing of the said offence was an undischarged bankrupt, and that the said John Juby afterwards, to wit, on the 8th June 1886, being an undischarged bankrupt as aforesaid, unlawfully did obtain from Peter Kerr and David Stevenson, trading as Kerr and Stevenson, credit to the extent of twenty pounds and upwards, that is to say, to the amount of 23*l.* 14*s.* 4*d.* without informing the said Peter Kerr and the said David Stevenson, or either of them, that he was an undischarged bankrupt as aforesaid, against the form of the statute, &c.

(*a*) Reported by B. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

(*b*) Sect. 31 enacts that: "Where an undischarged bankrupt who has been adjudged bankrupt under this Act obtains credit to the extent of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanour under the Debtors Act 1869, and the provisions of that Act shall apply to proceedings under this section."

The facts were as follows: The defendant was a fruit and potato merchant at Leicester, and commenced business in 1884 with a capital of 20*l.*; he was adjudicated a bankrupt in Dec. 1884, and had not been since discharged. Peter Kerr was on the 21st May 1886 carrying on the trade of a potato and fruit merchant at Edinburgh in partnership with David Stevenson, the firm trading as Kerr and Stevenson. On that day (21st May 1886) Kerr received from the defendant a telegram of which the following is a copy:

To Kerr and Stevenson, Edinboro'. Wire price good magnums. What shire.—JUBY.

In consequence of that telegram Kerr telegraphed the prices as requested to the defendant at Leicester.

On the next day (22nd May) Kerr received from the defendant another telegram, which was as follows:

To Kerr and Stevenson, Edinboro'. Send truck magnums for sample, L. and N. W.—JUBY.

After receiving the last-mentioned telegram, Kerr sent to the defendant at Leicester two trucks of potatoes (Magnums), which were at that time lying at the railway station at Cupar. They weighed 6 tons, 5 cwt., 3 quarters, and their price was 50*s.* per ton, amounting in the whole to 15*l.* 14*s.* 4*d.* These goods were delivered to the defendant, who, on the 2nd June, signed a book kept by the clerk of the goods department of the Midland Railway station at Leicester, in acknowledgment of their delivery.

On the 27th May Kerr received from the defendant another telegram, which was in the following terms:

To Kerr and Stevenson, Edinboro'. Send truck Champions sample forty shillings.—JUBY.

In consequence of this telegram Kerr sent from Long Niddry station to the defendant at Leicester four tons of potatoes, the price of which was 8*l.*, and the defendant's servant, on the 8th June, signed a book kept by the clerk of the goods department of the Midland Railway station at Leicester, acknowledging the defendant's receipt of the goods so sent. In cross-examination Kerr said that a "truck" of potatoes would be understood in the trade to mean four tons, and he explained that the reason of his sending to the defendant six tons in execution of the order of the 22rd May was that he (Kerr) had "that lot in hand," and that he had not "a truck of four tons loaded."

The defendant retained all the potatoes consigned to him by Kerr, and not only made no complaint that Kerr had sent him more than had been ordered, but prior to the order for the truck of Champions on the 27th May, namely, on the 26th May, wrote Messrs. Kerr and Stevenson a letter, of which the following is a copy:

Leicester, May 26th, 1886.—From John Juby, fruit and potato merchant and commission agent, Leicester.—To Messrs. K. and S., Edinburgh.—Gentlemen, your wire to hand, also potatoes per Midland. You can forward me two or three more trucks per L. and N. W., not Midland. Will forward cheque for these two trucks soon as weighed up.—Yours respectfully, J. JUBY.

Messrs. Kerr and Stevenson have never been paid for any of the goods sent by them to the defendant. The amount thus owing to Messrs. Kerr and Stevenson in respect of the two consignments was 23*l.* 14*s.* 4*d.* Kerr stated in his evidence that he was not aware at the time the potatoes were sent that the defendant was an undischarged bankrupt, and that he (Kerr) became aware of that fact about a month afterwards.

The defendant had, prior to May 1886, been cautioned by one William Shelton, clerk to the official receiver of the Leicester Bankruptcy Court, against obtaining credit to more than 20*l.* without informing the person from whom he obtained credit that he was an undischarged bankrupt, and he was told by the said William Shelton that if he did so obtain credit he would be liable to be prosecuted.

It was objected on behalf of the defendant that there was no evidence of the defendant's having obtained credit to the extent of 20*l.* in respect of the goods ordered on the 22nd and 27th May, inasmuch as he had on the 22nd May ordered only one truck, which, according to the evidence of Kerr, would in the ordinary course have contained four tons only, the price of which would, according to the evidence of the same witness, have been 8*l.*; that more potatoes having been sent to the defendant by Kerr than he (the defendant) had ordered, Kerr thereby caused the amount of credit in respect of the goods ordered on the 22nd and 27th May to extend to 23*l.*, whereas, if the defendant's order of the 22nd May had been complied with, credit would not have been obtained for a larger amount than 16*l.*; that is, 8*l.* in respect of the goods ordered on the 22nd May, and 8*l.* in respect of those ordered on the 27th.

It was further objected that the defendant did not "obtain" credit to the larger amount within the meaning of the section; but that such credit was forced upon him by the act of Kerr.

I overruled these objections, and held that there was a case for the jury, but, at the request of the learned counsel for the defendant, I consented to reserve the points of law for the opinion of the Court of Criminal Appeal in the event of a conviction. The jury found the defendant guilty.

The question for the court is, whether there was evidence to go to the jury that the defendant had committed an offence within the meaning of sect. 31 of the Bankruptcy Act 1883.

A. T. Toller, for the defendant, submitted that there was no evidence of an obtaining credit within the section; that there was no evidence to show that when the defendant sent the second telegram he knew the amount of potatoes which were coming to him. He was under the impression that only eight tons were coming, and it was not until the 2nd June he knew the amount sent. The obtaining, to come within the section, must relate to the time when the goods are received. But when the goods were received here there was no obtaining, for the defendant had goods to over 20*l.* forced upon him, and he merely accepted them, which was not an obtaining. The section means the procuring of credit, while here the defendant obtained credit, if at all, against his will. When he ordered the third truck, he did not intend to obtain more than 16*l.* worth of goods. [Lord COLERIDGE, C.J.—Is not the decision in *Reg.* v. *Peters* (55 L. T. Rep. N. S. 545; 16 Cox C. C. 36; 16 Q. B. Div. 636) against your construction of the section?] The decision there was merely that it is not necessary

that there should be a contract stipulating for credit in order to render it an offence within the section. There the defendant knew what he had obtained, while here he does not know anything about it. [DENMAN, J.—Does not the question turn upon whether he was bound either to accept the goods and take credit for them, or at once to repudiate them?] No; for the offence was complete, if at all, on the 27th May, whereas the defendant did not know until the 2nd June what had been sent to him.

No one appeared in support of the convictions.

Lord COLERIDGE, C.J.—In this case the question is whether an undischarged bankrupt, who has obtained credit to an amount exceeding 20*l.*, under the circumstances stated in the case, is guilty of an offence against sect. 31 of the Bankruptcy Act 1883. The circumstances were these: that the prisoner being at Leicester and Kerr and Stevenson the vendors being at Edinburgh, the prisoner telegraphed for the price of potatoes per truck, which, according to the usage of the trade, means four tons. Kerr and Co. send the price, and he telegraphs for one truck. He then telegraphs for another truck. He does not get what he orders, but he receives two trucks containing potatoes, the value of which was 15*l.* 14*s.* 4*d.*, which he keeps, and he subsequently receives another truck, the value of the potatoes in which was 8*l.*; these also he keeps. Under the section the offence is complete when he had obtained credit to an amount exceeding 20*l.*, he being an undischarged bankrupt. Now, in this case, I do not place my judgment on the fact that when he received the two trucks he had ordered another, but on the fact that when he received the third truck he had so much of unpaid goods of the Edinburgh traders in his hands that the receipt of the fresh order made the amount unpaid over 20*l.*, and that he then obtained goods, the amount due in respect of which was over 20*l.* The matter is not, however, *res integra*, because in *Reg* v. *Peters* (*ubi sup.*) an interpretation has already been placed upon this Act. No two cases are absolutely the same, and there is in that case the distinction that the price for which the article was to be sold, and for which it was kept, was, in the first instance, above 20*l.*, but the principle upon which the judgment is based is what I there endeavoured to show. The Act is intended for the protection of honest traders. It uses the words "obtains credit," and, as I understand the judgment in *Reg.* v. *Peters*, this court has held that "obtains" means the getting goods and retaining them, and not paying for them, to the value of over 20*l.*, without the vendors being informed of the circumstances of the person so obtaining them. I am therefore of opinion that in this case the defendant was guilty of an offence within the meaning of the section.

DENMAN, J.—I think that it is clear that the *ratio decidendi* of the case my Lord has referred to is one which conclusively governs this case, and that the prisoner is guilty of obtaining credit to an amount exceeding 20*l.*, within sect. 31 of the Bankruptcy Act 1883.

HAWKINS, J.—I have not the least doubt that this was an obtaining credit to an amount exceeding 20*l.* within the meaning of the section, and that, therefore, the defendant was rightly convicted.

STEPHEN, J.—I am of the same opinion, and will only say that I think that the case of *Reg.* v. *Peters* applies as showing when the offence was committed. It has been ingeniously argued that the offence, if any, was complete on the 27th May. But *Reg.* v. *Peters* appears to show that the offence was not completed then, but afterwards when he obtained such an amount of goods as brought his credit over the amount of 20*l.*, and that his duty then was to have repudiated the transaction, or to have given notice to Kerr and Co. of his being an undischarged bankrupt, so that they might have been put upon their election whether to take the goods back or to give him credit. As the defendant did neither of these things, but kept the goods, I am of opinion that he was guilty of the offence of which he was convicted.

DAY, J.—I concur. *Conviction upheld.*

Solicitor for the defendant, *H. H. Hood Barrs*, for *Lionel E. Gee*, Leicester.

HOUSE OF LORDS.

March 19, 22, *and July* 30, 1886.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, FITZGERALD, and ASHBOURNE.)

JUSTICES OF LANCASHIRE *v.* COMMISSIONERS OF NEWTON-IN-MAKERFIELD. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Highway—Highways and Locomotives Amendment Act 1878 (41 *&* 42 *Vict. c.* 77), *s.* 13—*Cesser of turnpike road—Local Act—Main road.*

By a local Act passed in 1855 (18 *&* 19 *Vict. c. c.*) *incorporating the Towns Improvement Clauses Act* 1847 (10 *&* 11 *Vict. c.* 34) *the maintenance of all highways within a district, which was traversed by a turnpike road, became vested in commissioners, who were the highway authority for the district. The turnpike trust expired in* 1877, *but the trustees had ceased to repair the portion of the road within the district from the time of the passing of the local Act.*

Held (*affirming the judgment of the court below*), *that the portion of the road within the district did not "cease to be a turnpike road" within the meaning of sect.* 13 *of the Highways and Locomotives Amendment Act* 1878 *till the expiration of the trust, notwithstanding the passing of the local Act, and that the county authority was liable for half the expenses of its maintenance as a main road within the district.*

Justices of the West Riding *v.* The Queen (49 *L. T. Rep. N. S.* 786; 8 *App. Cas.* 781) *followed.*

THIS was an appeal from a judgment of the Court of Appeal (Brett, M.R., Cotton and Lindley, L.JJ.), reported in 52 L. T. Rep. N. S. 337, and 15 Q. B. Div. 25, affirming a judgment of the Divisional Court (Mathew and Day, JJ.), reported in 51 L. T. Rep. N. S. 707, and 13 Q. B. Div. 623 upon a special case.

The facts appear from the head-note above, and from the judgment of the Lord Chancellor, and the special case is set out in the report in the Divisional Court.

(*a*) Reported by C. E. MALDEN Esq., Barrister-at-Law.

Sir *J. Gorst*, Q.C. and *Blair* appeared for the appellants, and contended that the road within the limits of the district "ceased to be a turnpike road" within the meaning of sect. 13 of the Act of 1878 (41 & 42 Vict. c. 77) on the passing of the local Act in 1855, and therefore, as it so ceased before the 31st Dec. 1870, it ought not to be deemed to be a "main road" within the section, and the county authority is not liable for any part of the repairs. The case of the *Justices of the West Riding* v. *The Queen* (49 L. T. Rep. N. S. 786; 8 App. Cas. 781) is very like this case, but it is distinguishable, for here the road was put under a new jurisdiction created by the local Act, and has not been a turnpike road since. The principle of that case ought not to be extended. The case of *The Justices of Lancashire* v. *Mayor of Rochdale* (49 L. T. Rep. N. S. 368; 8 App. Cas. 494) was different, for there the turnpike trusts had not expired. A part of a road may cease to be a turnpike road otherwise than under the Act of 1878. See the Turnpike Acts Continuance Act 1874 (37 & 38 Vict. c. 95), s. 10. They also cited

Northam Bridge Company v. *London and Southampton Railway Company*, 6 E. & B. 428;
Reg. v. *East and West India Dock Company*, 22 L. J. 380, Q. B.;
Reg. v. *Thomas*, 7 E. & B. 399;
Nutter v. *Accrington Local Board*, 40 L. T. Rep. N. S. 802; 4 Q. B. Div. 375; affirmed in H. of L. 43 L. T. Rep. N. S. 710.

Dugdale, Q.C. and *A. Glen*, for the respondents, maintained that the case was governed by the decisions in *Justices of the West Riding* v. *The Queen* (*ubi sup.*) and *Justices of Lancashire* v. *Mayor of Rochdale* (*ubi sup.*).

Sir *J. Gorst*, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

July 30.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).—My Lords: The point raised in this case may be shortly stated, but the determination of it is by no means free from difficulty. In the year 1855 a portion of a turnpike road running from Warrington to Wigan was included within the improvement district of Newton. Thereupon that portion of the road became vested in the improvement commissioners, and came under their management, and the turnpike trustees, by reason of sect. 50 of the Towns Improvement Act, no longer had power to maintain it, and ceased to do so. Sect. 51 of the Towns Improvement Act gives to the commissioners large powers of managing and altering the roads within their jurisdiction. In 1877 the turnpike trust came to an end. The question is, whether the portion of the road within the improvement district ceased to be a turnpike road subsequent to the 31st Dec. 1870, within the meaning of the Highway Act 1878. For the appellants, it was contended that it ceased to be a turnpike road prior to that date. The respondents insisted that it continued to be part of the turnpike road until the expiration of the trust in 1877. Two cases have recently been before your Lordships' House, in which the facts were very similar to the present, and in which it became necessary to put a construction upon the 13th section of the Highways Act 1878. These cases require careful examination. The first in order of date was *Justices of Lancashire* v. *Mayor of Rochdale* (49 L. T. Rep. N. S. 368; 8 App. Cas. 494). There portions of certain turnpike roads were included in 1853 in a district subject to the Towns Improvement Act of 1847. In 1856 the powers theretofore exercised by the commissioners were transferred to the town council of the borough, and by an extension of the boundaries of the borough other portions of the same roads, with regard to which the question in the action arose, were brought within the area of the borough. After the passing of the Highways Act 1878 it was contended, on behalf of the corporation of Rochdale, that these parts of the roads had ceased to be turnpike roads since 1870, within sect. 13 of that Act, and that consequently they had become main roads, one-half of the cost of repair of which must fall upon the county. This view was contested on behalf of the county, and ultimately it was decided by this House, reversing the judgment of the Court of Appeal, that the county were not liable. The main ground of this decision appears to have been that sect. 13 of the Act of 1878 only applied where the entire road which had been subject to the turnpike trust ceased to be so, and that it did not apply to a portion of a turnpike road, even if that portion might in some sense be said to have ceased to be a part of the turnpike road. The question in the *Rochdale* case arose with reference to portions of five turnpike roads created under different Acts. The trusts expired in the case of one of these roads after the commencement of the action, the writ in which bore date the 13th Nov. 1880. In the case of one road the trust expired on the 1st Nov. 1879, and in the case of two others on 1st Nov. 1880. But inasmuch as the sum sought to be recovered in the action was one-half of the expenses incurred for the half-year ending the 31st March 1879, these cases were obviously all governed by the same considerations. The trust in the case of one road, however, the Halifax road, had expired as far back as 1872; and the facts relating to this road appear to be precisely parallel to the facts in the present case. The question asked in the special case stated in the case of *Justices of Lancashire* v. *Mayor of Rochdale* (*ubi sup.*) was whether the county authority were liable to pay to the corporation the sums demanded "or any part thereof." It was competent, therefore, for the tribunals in that case to deal separately with the sum relating to the Halifax road, and to give the plaintiffs judgment for that sum, whilst absolving the defendants from liability in other respects. The Queen's Bench gave judgment generally for the defendants, and their judgment was affirmed by your Lordships' House. If I could find that the learned Lords who gave their opinion on that occasion had present to their minds the distinction between the Halifax road and the other roads, I should have felt that the case now before us was concluded in favour of the appellants by the decision in the *Rochdale* case. But it seems to me clear that the distinction in favour of the plaintiffs in the *Rochdale* case, so far as the Halifax road was concerned, was not adverted to or considered by any of your Lordships who took part in that decision, and there is no reference to it in the then respondents' case. Lord Blackburn indeed refers incidentally in his statement of the case to

the fact that the trusts of some of the roads had expired, and that some had not expired at the time the action was brought. But this, of course, was immaterial unless the trust had expired prior to the half-year in respect of which the claim was made, and the learned Lord grounds no argument upon it. Lord Bramwell in his judgment, after enunciating his construction of the Act of 1878, adds: "How is it conceivable that the Legislature could have intended that at the expiration of six years this burthen which the corporation of Rochdale had voluntarily taken upon themselves should be taken from them, and shifted in part upon the county?" And he further pointed out that the Rochdale corporation had power to deal with these roads in a very different manner from that in which a road is commonly dealt with by a parish which has to repair it after it ceases to be a turnpike road. Lord Fitzgerald, too, strongly enforces these considerations; but I think they were urged by both these learned Lords, in support of the construction they were putting upon sect. 13, that "road," as used in that section, does not include a part of a road, but means, in the language of Lord Bramwell, "the entirety of the road which has been a turnpike road." They neither of them address any observations to the construction which must be put upon the enactment if, when the entire turnpike trust expired after Dec. 1870, those portions of the road which prior to that date had become included within the area of boroughs were not to be treated as part of the road which, on the expiration of the trust, ceased to be a turnpike road, and therefore was to become a main road. I turn now to a consideration of the other case to which I have alluded, viz., *Justices of the West Riding* v. *The Queen* (49 L. T. Rep. N. S. 786; 8 App. Cas. 781). The question in that case was, as in the present, whether portions of certain turnpike roads had ceased to be turnpike roads subsequent to the 31st Dec. 1870. The turnpike trust had, in the case of one of those roads, expired in 1876. But prior to 1870 the part of the road in question was within the borough and within the town of Sheffield. By the terms of the Turnpike Act the trustees were forbidden to spend any money in repairing any street, highway, or place in any part of that town, or to collect any toll there. Under these circumstances it was contended that this portion of the road had been disturnpiked prior to 1870, and that, consequently, on the expiry of the turnpike trust in 1876, it did not form part of the turnpike road which then became a main road. Taking these to be the facts, Lord Blackburn held that nothing had happened to prevent this part of the road from being still a part of the turnpike road, or to afford an argument for saying that it was not to be a part of the main road on the expiry of the trust, though an argument was, he thought, afforded in favour of saying that it was no longer under the turnpike trust. Lord Watson entirely concurred in this judgment. Having regard to the reasoning upon which the judgment in the *Sheffield* case proceeded, I think it is hardly possible to distinguish that case in substance from the one now under consideration. And taking the *Rochdale* and *Sheffield* cases together, they appear to me to conclude the present case against the appellants. The former of those cases decided that, in the 13th section of the Highway Acts 1878, the words "any road" refer to the entire road which had been subject to the turnpike trust, and not to a part of it. The latter case determined that a portion of a turnpike road which has, during the currency of the term for which the trust was created, become part of a street within a borough, and no longer repairable by the turnpike trustees, nevertheless remains so far a part of the turnpike road as to become part of the main road when the trust expires within the time specified in the 13th section. It is not necessary to say what my opinion would have been had the matter been *res integra*. I quite feel the force of the observations made by Lord Bramwell in the *Rochdale* case, that it was not probable that the Legislature intended to relieve the corporation of part of the expense of repairing one of the streets in the town, and to throw that burden on the county; but I think the force of those observations is much weakened by the fact, which was pointed out by Mr. Glen in the course of his argument, that part of the burden of repairing all the other main roads in the county is by the same enactment thrown upon the borough. I move your Lordships, that the judgment appealed against be affirmed, and the appeal dismissed with costs.

Lord WATSON.—My Lords: I concur in the judgment proposed, which appears to me to be a necessary consequence of the construction of sect. 13 of the Highways Act 1878 which was adopted by this House in the case of *Justices of the West Riding of Yorkshire* v. *The Queen* (*ubi sup.*).

Lord FITZGERALD.—My Lords: I also concur, and think that this case is governed by the *Sheffield* case.

Lord ASHBOURNE.—My Lords: I have had an opportunity of reading the opinion of the noble and learned Lord on the woolsack, and I entirely concur in the conclusion at which he has arrived, and in the reasons which he has given for it.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Ridsdale* and *Son*, for *Wilson* and *Hulton*, Preston.

Solicitors for the respondents, *Field, Roscoe*, and *Co.*, for *J. E. Worsley*, Warrington.

Dec. 2 *and* 3, 1886.

(Before the LORD CHANCELLOR (Halsbury), Lords WATSON and FITZGERALD.)

VESTRY OF ST. JOHN, HAMPSTEAD, *v.* COTTON. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Metropolis Management Amendment Act 1862 (25 *&* 26 *Vict. c.* 102), *ss.* 52, 53—*Sewer—Expense of constructing—New street.*

Sect. 52 *of the Metropolis Management Amendment Act* 1862 *enacts that where any sewer shall be constructed for the drainage of any "new street," the expense shall be defrayed by the owners of the land abutting on such street.*

Sect. 53 *contains a proviso that, where any sewer shall be constructed in a street in which previously there has been no sewer, but where sewers rates*

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

have been levied previously, no property in respect of which sewers rates have been levied for five years prior to Jan. 1, 1856, *shall be subject to be charged.*

The respondent was the owner of property which abutted upon a road in which there was no sewer. Sewers rates had been levied in respect of the property for five years prior to Jan. 1, 1856. *In* 1872 *the road ceased to be a turnpike road, and the appellant vestry afterwards constructed a sewer in it.*

Held (affirming the judgment of the court below), that sect. 52 *of the Act did not apply, and that the respondent was exempt under the proviso in sect.* 53 *from liability to contribute to the expense of constructing the sewer.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Cotton and Bowen, L.JJ.), reported in 54 L. T. Rep. N. S. 441, and 16 Q. B. Div. 475, reversing a judgment of the Divisional Court (Pollock, B. and Manisty, J.) upon a special case.

The facts of the case appear shortly in the head-note above, and the special case is set out in full in the report in the court below.

Philbrick, Q.C. and *English Harrison* appeared for the appellant, and argued that there had been a difference of opinion as to the true construction of sects. 52 and 53 of the Act of 1862, upon which the question depended. In 1869 the Court of Exchequer, consisting of Bramwell, Channell, and Cleasby, BB., in the case of *Vestry of St. Giles, Camberwell* v. *Weller* (17 W. R. 973; L. Rep. 6 Q. B. 168, n.), took a view favourable to the contention of the present respondent, that sect. 53 is to be read as a proviso qualifying sect. 52. But in 1870, in the case of *Sawyer* v. *Vestry of Paddington* (23 L. T. Rep. N. S. 662; L. Rep. 6 Q. B. 164), the Court of Queen's Bench, consisting of Blackburn and Lush, JJ., took the opposite view, and held that the proviso in sect. 53 did not apply to "new streets." In 1876, in the case of *Sheffield* v. *Fulham Board* (1 Ex. Div. 395), Bramwell, B. and Denman, J. held that "street" in sect. 53 included new streets, following the *Camberwell* case, though neither that nor the *Paddington* case appear to have been cited in the argument. Here the Divisional Court held that the case was governed by the *Paddington* case, but the Court of Appeal preferred to follow the other cases. We say that, looking to the general scheme of the Act, this is a "new street" within sect. 52, and that sect. 53 does not apply to it. To hold otherwise would be practically to abrogate sect. 52, as it will leave no street to which it can apply.

The *Attorney-General* (Sir R. Webster, Q.C.) and *J. G. Wood*, for the respondent, maintained that, reading the sections in their ordinary and literal sense, he was not liable, and supported the judgment of the court below. They cited

Pound v. *Plumstead Board of Works*, 25 L. T. Rep. N. S. 461; L. Rep. 7 Q. B. 183.

Philbrick, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships gave judgment as follows:

The LORD CHANCELLOR (Halsbury).—My Lords: In this case the inquiry is as to the true construction of two sections of a statute, and for my own part I am prepared to move your Lordships' judgment simply upon the construction of those two sections according to the ordinary and natural interpretation of the words and sentences therein contained. Doubtless there are cases in which, when in the instrument itself, whether a will, or a contract, or a statute, evidences may be discovered of the general intention of the framer and of the general meaning, or what has been called the governing sense, in which the words or the provisions are to beunderstood—you may occasionally modify the language which you have to construe with reference to that general intention which has been so ascertained. In this case I confess myself wholly unable to discover any general intention which I can rely upon as governing or modifying the language which the Legislature has used. It is obvious that two sets of learned judges have construed these sections differently according as they have regarded the object which the Legislature had in view, and each of them has in turn pointed out the absurdities which would be the result of the opposite construction to that which their Lordships have favoured. That seems to me to show that at all events it is difficult, if not impossible, to obtain any such key to the statute as is to be found in its ascertained governing intention. The result of that appears to me to be that your Lordships should place upon it that construction which every court is bound to place upon any instrument whatsoever; namely, that if there is nothing to modify, nothing to alter, nothing to qualify the language which the instrument contains, it must be construed in the ordinary and natural meaning of the words and sentences therein contained. In this case, whereas your Lordships have, in the case before you, a matter which is expressly within the ordinary and natural language of sect. 53, you are asked at the bar not to understand the language which applies to that subject-matter in the ordinary and natural sense of the words, but to distort the language in order to give effect to what is assumed to have been the intention of the Legislature, which however, as I have said, it is obvious you cannot find. Apart from the language of the statute itself, and apart from some supposed intention to be ascertained within the four corners of the statute, your Lordships have been informed of a variety of facts which it is said may throw light upon what was the intention of the Legislature. For my own part I am unable to accept either the accuracy or the relevancy of that statement. It may very well be that the Legislature had before them facts which induced them, at the particular period when this legislation was being discussed, to attempt to provide for cases which subsequent experience caused them not to provide for. One knows historically, of course, that the system of drainage in this metropolis has undergone a very considerable amount of modification by legislation; but, speaking for myself, I am wholly unable to construe any part of this system of legislation with reference to that historical fact of the alteration of the system of drainage. Under these circumstances there seems to me to be only one safe course for your Lordships to adopt, namely, to abide by the plain language of the statute, and I therefore move your Lordships that the judgment of the Court of Appeal be

affirmed, and that this appeal be dismissed with costs.

Lord WATSON.—My Lords: I am of the same opinion. The question before us turns upon the construction of the 52nd and 53rd sections of the Act of 1862. The 53rd section provides that in the case of certain streets where a sewer is being constructed for the first time, if the property abutting upon a street has been assessed for sewer rates previously, the proprietors shall only be liable in a portion of the cost, the balance being provided out of the general rate; and the section further provides that if the sewer rates have been paid in respect of the property in question for five years previous to the 1st Jan. 1856, the whole cost of construction shall be borne by the ratepayers. The word "street" in that section admittedly means, according to its natural and ordinary construction, any and every street. On the part of the appellants it is contended that it must be read, for the purposes of the Act, as limited to old streets, or to streets other than new streets as defined by sect. 112 of the statute. It is quite possible that such a construction might become imperative; but, in order to attach such a construction, and so to modify and change the first and primary meaning of the words of the Legislature, it is necessary that some cogent reason should exist; and accordingly it was attempted to be shown in argument either that the ordinary and grammatical construction of the words would lead to some absurdity such as the Legislature could never have contemplated, or that it would be plainly contrary to the general scheme as disclosed in the context of this statute. It does not appear to me that any such case has been made out. It would be difficult, in framing the provisions of a statute like this, to provide for every possible injustice; to provide that justice shall be done in all cases, and that there shall be no hardship resulting in any single case from the operation of the Act. But it was said that the effect of reading sect. 53 as it has been construed by the Court of Appeal would be practically to abrogate and neutralise the provisions of sect. 52. It was said that practically all the property within every district is subject, and must be subject, to the payment of sewer rates, and that therefore, if you included new streets under the word "street" in sect. 53 there would really be no new streets at all falling under the operation of the preceding section. It appears to me that that argument does not rest upon a solid basis of fact. The older statutes, beginning with the Act of 1848, enabled the authorities who were executing the statutes to exclude from the assessments of sewer rates certain portions of the districts assigned to them. That was altered by the Act of 1855, but the 159th section of that statute contains a very important provision, which enables and authorises the vestry or district board to exempt from sewer rates such parts of the locality within their jurisdiction as are not benefited by the expenditure which they are making. Therefore, if that discretionary power was in point of fact exercised, as the Legislature no doubt intended it should be, there are only two alternatives open: either there were in some districts portions which were not benefited by the expenditure, and were therefore exempt; or all the area must have benefited by the expenditure already made, and must have contributed its share towards that expenditure. I think it is a very reasonable reading of these two sections, and is attaching to the words of the sections their natural and ordinary meaning, to hold that all property which had paid rates in the circumstances specified in sect. 53 should not be made liable for more than a proportion of the expenses; or, if it had paid rates for five years before the 1st Jan. 1856, should be exempted altogether, and that only those portions of the district which had not benefited by the expenditure, and which had therefore not contributed to the expenditure, should be liable for the full amount required to make drains on their behalf under sect. 52 of the Act. On these grounds it appears to me that the construction which the Court of Appeal have put upon sect. 53 is not only according to the plain and ordinary meaning of the language which the Legislature have employed, but leads to results which are certainly not inequitable, and which were quite as probably in the contemplation of the Legislature as the results which have been urged by the learned counsel for the appellants.

Lord FITZGERALD.—My Lords: I concur, and should say no more, but for my great respect for the eminent judges who have differed in opinion upon the question before us. We are to read sects. 52 and 53 in their ordinary sense, unless it shall have been made to appear that a literal and grammatical interpretation would necessarily create difficulties and injustices which the Legislature could not be taken to have intended. In my opinion no sufficient grounds have been disclosed to induce us to depart from the ordinary, literal, and grammatical construction, and to interpolate words in sect. 53 which are not to be found in that section. Sect. 52 is confined to cases of sewers constructed "for the drainage of any new street, or of any house or houses erected since the 1st Jan. 1856," the expenses of which are to be "borne by the owners of such street or houses, and of the land abutting on such street." Mr. Philbrick contends that sect. 52 embraces all new streets which come with the definition of, or which popularly may be called, new streets; and it would be just that the owners of such property should pay the expenses of the construction of a sewer made for their benefit; but it would cease to be just if that property had been previously taxed for sewer rates without receiving any equivalent. That injustice was to be provided against as well as the case of old streets in a similar condition; that is to say, where sewer rates had been levied previously without any equivalent. Sect. 53 embraces both cases. It applies to streets, both new and old, where there has been no sewer, but where sewer rates have been levied previously, in which case the owners are made subject only to an apportionment to be determined by the vestry, but they are to be free of charge if sewer rates have been levied for five years prior to the 1st Jan. 1856. Such seems to me to be the plain interpretation of the two sections, and I have been unable to discover any such difficulties or anomalies arising from that interpretation as to lead me to the conclusion that the "governing intention" of the Legislature was something different from that which it has literally expressed. The case in all its aspects has been so fully and clearly disposed of

by my noble and learned friends, that I forbear to make any further observations.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitor for appellants, *W. Gribble.*

Solicitors for respondents, *A. F.* and *R. W. Tweedie.*

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 29 *and* 30, 1886.

(Before Lord ESHER, M.R., LINDLEY and LOPES, L.JJ.)

THE TYNE BOILER WORKS COMPANY LIMITED (apps.) *v.* THE TYNEMOUTH UNION (resps.). (*a*)

Poor rate—Rating of premises used for a particular purpose — Chattels on the premises—Boiler works—Machinery and plant.

In assessing premises to the poor rate the question whether chattels on the premises are affixed to the soil or not is not an absolute test in determining whether or not they are to be taken into account as enhancing the value of the premises. But things which are on the premises to be rated, and which are there for the purpose of making them, and which do make them, fit as premises for the purpose for which they are used, ought to be taken into account for rating purposes. Therefore the machinery and plant of boiler works, which (whether fixed to the soil or not) is essentially necessary to the carrying on of the business to which the premises are devoted, and which is intended to remain upon the premises so long as they are used for the same purpose, ought to be taken into account as enhancing the value of the premises.

Judgment of the Queen's Bench Division (54 *L. T. Rep. N. S.* 612) *affirmed.*

THIS was an appeal from a judgment of the Queen's Bench Division (Mathew and Smith, JJ.), reported at 54 L. T. Rep. N. S. 612, upon a case stated by the Court of Quarter Sessions of and for the county of Northumberland.

The special case was as follows :—

1. On the 9th Jan. 1885 an appeal against a rate was heard by the said court of quarter sessions, in which the Tyne Boiler Works Company Limited were the appellants, and the overseers of the poor of the parish of Longbenton and the assessment committee of the Tynemouth Union were the respondents. The rate against which the said appeal was brought was a rate for the relief of the poor of the parish of Longbenton, in the said county, made the 28th June 1884, whereby the appellants were rated in respect of premises in the said parish occupied by them, as hereinafter appears.

2. The valuation, assessment, and rate in question were as appears from the following extract from the rate-book :

Occupier.	Owners.	Description.	Gross Estimated Rental.	Rateable Value.	Rate at 10d. in the pound.
Tyne Boiler Works Company Limited.	Tyne Boiler Works Company Limited.	Boiler Works. Land.	£590	£501	£20 17s. 6d.

3. The grounds of appeal were that the appellants were overrated in respect of the said premises.

4. All proper notices were given, and steps taken to entitle the appellants to raise upon the appeal the questions and objections raised by them herein appearing.

5. The appellants were, at all material times and still are, the tenants and occupiers of the premises in the said parish before referred to, and which are known as the Tyne Boiler Works. The said premises comprise upwards of 5100 square yards of land upon the banks of the Tyne, part of which land was and still is covered by a large brick building roofed in, the roof being supported by the walls of the building, and by iron columns, and the rest of the said land being, with the exception of certain offices and boiler or engine sheds erected on parts thereof, open and uncovered by buildings.

6. The premises were and are held by the appellants as assignees under a lease from the corporation of Newcastle-upon-Tyne which was granted to Joseph Pollard for a term of seventy-five years from Sept. 1864. In or about 1868 or 1869 Messrs. Thompson and Boyd, who were then the assignees of the term created by the said lease, erected the brick building mentioned in paragraph 5, and placed therein the engine in the following list referred to as No. 2, and the boiler in the same list referred to as No. 1, and certain of the shafting and machinery still on the premises, for the purpose of making boilers and erecting machinery on board vessels, and also for the purpose of making forgings. The appellants have, since they became assignees of the said term and occupiers of the said premises, purchased and placed upon them other machinery and plant in addition to that put by Messrs. Thompson and Boyd, and have used the said lands and building, together with the boilers, engine, plant and machines thereon, for making boilers and erecting them on board vessels. The proximity of the premises to the Tyne makes them suitable for boiler works, but at successive periods previous to their being occupied by the appellants they have been used for manufactures or purposes of different kinds.

7. It was agreed and admitted that, in arriving at the rateable value of 501*l.*, at which the said premises were assessed, the machinery and plant hereinafter specified, which were and are upon the said premises, had been taken into consideration as enhancing the rateable value of such premises, viz., in the main building: Water supplies—1, boiler; 2, main engine; 3, main shafting; 4, fan blasts; 5, blast pipes; 6, hydraulic accumulator; 7, pair of hydraulic pumps near end of building, ditto near accumulator; 8, two small open return water-tanks; 9, flanging machine; 10, riveting machine; 11, two plate-edge planing machines; 12, plate-bending rolls;

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

13, punching machine; 14, punching, plate-shearing and angle shearing machine; 15, three roll drill; 16, radial drilling machine; 17, boiler shell drilling machine; 18, grindstone; 19, drilling machine; 20, screwing machine; 21, rivet heating furnace; 22, two-hand power travelling cranes. Outside the main building—23, shear legs with engine and boiler; 24, line of rails from main buildings to shear legs; 25, punching and shearing machine; 26, line of rails in middle of yard; 27, jib crane; 28, plate rolls; 29, plate furnace; 30, open smithy fire in yard. It is further agreed between the parties on the hearing before the the Court of Quarter Sessions, that if the whole or any part of the above-mentioned machinery and plant ought not to have been taken into consideration in assessing the premises, then the rateable value should be reduced by the whole sum of 221*l.*, or by a proportionate amount to be afterwards agreed upon between the parties as sufficient to give effect to their decision, Photographs of the more important parts of the machinery were also by agreement placed before the magistrates and were afterwards referred to as adjuncts to this case.

8. Of the above specified machinery and plant the boiler, No. 1, was, as usual, set on a brick seating on a building or shed outside the main building. The steam from that boiler was conveyed to the main engine through iron pipes which pass through the wall of the main building. The main engine, No. 2, was fixed by iron screw-bolts to masonry foundations, on which a wall was constructed for the fly-wheel of the main engine. The hydraulic riveting machine, the two-hand power travelling cranes, the plate rolls, the flanging machine, the accumulators, and the boilers attached to the shear legs are not attached either to the soil or the building, but rest by their own weight. The main standards have an iron bolt passed through the end walls of the main building. The fly-wheel shaft passes through the wall of the main building and is carried by a bearing fixed to an iron box built into the wall of the main building. The main shafting runs along the entire length of the main building and is supported by the main wall of the building by means of bracket bearings on iron plates fixed to wall buttresses. Each bracket is fixed to the wall by six iron screw-bolts passing through the main wall. All the machines are driven from the main shafting by means of leather belts. The fan blast for supplying an air blast to the smithy fires is sunk in a hole in the ground and is driven from the main shaft. The blast pipes for conveying the air are earthenware pipes laid under ground, branches being taken to the various smithy fires. The smithy fires are open hearths and fires built of brick having an air blast conveyed to each by means of the fan blasts and blast pipes mentioned in the immediately preceding paragraph. The smithy fires are capable of being moved to another place. They rest on the ground solely by their own weight. Such removal would necessitate the moving of the air-blast pipes along with the fires. The hydraulic plant consists, first of an accumulator which rests by its own weight on concrete foundations, and secondly of pumps in connection therewith. The water pipes pass under ground to the accumulator. The hydraulic riveting machine, the plate roller, the flanging machine, the accumulator, and the boiler for the shear legs rest by their own weight upon cement or stone foundations prepared for them. The boiler is connected by steam pipes with the engine which works the shear legs. The two-hand power travelling cranes are not fixed but run along the whole length of the main building on rails laid on baulks of timber which rest upon brackets forming part of the columns which support the roof of the main building. The shear legs are placed on the edge of a timber jetty or quay built on timber piles which are driven into the bed of the river and project beyond the stone quay out into the river. They are worked by means of a separate engine and boiler. A line of iron rails laid on sleepers, for waggons, connects the main building with the jetty. The wall drills are bolted to iron brackets, which are held in position by iron screw-bolts passing through the main wall of the building and secured by a plate on the other side. The jib cranes are attached to the iron columns which support the roof of the building and are worked by steam by means of a steam pipe from the main boiler. With these exceptions the whole of the machinery and plant referred to in this case are held in position in the following manner: A foundation of stone, timber, or concrete is prepared for the individual machine. Into this foundation bolts are let and fastened by lead or cement. When the machine is brought into position it is hoisted by the crane over the foundation and let down in such a manner that the holes pierced in the lower portion (or bed plates) of the machine would slide over the bolts fixed in the foundation. A nut is screwed on to the top of each bolt to steady the machine. All the machines are worked by belts from the main shafting. When a machine has to be removed the nuts are unscrewed and the machine hoisted up over the bolts, which remain in the foundation.

9. It was proved that the whole of the above specified machinery and plant were in fact the property of the appellants, and not of the corporation of Newcastle-on-Tyne, the owners of the freehold, the same having been brought upon the premises either by the appellants or their predecessors in the occupancy of the premises under the lease before referred to.

10. All the said machinery and plant are required for the purpose of boiler making, and are arranged and adapted for use upon the said premises for manufacturing and setting up boilers, and are used by the appellants for such purposes, but further than appears by this case there was not any intention on the part of the appellants of making such machinery part of the soil or hereditaments or of permanently annexing them thereto.

11. The machines constituting the said machinery and plant were each of them, as machines, except so far as herein appears, separate and distinct from each other, and could be, and were in practice from time to time, bought, sold, renewed, and removed as separate and distinct articles.

12. The said machines and plant could be and are in practice taken down or removed when and as required either for repairs or rearrangement or change in the use of the premises, or for any other purposes, and that without injury to themselves or structural damage to the hereditaments.

13. The object of the attachment described in the 8th paragraph of this case is the steadying the machines in working and the preventing them from being pulled by the belting by which they were worked.

14. The above method of attachment does effectually teady the machines in working and prevents them from being pulled by the belts, and it is also convenient, if and when occasion arises, for the machines being for any purpose removed.

15. The mode in which the rateable value of the premises was arrived at was by ascertaining the gross estimated rental which a tenant from year to year might reasonably be expected to be willing to give for the use of them (inclusive of the machinery and plant before specified), and by making the statutory deductions for such rental.

16. The appellants contended that the above specified machinery and plant were not, nor any of them, part of the freehold or hereditament, but were chattels, and that they were not, nor were any of them, rateable, or to be taken into consideration as enhancing the rateable value of the hereditaments. The respondents, on the other hand, contended that the said machinery and plant were necessary to the beneficial occupation of the premises as boiler works, that being the purpose to which they were appropriated, and ought to be taken into consideration as enhancing the rateable value of the hereditaments to which they were attached.

17. The magistrates considered that, at least before them, the case of *Laing* v. *Overseers of Bishopwearmouth* (37 L. T. Rep. N. S. 781; 3 Q. B. Div. 299) was conclusive, and, in accordance with what they understood to be the principles laid down in that case, they held that the machinery and plant had been rightly taken into consideration in estimating the rateable value of the premises to which the appeal related. It being, however, urged upon them by the counsel for the appellants that the special case in *Laing* v. *Bishopwearmouth* had been agreed upon by the parties themselves out of court, and that it was desired to test the soundness of the principle alleged to have been enunciated by the decision in that case by arguments on a special case, to be stated by the Court of Quarter Sessions, and counsel for the respondents not objecting to this being done, the order dismissing the appeal was made subject to a special case to be stated for the opinion of the court.

18. Each party was to be at liberty, if and so far as the court should permit, to refer to shorthand notes of the hearing at quarter sessions, or to the photographs of the machinery then produced, or to the articles of association of the appellant company, by way of supplementing this case upon any point or points which might appear to the court to require further elucidation.

19. The question for the opinion of the court is, whether the decision above stated was correct or incorrect, and if incorrect, in respect of what items, matter, or principles. If the court should be of opinion that the whole of the said machinery and plant was properly taken into consideration, as enhancing the rateable value of the premises, to which the appeal relates, the decision of the magistrates is to be affirmed.

Upon the above case so stated the Queen's Bench Division (Mathew and Smith, JJ.) gave judgment in favour of the respondents (54 L. T. Rep. N. S. 612).

The appellants appealed.

Sir *Horace Davey*, Q.C., and *R. T. Reid*, Q.C. (*Cyril Dodd* with them) for the appellants.—The machinery in question in this case is movable chattels and as such cannot be rated. The court below has held that it can be taken into consideration as enhancing the value of the premises, but that involves a misapprehension. There are only two alternatives: the machinery is either rateable or not; if it is not rateable it cannot be taken into consideration as enhancing the value of that which is rateable. It is intelligible that the total value of two things is the sum of their values; but it is not intelligible that, when one has to be left out of the rate, it may be taken into consideration as enhancing the value of the other. The true test of whether machinery is rateable or not is whether it is so affixed to the freehold as to become part of the freehold and to pass by a demise of the land. If so, it is rateable, even though it may be removable as tenant's fixtures; but if not, then it remains mere chattels, and is not to be taken into consideration for rating purposes in any way. A long series of decisions has pointed this out, and it is now settled law that it is the hereditament which is to be rated, and that nothing but the hereditament and that which is part of it can be taken into consideration:

R. v. *Hogg*, 1 T. Rep. 721;
R. v. *St. Nicholas, Gloucester*, 1 T. Rep. 723;
R. v. *Birmingham and Staffordshire Gaslight Company*, 6 Ad. & E. 634;
R. v. *Guest*, 7 Ad. & E. 951;
R. v. *Southampton Dock Company*, 14 Q. B. 587;
R. v. *Haslam*, 17 Q. B. 220;
R. v. *Lee*, 13 L. T. Rep. N. S. 704; L. Rep. 1 Q. B. 241;
R. v. *North Staffordshire Railway Company*, 3 L. T. Rep. N. S. 554; 30 L. J. 68, M. C.;
Chidley v. *West Ham*, 32 L. T. Rep. N. S. 486.

The sessions proceeded upon the case of *Laing* v. *Bishopwearmouth* (37 L. T. Rep. N. S. 781; 3 Q. B. Div. 299); but, if that case decided what the sessions supposed it to decide, it has gone beyond the previous cases and cannot be supported. They also cited

R. v. *White*, 4 T. Rep. 771;
Hellawell v. *Eastwood*, 6 Ex. 295;
R. v. *Lumsdaine*, 10 Ad. & E. 157.

Sir *R. E. Webster* (A.-G.) and *Graham* (*Hans Hamilton* with them) for the respondents.—These premises are to to be regarded as boiler works as a whole; the machinery then forms a part of that whole, and, if the premises are to be continued as boiler works, an essential part. That being so the machinery is rateable. Physical attachment to the soil never has been the true test; the fair result of all the cases is, that all that is necessary in order that chattels may be taken into consideration for rating purposes is that they should be attached to the premises in this sense, that they are placed on the premises for the purpose of being there used as a part of the premises as long as the premises remain in their existing state and are used for their existing purpose. The case of *Laing* v. *Bishopwearmouth* (*ubi sup.*) has therefore not gone further than any other case, and is an authority in favour of the respon-

dents. The case of *Chidley* v. *West Ham* (*ubi sup.*) was decided upon the ground that the tanks had been rated as personalty, which was of course wrong.

Sir *Horace Davey*, Q.C. in reply.

Lord Esher, M.R. — The first of the many difficulties arising in this case is to determine what exactly is the question raised by the special case, because we are of course confined to that question, whatever it is; and we must not be led away from it because the arguments of counsel invite us to consider something else. Now, when I look at the special case, I find that the two contentions are thus stated: "The appellants contended that the above specified machinery and plant were not, nor were any of them, part of the freehold or hereditament, but were chattels, and that they were not, nor were any of them, rateable, or to be taken into consideration as enhancing the rateable value of the hereditaments. The respondents, on the other hand, contended that the said machinery and plant were necessary to the beneficial occupation of the premises as boiler works, that being the purpose to which they were appropriated, and ought to be taken into consideration as enhancing the rateable value of the hereditaments to which they were attached." It seems to me clear that the contention between the parties was therefore this: on the one side it was said that these things were mere chattels, and ought not in any way to be taken into consideration at all for rating purposes; on the other side it was said that they were in some way to be taken into consideration as enhancing the value of the premises. I think that was the dispute between the parties at the sessions, and that dispute the sessions decided, and they decided that the machinery and plant had been rightly taken into consideration in estimating the rateable value of the premises, by which I take it that they meant that it was right to take the machinery and plant into consideration in some way for rating purposes. Then they stated the special case, and the question raised by that case is, as it seems to me, whether this machinery and plant ought to be taken into consideration at all in order to consider whether the value of the premises is enhanced by it; and the question is not how it ought to be taken into consideration, or whether the particular valuer in this particular case has taken it into consideration in a proper way. That the question raised by the case is as I have stated seems to me to be made still more clear by the reason which the sessions give why they were induced to state a case: "It being, however, urged by the counsel for the appellants that the special case in *Laing* v. *Bishopwearmouth* had been agreed upon by the parties themselves out of court, and that it was desired to test the soundness of the principle alleged to have been enunciated by the decision in that case, a case was granted, &c.," the principle of the case of *Laing* v. *Bishopwearmouth*, which it was sought to attack, being that certain things are to be taken into consideration as enhancing the value of the premises, and not the method of taking them into consideration. Now, further, this was the point argued, and the only point argued, as far as I can see, in the court below, and I think that we must not now hear any arguments on any other point. I therefore think that the question, and the only question, is, whether this machinery and plant is to be taken into account at all, and that we are not asked, and we do not consider, whether in this case the particular valuer has taken them into consideration in a proper way. Now, when I come to consider the case of *Laing* v. *Bishopwearmouth*, it becomes necessary to examine whether that case goes beyond those which preceded it or not, because, if it did not do so, then all the older authorities, as well as that case, are now attacked. I think it would be a very serious thing for us to try and review them at this time; they stand as authorities for the way in which real property is to be rated, and to them, I think, we must look when we are searching for the true rule upon this subject. Now, I think it will be found, upon an examination of the cases, that the same rule, at least the same idea of the rule, is in the minds of all the judges throughout, but that the difficulty that the judges have met with is the difficulty of so expressing themselves as to decide beyond the possibility of doubt or cavil what the rule in their judgment really is—perhaps that same difficulty will occur again to-day. Now, the first case I refer to is the case of *Reg.* v. *Haslam* (*ubi sup.*). Patteson, J. there says: "We do not think it necessary to determine whether the chambers erected on the appellants' premises are or are not annexed to the freehold, which is rather a question of fact for the Court of Quarter Sessions to find than for us to decide, because we are of opinion that, according to the principles laid down in the various cases on the subject, the rateable value of the premises is undoubtedly increased by the use of these chambers." I think it is clear from that statement that the learned judge was of opinion that it was not necessary that the matters in question should be affixed to the freehold, in the sense of being physically fixed thereto. Again, in the case of *Reg.* v. *Southampton Dock Company* (*ubi sup.*), Lord Campbell said: "The fourth question arose upon a deduction claimed by the appellants, which was disallowed. They contended that their cranes, steam-engines, and other like ponderous machinery, although attached to the freehold, ought to be treated as stock-in-trade and part of the capital, which a tenant would have to invest in the business so as to diminish instead of increasing the rateable value of the property of the company. The sessions did find, as a fact, that those fixtures, worth 6450*l.* to an incoming tenant, although attached to the freehold, are capable of being detached from the freehold as easily, and with as little injury to it, as other fixtures put up for the purposes of the trade of the tenant, and usually valued as between incoming and outgoing tenant. But this is a rate upon buildings to which machinery is attached for the purposes of the trade, and it has been solemnly decided that such real property ought to be assessed according to its existing value as combined with the machinery, without considering whether the machinery be real or personal property, or whether it be liable or not to distress or seizure under a *fi. fa.*, or whether it would go to the heir or executor, or, at the expiration of a lease, to the landlord or tenant." For this Lord Campbell cites the cases of *Reg.* v. *Birmingham and Staffordshire Gaslight Company* (*ubi sup.*) and *Reg.* v. *Guest* (*ubi sup.*), following

exactly the rule laid down in the latter case. He therefore treats machinery which remains personal property as an element in estimating the value of the realty. But is his meaning, when he speaks of that machinery as "attached to the freehold," that it must be physically attached to it as a fixture? I certainly do not so understand it. Now I come to the case of *Reg.* v. *Lee* (*ubi sup.*), in which I find an elaborate enunciation of the same doctrine. Blackburn, J., in his judgment in that case, cites the cases of *Reg.* v. *North Staffordshire Railway Company* (*ubi sup.*) and *Reg.* v. *Southampton Dock Company* (*ubi sup.*), and proposes to follow them, and points out that they contain the same principles and the same idea as the earlier case of *Hellawell* v. *Eastwood* (*ubi sup.*). He says: "Then the rule laid down for the guidance of the sessions was this: The articles may be divided into three classes—first, things movable, such as office and station furniture; it is clear these are not to be included. Secondly, things so attached to the freehold as to become part of it; it is clear, on the principle of all the cases, that no deduction is to be made for them, and they are to be considered as part of what is let. Thirdly, things which, although capable of being removed, were yet so far attached as that they were intended to remain permanently connected with the railway or the premises used with it, and to remain permanent appendages to it, as essential to its working." In that passage expressions are used which no doubt differ slightly from the expressions used in other cases, but do they not contain the same idea? It seems to me that the terms "so far attached," "permanently connected with," "permanent appendages as essential to its working" are different modes of expressing the same idea, but that the idea intended to be conveyed is the same as in the former cases. It is true that learned judge uses the expression, "if the things are annexed though but slightly," and I agree that he there refers to some actual and physical attachment to the soil; but he was then dealing with the particular facts of the case before him, in which there was some physical attachment. I do not think that he meant to say that nothing not physically attached could come under the third class of chattels he had mentioned, or to overrule what had been said by Patteson, J. in the case which I have before referred to. Then in the same case there is the judgment of Lush, J., in which he lays down the rule as follows: "Now I apprehend that the premises to be rated are to be taken as they are with all their fittings and appliances by which the owner has adopted them to a particular use, and which would pass as part of the premises by a demise of them to a tenant. That seems to me to express what in other words has been expressed in the cases referred to by the other members of the court." The learned judge describes the matters there in question as "fixed and so far annexed as to be intended to be permanent, and as really necessary for the use of the premises as gasworks." But does the learned judge mean that the things must be fixed in the sense of being physically fixed as fixtures? I think not. I think he means to lay down the same rule as Blackburn, J., though he uses different words. Then we come to the case of *Laing* v. *Bishopwearmouth* (*ubi sup.*), in which all the previous cases were gone into, and in which the court stated that they intended to adopt and act upon those cases, and pointed out that they all laid down the same rule. In that case the court carefully considered the nature of the machinery in question, and came to the conclusion that, though some of it was capable of being removed without injury to the freehold, yet that all of it was essentially necessary to the shipbuilding business, to which the premises were devoted, and must be taken to be intended to remain permanently attached to them so long as the premises were applied to their present purposes. Does the court mean by the word "attached" that the thing must be bolted or screwed to the freehold by some sort of fastening? I think not. I think they did not mean to overrule Patteson, J. when he said that it was not necessary to inquire into that. Further, the contention that there the court meant physically fastened would lead to this absurdity, that a piece of machinery which weighs many tons, and which rests on the ground by its own weight, and which is never intended to be removed as long as the premises are used for the same purpose, but which is not bolted or screwed to the premises, is not to be taken into account; while it is to be taken into account if there are some bolts or screws which for any other purpose are wholly unnecessary. That seems to me a monstrous consequence, and I do not think that the courts ever intended that physical attachment should be the test. Therefore, it becomes necessary to consider in what sense it is that such words as "attached" are used in the decisions on this subject; and though I cannot hope to express myself with absolute accuracy, I will endeavour to express my construction of the rule to be deduced from the cases without including in my definition the word "attached," or any other similar expression. I think the rule really is, that things which are on the premises to be rated, and which are there for the purpose of making, and which do make them fit as premises for the purpose for which they are used, are to be taken into account in ascertaining the rateable value of the premises. It seems to me that, when once you bring the things upon the premises into that category, it follows that they are such as would pass by a demise of the premises, as such, between landlord and tenant, and therefore the test which I have enunciated, and the test which I have cited as having been enunciated by Lush, J., become in that view absolutely identical. Taking the test as I have expressed it to be a good one, and applying it to the facts of this case, then I say with Patteson, J. that it is immaterial to inquire whether or not these things are physically attached to the premises, because I think they one and all of them come within the rule as I have expressed it; they are all of them on the premises for the purpose of making, and they do make them fit as premises for the purpose for which they are used, and therefore, in ascertaining the rateable value of the premises, they must all be taken into account. I have said before that the way in which they are to be taken into account is not a question for this court. I am therefore of opinion that the judgment of the court below was right, and that this appeal must be dismissed. With regard to the case of *Chidley* v. *West Ham* (*ubi sup.*), I do not say that the

court was not right in deciding as it did upon that case as it came before them; but, if the right question had been asked them, I cannot understand how it could be possible to say that the articles in question in that case ought not to be taken into account in arriving at the rateable value. I think the true explanation of that case is, that a mistake had been made in rating the tanks separately as mere personalty.

Lindley, L.J.—The first question is, what the property is which is to be rated, and how it is to be described. In the rate-book it is described as "boiler works and land," and I think a good deal depends upon whether that description is right or wrong. No one quarrels with that description, and I have no doubt that it is a proper description, and that it is proper to rate it under that description. Now, I agree that, for the purpose of deciding this case, we must look at the Act and at the authorities which have placed a construction upon the enactments relating to rating, and it does not seem to me that the courts have departed from the construction which was originally placed by them upon those enactments. By the Parochial Assessment Act it is provided that no rate shall be of any force that is not made upon an estimate of the net annual value of the several hereditaments rated, and that the estimate is to be of rent at which the same may reasonably be expected to let from year to year, subject to certain deductions, and then there is a proviso in these terms: "Provided always that nothing herein contained shall be construed to alter or affect the principles or different relative liabilities, if any, according to which different kinds of hereditaments are now by law rateable." Therefore you have to look first at the thing which is to be rated, and estimate the rent at which it may reasonably be expected to let from year to year, and the statute does not mean that the hereditaments are always to be regarded as mere land, but that they are to be taken as they are found, and if they are found with buildings upon them, then the rent is to be estimated upon what a tenant from year to year would reasonably be expected to give for them in that shape. They are to be treated as so much land with works or whatever structure is upon them. Looking at it, then, from this point of view, it is apparent, I think, that in this case these premises are properly described as "boiler works." Then it is argued that, in estimating the value of these premises, the value of the machinery mentioned in the special case is to be altogether left out. I cannot agree with that contention. Nothing is here included which is mere loose tools or machinery which would not pass upon a demise of the works to a tenant. So far as I understand, the articles in question in this case are of the same nature as millstones in a mill, which would pass by a demise of the mill. Taking the works as a whole, this machinery is part of them, and would all be included, as it seems to me, in such a supposed tenancy of the works as a whole as we are bound to suppose by the Act of Parliament. Now, when I come to examine the various cases, it seems to me that physical attachment to the soil never has been considered as being really the test. *Reg.* v. *Haslam* (*ubi sup.*) and many subsequent cases seem to show that the question whether or not there is physical attachment to the soil is not conclusive, but that on the other hand it is not to be disregarded. We are now asked to go back upon those cases and to say that no chattels are to be taken into consideration, in arriving at the rateable value, except such as have become part of the realty by actual attachment, that is, by actual physical attachment, to it. I do not think that we can now say this and be consistent with the Act and with the various decisions upon it. The only case which is at all puzzling, or which presents any difficulties to this view, is the case of *Chidley* v. *West Ham* (*ubi sup.*). I think the true view of that case is this: I do not think the court decided that the tanks which were in question in that case could not in any way be taken into consideration in arriving at the value of the premises and in fixing their rateable value, but that the Court of Quarter Sessions was wrong because, as a fact, in that case, the tanks had been rated as mere personalty. Upon the statement of facts in that case it seems to me that it would be absurd to suppose that the tanks would not have passed to the tenant upon a demise of the premises as a whole. I therefore think that the true test in such a case as this is that which has been stated by the Master of the Rolls. For these reasons I think that the judgment of the Queen's Bench Division was right, and that this appeal must be dismissed.

Lopes, L.J.—The question in this case is, whether certain machinery and plant are to be taken into consideration in assessing the value of the premises to the poor rate. The machinery and plant in question are not physically attached to the premises in such a way as to make them fixtures, for they cannot properly be described either as landlord's, tenants', or trade fixtures. Now, it perfectly well settled law that personal property is not *per se* rateable, but if it is so attached to the premises as to be properly describable as landlord's, tenants', or trade fixtures, then it is clear, I think, that it is to be considered as enhancing the value of the premises upon which it is found. But there are other things which, though not properly describable as fixtures at all, are yet so placed on the land, and are so essential to the use to which the land is being put, and are so obviously intended to be used with the land while it still continues to be put to that use, that they become in that sense, and in that sense only, part of the land. This case raises the question whether such things are to be taken into consideration as enhancing the value of the premises for rating purposes. I am clearly of opinion that they ought to be, and that a long series of cases establishes the proposition. The only case that militates against it, as far I have been able to discover, is the case of *Chidley* v. *West Ham* (*ubi sup.*), but I think it is clear that the ground of the decision in that case was that the tanks had been separately rated. Then the question arises, whether the machinery and plant in this case come within the definition which I have enunciated; I think they do. I adopt the judgment of Mathew, J., where he says, "Here the land and machinery combined are used for carrying on the business, and there seems to be no reason why the combination, which is essential to this use of the land, should not be rateable." I am therefore of opinion that the judgment of the

court below was right, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Flux* and *Leadbitter*, for *Leadbitter* and *Harvey*, Newcastle-on-Tyne.

Solicitors for the respondents, *Crossman, Crossman*, and *Prichard*, for *Kidson, McKenzies*, and *Kidson*, Sunderland.

Monday, Nov. 1, 1886.

(Before Lord ESHER, M.R., LINDLEY and LOPES, L.JJ.)

REG. on the prosecution of THE CORPORATION OF CROYDON *v.* THE CROYDON AND NORWOOD TRAMWAYS COMPANY.(*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION (CROWN SIDE).

Tramways Act 1870 (33 *&* 34 *Vict. c.* 78), *s.* 33—*Difference between local authority and tramway company as to paving—Application for mandamus to company—Reasonableness of local authority—Reference to Board of Trade.*

By sect. 33 *of the Tramways Act* 1870, "*If any difference arises between the promoters or lessees on the one hand and any local authority . . . on the other hand, with respect to any interference or control exercised, or claimed to be exercised by them . . . in relation to any tramway or work, . . . or with respect to the propriety of or mode of execution of any work relating to any tramway . . . or on the question whether any work is such as ought reasonably to satisfy the local authority,*" *the difference shall, on the application of either party, be referred to a person nominated by the Board of Trade. By the special Act of a tramways company, it was provided that where their line passed along any street, the space between and beyond the rails should be paved by the company to the satisfaction of the local authority with wood or other paving, to be approved of by the local authority, and should at all times be kept in good repair by the company. The company accordingly laid down a paving material in the first instance which was approved by the local authority; but they subsequently substituted a paving to which the local authority objected. The local authority having applied for a mandamus commanding the company to take up the paving objected to:*

Held (*affirming the judgment of Lord Coleridge, C.J. and Fry, L.J.*), *that a mandamus ought not to be granted, as a difference had arisen within sect.* 33 *of the Tramways Act* 1870, *and, therefore, the remedy of the local authority was to apply to the Board of Trade to nominate a referee.*

THIS was an appeal from an order of the Queen's Bench Division discharging a rule for a *mandamus*.

The Croydon and Norwood Tramways Company laid some portion of their lines with macadam, with the approval of the corporation of Croydon. Finding, as they alleged, that this was dangerous, they applied to the corporation for permission to substitute granite setts, which was refused. The company nevertheless substituted the granite setts.

By sect. 41 of the Croydon and Norwood Tramways Act 1883,

For the protection of the mayor, aldermen, and burgesses of the borough of Croydon (hereinafter called "The Corporation"), the following provisions shall have effect, and be applicable in the case of every tramway by this Act authorised, so far as the same is to be laid upon, along, or across any public street or road within the borough, that is to say,

2. The whole space between the rails and for a distance of eighteen inches beyond each external rail, and the whole space between the two lines where the tramway is double, shall be paved by the company to the satisfaction of the council with wood or other paving, to be approved of by the council, and shall at all times be kept in good repair by the company.

By sect. 33 of the Tramways Act 1870 (which is incorporated with the Croydon and Norwood Tramways Act, so far as its provisions are applicable to and not varied or excepted by or inconsistent with the provisions of that Act),

If any difference arises between the promoters or lessees on the one hand and any local authority . . . on the other hand, with respect to any interference or control exercised, or claimed to be exercised by them . . . in relation to any tramway or work . . . or with respect to the propriety of or mode of execution of any work relating to any tramway . . . or on the question whether any work is such as ought reasonably to satisfy the local authority . . . or with respect to any other subject or thing regulated by or comprised in this Act, the matter in difference shall (unless otherwise specially provided by this Act) be settled by an engineer or other fit person nominated as referee by the Board of Trade, on the application of either party.

A rule for a *mandamus*, commanding the company to take up the granite setts, and to relay the portions of the road in question with macadam or other paving to be approved by the corporation, was discharged by the Divisional Court (Lord Coleridge, C.J., and Fry, L.J.).

From this decision the corporation appealed.

Sir *Richard Webster* (A.-G.), *Murphy*, Q.C., and *R. G. Glenn* for the corporation.—No difference has arisen here within sect. 33 of the Tramways Act 1870. If a question had arisen as to whether the granite had been properly put down that would have been a difference within the meaning of the section. But by the Croydon and Norwood Tramways Act 1883, the corporation had power to order what material shall be put down; and the company cannot bring themselves within sect. 33 by putting down the wrong material. There is an absolute discretion given to the corporation by the company's private Act. The effect of the decision in the court below would be to transfer that discretion from the corporation to the Board of Trade.

Sir *Horace Davey*, Q.C. (with him *Pembroke Stephens*, Q.C. and *G. S. Bower*) for the company.—This case is clearly within sect. 33 of the Tramways Act 1870. A difference has arisen between the company and the corporation either with respect to control exercised by the corporation in relation to the tramway or with respect to the propriety of work relating to the tramway, or on the question whether the work is such as ought reasonably to satisfy the local authority. This is really a question whether the tramway has or has not been kept in good repair by the company.

Lord ESHER, M.R.—As to the first point which was argued, I think it is right to say that I cannot agree that the corporation of Croydon

(*a*) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

have superciliously declined to apply their minds to this question. The letter of the town clerk, which has been read, says that they have considered the matter, and there is no evidence that they have not. I should have been sorry to have had to decide this case on that ground. But on the second point which has been taken I entertain a very strong opinion. The Divisional Court thought that there was evidence that the decision of the corporation was not a reasonable one. The question will be whether, where there is a point to be considered, the proper tribunal to determine that point is, not the Divisional Court acting by *mandamus*, but the Board of Trade. That depends upon sect. 33 of the general Act and sect. 41 of the special Act, which must be read together. Then, is it inconsistent with the terms of the special Act that the question whether the corporation has acted reasonably or not should be referred to the Board of Trade? I cannot see myself that, however absolute an authority may be given, it is inconsistent to say that if the persons who are to exercise that authority have acted unreasonably there shall be an appeal to another tribunal. It is to be an absolute authority subject to the reasonable exercise of it. Sect. 33 applies to all local authorities; and considering how many of them there are, one would expect Parliament to put some check upon them. This is just the sort of supervision under which local authorities are frequently put. To give or to refuse assent to acts is an exercise of control, and, therefore, is within sect. 33. By sect. 33, where control has been exercised, it must be seen, when either party desire it, whether that control has been exercised reasonably or not. Therefore, this appeal must be dismissed.

LINDLEY, L.J.—I am of opinion that a difference has arisen between the company and the corporation in this case within sect. 33 of the Tramways Act 1870. It is impossible to say that the corporation had no control over the material to be used for the purpose of preparing the streets for this tramway. They had a right to disapprove of any material suggested by the company. If I have the right to disapprove of a man doing a thing, I control him in relation to it. It follows that the Divisional Court were right in holding that this case comes within sect. 33.

LOPES, L.J.—I am clearly of opinion that this case is within sect. 33 of the Tramways Act 1870 I think that this is a difference which has arisen, within that section, and particularly within the words, "or on the question whether any work is such as ought reasonably to satisfy the local authority." I think that those words were inserted to meet exactly such a case as this, and to prevent the possibility of any tyrannical exercise of their power by the local authority. On that ground I am of opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitor for the corporation, *George Tilling.*

Solicitors for the company, *Sutton* and *Ommanney.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Tuesday, Dec. 14, 1886.

(Before HUDDLESTON, B. and MANISTY, J.)

Ex parte ROBSON; *Re* AN APPLICATION UNDER THE CORRUPT AND ILLEGAL PRACTICES AT MUNICIPAL AND OTHER ELECTIONS ACT 1884, IN RESPECT OF A MUNICIPAL ELECTION IN THE BOROUGH OF SAFFRON WALDEN. (*a*)

Municipal election—Illegal practice—No return of expenses—Statutory declaration—No expenses incurred—Inadvertence—No want of good faith — Extension of time — Municipal Elections (Corrupt and Illegal Practices) Act 1884 (47 & 48 *Vict. c.* 70), *ss.* 20, 21, *sub-sect.* 3, *schedule* 4.

A candidate at a municipal election, even though he has incurred no expenses thereat, must within twenty-eight days after the election make the required declaration in the form provided by schedule 4 *of the Municipal Elections (Corrupt and Illegal Practices) Act* 1884.

Where a candidate has failed to make such declaration within the statutory period through inadvertence, and not want of good faith, the court will extend the time, to enable him to make the required declaration.

THIS was an application for relief by one Robson, under sect. 20 of the Municipal Elections (Corrupt and Illegal Practices) Act 1884.

The affidavit filed by the applicant stated that he had been elected as town councillor for the borough of Saffron Walden, at a casual vacancy in Oct. 1885; and that owing to the other candidate nominated retiring, he had been returned unopposed, and that he had issued no address, nor had hired any agents, &c., and had not incurred any expenses at all.

He failed to make the return through inadvertence, and not want of good faith, believing in his case it was not necessary to do so, but expressed his willingness to make the declaration if necessary.

By 47 & 48 Vict. c. 70, s. 20:

Where on application made it is shown to the High Court . . . by such evidence as seems to the court sufficient:

(*a*) That any act or omission of a candidate at a municipal election for a borough or ward of a borough . . . would, by reason of being in contravention of any of the provisions of this Act, be but for this section an illegal practice . . . and

(*b*) that such act or omission arose from inadvertence or from accidental miscalculation, or from some other reasonable cause of a like nature, and in any case did not arise from any want of good faith . . . and under the circumstances it seems to the court to be just that the said candidate . . . should not be subject to any of the consequences under this Act of the said act or omission, the court may make an order allowing such act or omission to be an exception from the provisions of this Act, which would otherwise make the same an illegal practice . . . and therefore such candidate . . . shall not be subject to any of the consequences under this Act, of the said act or omission.

By sect. 21 (3):

Within twenty-eight days after the day of election of a councillor, every candidate at such election shall send to the town clerk a return of all expenses incurred

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

by such candidate, or his agents, on account of or in respect of the conduct or management of such election, vouched (except in the case of sums under twenty shillings) by bills, stating the particulars and receipts, and accompanied by a declaration by the candidate, made before a justice in the form set forth in the fourth schedule to this Act, or to the like effect.

By schedule 4:

Form of Declaration by Candidate as to Expenses.

I having been a candidate at the election of councillor for the borough (or ward) of on the day of (and my agents do hereby solemnly and sincerely declare that I have paid) for my expenses at the said election, and that, except as aforesaid, I have not, and to the best of my knowledge and belief, no person, nor any club, society, or association, has on my behalf made any payment or given, promised, or offered any reward, office, employment, or valuable consideration, or incurred any liability on account of or in respect of the conduct or management of the said election.

And I further solemnly and sincerely declare that, except as aforesaid, no money, security, or equivalent for money, has to my knowledge or belief been paid, advanced, given, or deposited by anyone to or in the hands of myself, or any other person, for the purpose of defraying any expenses incurred on my behalf on account of or in respect of the conduct or management of the said election.

And I further solemnly and sincerely declare that I will not at any future time make or be a party to the making or giving of any payment, reward, office, employment, or valuable consideration for the purpose of defraying any such expenses as last mentioned, or provide or be a party to the providing of any money, security, or equivalent for money for the purpose of defraying any such expenses. Signature of declarant, C. D. Signed and declared by the above-named declarant on the day of before me. (Signed) E. F., Justice of the Peace for .

Wm. Graham for the applicant.—This is an application for relief against the penalties imposed by sect. 21 (4) of the Act. The applicant incurred no expenses in respect of his election, and he failed to make the statutory return and declaration, not through want of good faith, but because he did not think it necessary. The question here is whether a candidate who has incurred no expenses must make the statutory declaration. If necessary the applicant is ready to make it, and asks for the time to be extended within which to make it.

HUDDLESTON, B.—This is an application for an order excusing the applicant from the consequences of his omission to make a return of his expenses, and a declaration as to those expenses, required by the Municipal Elections (Corrupt and Illegal Practices) Act 1884, in respect of his election as town councillor. Sect. 21 (sub-sect. 3) requires that within twenty-eight days after the election each candidate shall make a return of all expenses incurred by him or his agents, accompanied by a declaration in the form provided by schedule 4 of the Act. It is clear, when that schedule is considered, that the required declaration is a declaration not only of expenses of which the candidate has personal knowledge, but that to the best of his knowledge no other person has incurred them; and, further that in the future he will not provide money for any expenses that may have been incurred by his agent. The applicant in the present case has not incurred any expenses, therefore it is impossible for him to state any account at all. But the Act requires the declaration that neither the candidate nor any person in his behalf has incurred or will incur any expenses, so that, even if no expenses have been incurred, the declaration is still necessary. The affidavit in the present case sets forth the omission of Mr. Robson to make this return and declaration was due to inadvertence, and not want of good faith, and he asks to be excused from the penal consequences of his omission. We think under the circumstances we ought to grant the relief prayed, so that the defect may be cured. I think it was intended that we should have the power to enable us to remedy such a defect, and the Master has handed up to me a case of *Re Spence* (not reported), in which an order was made to excuse the omission to make a statement of the account of expenses at a municipal election, with this addition, that the time should be extended in order that the return and declaration should now be made. We order that the applicant be excused from the consequences of his omission, and that the time be extended for him to make the declaration as required by the fourth schedule to the Act.

MANISTY, J. concurred. *Order accordingly.*

Solicitors for the applicant, *Aldridge, Thorne,* and *Morris.*

Friday, Feb. 25.

(Before DENMAN and MATHEW, JJ.)

PENNY (app.) v. HANSON (resp.). (a)

Vagrant Act 1824—*Pretending or professing to tell fortunes—Issuing a circular—Intention to deceive or impose—Rogue and vagabond*—5 *Geo.* 4, *c.* 83, *s.* 4.

Sect. 4 *of* 5 *Geo.* 4, *c.* 83, *enacts that "every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects . . . and being subsequently convicted of the offence for which he or she shall have been so apprehended, shall be deemed a rogue and a vagabond."*

The issuing of a circular by way of advertisement, in which the issuer states that, on being informed of the dates of births of those who consult him, he will (on the payment of money) forecast their future, is a pretence or profession to tell fortunes within the above section, though no money is received by him and the future of any particular person is not told.

Proof that the issuer of such a circular does not believe in his own power to foretell the future is not necessary to substantiate the charge, and the intent to deceive and impose may rightly be inferred from the issuing of such circular.

THIS was a case stated by one of the metropolitan police magistrates under 42 & 43 Vict. c. 49, for the opinion of the court. The facts were as follows:—

Upon the hearing of a certain information preferred by the respondent against the appellant under sect. 4 of 5 Geo. 4, c 83, that the appellant did unlawfully pretend to tell fortunes to deceive and impose on one Timm Khurt and others of Her Majesty's subjects, I convicted the appellant of the said offence and adjudged him to pay to the clerk of the said court at Bow-street the sum of 5*l.* and the sum of 2*s.* for the costs of the

(a) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

summons on or before the 5th day of June then next, or in default of making such payment to be imprisoned with hard labour for the space of twenty-one days. The following facts were proved before me:

The appellant caused to be inserted in various newspapers advertisements to the following effect:

Neptune, the astrologer's permanent address, is 12, Grenville-street, Brunswick-square, London, W.C. Terms sent on application.

Wanted everyone to have their own nativity cast yearly; advice given and astrological questions answered. For terms send stamps to "Neptune," 12, Grenville-street, Brunswick-square, W.C.

Khurt subsequently answered one of the advertisements by a letter under an assumed name and address of which the following is a copy:

Sir,—I have seen your advertisement and should like to know further particulars with a view to receive advice.—I am, Sir, yours truly, TIMM NICHOLANS.

And in reply received a printed circular, of which the following is a copy:

ASTROLOGY

Is a science giving cause and effects; without this it could not be accurately termed a science. In all ages some of the most eminent men have been practical astrologers; even now it is the same. In ancient time astrologers occupied more prominent positions than any other class of prophets, being men of science and knowledge. We do not consult the spirits of the so-called dead, nor use any unlawful means; neither do we practise any of the black arts, or other mysteries, nor use enchantments (mystery is only a word that expresses our want of knowledge).

The works of the Great First Cause are all governed by immutable and perfectly natural laws, working in order and harmony. Every cause produces its own effects. Every planet in our solar system has its own orbit (course to run) round the sun, from which it cannot deviate. It is the same in the animal and vegetable kingdoms, and man is no exception to the Divine laws which govern all things. We all have our own orbit or sphere (sun) of usefulness, around which we revolve in this life. By our own mistakes in life we create clouds that sometimes obscure our path, and in the desire for betterment we have a divine right to consult the works of the Great First Cause, who has declared that the stars are for signs (of what? the past, present, or future) and for seasons.

By the positions of the planets in the nativity, and their aspects to each other, we are able to give the general descriptions of person, the diseases liable to, health, mental abilities and disposition, the occupation most suitable, where and when successful, marriage, travelling, friends, &c., and the events of everyday life. Interviews are unnecessary; all that is required is the time of birth as near as possible, day of week, day of month, year, sex, and birthplace.

Nativities cast from 5*s.* and upwards.

Ditto with events in life in brief from 21*s.*, 100*s.* and upwards.

Two ordinary questions answered in writing, 1*s.* 6*d.*

Intricate questions, as agreed.

Yearly birthday information, 2*s.* 6*d.* and 5*s.*

Ditto for business purposes, 10*s.* and 20*s.*

Five years' direction in advance from 5*s.*, 10*s.*, and upwards.

Astro-medical diagnosis of diseases delineated.

Short interviews, 2*s.* 6*d.*

More information if necessary on application.

A stamped addressed envelope must accompany every communication where a reply is required.

All work done will be in accordance with the remuneration received, and will be executed as early as possible.—Address R. H. Neptune, 12, Grenville-street, Brunswick-square, London, W.C.

On the part of the appellant it was contended that there was no evidence of pretence or profession to tell the fortune of Timm Khurt, the informant, inasmuch as there was nothing whatever told him as being his fortune, and that by the Act such pretence or profession must consist of the actual telling and purporting to tell a fortune. That the profession made by the appellant in his circular was that he could apply certain rules (which were known to those who had studied astrology) to the particular cases of individuals; although this profession was coupled with an expression of opinion that such fixed rules were sound, and when properly applied would give an indication of what was likely to happen, yet there was no pretence by the appellant that he had any mysterious personal power of divination, such as might impose on the credulity of the superstitious, which was the mischief aimed at by that portion of the statute under which the offence was charged. That there was no evidence of intent to deceive as required by the words of the Act "to deceive or impose upon," inasmuch as there was no evidence that the appellant had not the most implicit faith in the science he professed to apply, namely, astrology. That there was no presumption in a criminal case, and that the intent to deceive being an actual part of the offence must be capable of being inferred from some evidence, and that here there was no such evidence of this as would have been left by a judge to a jury.

The magistrate was, however, of opinion that there was evidence that the appellant did pretend and profess to tell fortunes, and that he did it to deceive and impose on Timm Khurt and others of Her Majesty's subjects within the meaning of the said statute, and the magistrate found accordingly, and referred to the case of *Monk* v. *Hilton* (46 L. J. 163, M. C.).

The question for the court was, whether there was evidence before the magistrate to justify the conviction.

By 5 Geo. 4, c 83, sect. 4:

Every person pretending or professing to tell fortunes, or using any subtle craft, means or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects . . . . and being subsequently convicted of the offence for which he or she shall have been so apprehended, shall be deemed a rogue and a vagabond.

Murphy, Q.C. (*Wormald* with him) for the appellant.—The statute in question does not aim at such a case as this; if the appellant had told the prosecutor his fortune, or had received money from him for so doing, it would have been different, but the case stops short of that. All he did was to advertise by way of a circular that by the lesson he read from the planets he was able to give such information as he set forth in his circular. The mere professing to forecast a nativity and tell fortunes is no offence under sect. 4. Again, there is no evidence that he did not believe in astrology and his capacity to forecast the future by counselling the stars. If this conviction stands, any person who foretells another what may be going to happen to him may be convicted as a rogue and a vagabond; and many persons in all grades of society are in danger. The magistrate seems to have based his decision on *Monk* v. *Hilton* (46 L. J. 163, M. C.); but in that case there was a complete proof of palmistry.

Poland, for the respondent, was not called upon to argue.

DENMAN, J.—This is an instance in which the doctrine *res ipsa loquitur* applies. It is nonsense to suppose that in these days of advanced knowledge the appellant really did believe he had the power to predict a man's future by knowing at what hour he was born, and the position of the stars at the particular moment of his birth. No person who was not a lunatic could believe he possessed such power. There was, therefore, no need on the part of the prosecution to negative his belief in such power or capacity. The magistrate rightly drew an inference that the appellant had an intent to deceive and impose on the prosecutor. I do not decide whether merely telling fortunes is or is not an offence under the statute, but this advertisement and circular amounted to a pretending and profession to tell fortunes within sect. 4 of the Act. I think there was ample evidence on which we ought to hold the magistrate was right.

MATHEW, J.—I am of the same opinion.

Solicitors for the appellant, *Webb* and *Templeton*.

Solicitors for the respondent, *Hare* and *Co.*, for the *Solicitor to the Treasury*.

Wednesday, March 2, 1887.

(Before DAY and WILLS, JJ.)

LEWIS (app.) *v.* FERMOR (resp.). (*a*)

Cruelty to animals—Spaying sows—Operation rendering animal more fit for use of man—Torture—12 *&* 13 *Vict. c.* 92, *s.* 2.

Where an operation that has become customary is performed with reasonable care and skill on an animal undoubtedly causing it severe pain in the bonâ fide belief that it renders its flesh more fit as an article of human food, such operation is not cruel ill-treatment, abuse, or torture of the animal within sect. 2 *of the Prevention of Cruelty to Animals Act* 1849, *though the utility of such operation may be open to doubt.*

CASE stated under 20 & 21 Vict. c. 43.

This was a case stated by justices of which the material parts were as follows:—

1. At a court of summary jurisdiction holden at East Grinstead, in the county of Sussex, on the 11th May, 1886, the appellant prosecuted the respondent under 12 & 13 Vict. c. 92, s. 2, for that the respondent did, on the 5th March 1886, ill-treat, abuse, and torture certain animals, to wit, five sows.

2. On behalf of the respondent it was admitted that he had performed the operation of spaying upon the said sows in the manner in which that operation is usually performed; and on behalf of the appellant it was admitted that the said operation was performed in a reasonably careful and skilful manner, and it was agreed that the only questions to be tried were, whether the said operation caused pain to the said sows, and, if it did, whether such pain was necessary or justifiable.

3. In support of the prosecution it was contended that the operation caused much pain, and was unjustifiable because it was unnecessary, being performed not for the benefit of the animals themselves nor for the welfare or safety of the human race generally, but under the pretence only that it saved money to the owner of the sows operated upon, and that this pretence, though unjustifiable if true, had no foundation in fact.

In support of this contention the following evidence was adduced:

Peter Stalker Cowan: I am a M.R.C.V.S., and veterinary inspector of Colchester borough. I have made a special study of the question of spaying pigs. [The witness then proceeded to describe the operation, which, though quickly performed, caused excessive pain.] After the operation has been performed, the animal suffers pain for about a week, because when the animal takes food the pressure of the bowels upon the operated part causes pain. The operation is performed when they are from six to eight weeks old. I have performed experiments in feeding as regards both spayed and unspayed pigs. I have taken half a score of pigs, half of which have been spayed and half not spayed, and fattened them until four months old, to be good jointers until weighing about eight stone. They are then worth 1½d. per pound more than if they are kept till double that age. I tested them and sold them at about five months old and found the unspayed pigs were of greater weight than those which had been spayed. The spayed ones lost flesh after the operation. They were all of the same age and weight to start with. They were from the same sty. In my opinion the operation of spaying does not improve the animal's flesh or benefit the animal itself. It is not, so far as I know, done in the north of England. I have acquaintance with the practice in Scotland, and sow pigs are never spayed there, nor in Yorkshire, where they sell sow pigs as jointers, and keep the castrated hogs as bacon hogs. The operation is, in my opinion, both unnecessary and barbarous (the witness here produced a report of the British National Veterinary Congress 1881, which reported, *inter alia*, that the spaying of female animals was unnecessary, and recommended its abolition. The witness was a member of that committee). In conclusion he said: I agree with that report. I perform about four thousand of these operations a year. In my own practice the mortality resulting is about 1 per cent. I have known a case in which about eight out of thirteen died—the animals being fed too soon. I have come to the conclusion that the operation is unnecessary and should be abolished.

Cross-examined: Spaying gives more pain than castration. I can do from forty-five to fifty sows in an hour. If my directions as to feeding are carried out perhaps the pain might abate in three days. I have not seen a sow feed eagerly after the operation, but her doing so would not indicate absence of pain. In the instance I gave the two sows were sisters, and the litters were from the same boar. Castration is necessary, but spaying is not. The flesh of a female pig is only deteriorated when it is killed during the period of menstruation.

Re-examined: What I mean to imply as to the difference between the male and female is, that the flesh of the former is improved by the operation, as the periods of heat are constant, but in the female they only come on at regular intervals, and the sow need not be killed at such times, and not until they have passed off and the flesh resumed its normal condition. Also, the male animals are sometimes very dangerous unless masculated, not only during a few weeks, but constantly all the year round.

By the Bench: The plan of operating I have described is the universal one. The subject is never taught in any of the colleges.

H. Leeney: I am M.R.C.V.S., and in practice at East Grinstead. I quite agree with Mr. Cowan's evidence which I have heard. I have performed the operation under protest, as I believe it unnecessary and therefore cruel. It is usual in this district, but most of my clients have left off the practice on my advice. The operation is not practised near Brighton, and I believe not much in the Midlands, if at all.

Wm. Hunting: I am F.R.C.V.S. I have heard the whole of Mr. Cowan's evidence and agree with it. The practice is not done in the north of England, where I come from. There is not much difference, I think, in the pain between castration and spaying, unless peritonitis sets in, as is most likely in the female.

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

4. No evidence was adduced on behalf of the respondent, but it was contended that the evidence adduced by the appellant did not show an offence had been committed within the meaning of the statute.

5. The justices were of opinion that the said operation undoubtedly caused pain, but agreed with the contention of the respondent, and dismissed the information with costs.

The question for the opinion of the court was, Did the evidence adduced by the appellant disclose an offence under sect. 2 of 12 & 13 Vict. c. 92? If it did, the case was to be remitted to them in order to convict. If it did not, the dismissal was to stand.

By 12 & 13 Vict. c. 92, s. 2:

If any person shall . . . . cruelly beat, ill-treat, ... abuse . . . . or torture, or cause or procure to be cruelly beaten, ill-treated . . . . abused, or tortured, any animal, such offender shall for every such offence forfeit and pay a penalty not exceeding 5*l*.

Waddy, Q.C. (*Colam* with him) for the appellant. —The operation performed by the defendant is not necessary for the benefit of mankind, and amounts to cruelty within sect. 2 of 12 & 13 Vict. c. 92. The cruelty need not be wanton as formerly under 5 & 6 Will. 4, c. 59; it is enough if it is unnecessary. [DAY, J.—The case finds that it was performed for the purpose of improving the property of the owners.] That has been held to be not sufficient if the pain is unnecessary; that is the effect of the case of *Murphy* v. *Manning* (36 L. T. Rep. N. S. 592; L. Rep. 2 Ex. Div. 307). [DAY, J.—This is a customary practice believed to be for the good of man, and so is outside the statute. The custom of the country is here admitted.] If that were so, nearly all the convictions under this statute and upheld by this court could have been set aside. It is sought to obtain a binding decision that this operation is illegal. The evidence shows that it does the animal subjected to it a great deal of harm apart from the pain. The leading veterinary surgeons, a skilful and scientific body, have denounced this practice as wholly unnecessary and cruel, and their evidence enables this court to pronounce it cruelty within the statute.

No counsel appeared for the respondent.

DAY, J.—In this case a prosecution was instituted against John Fermor, who was said to be a veterinary surgeon carrying on his business in the county of Sussex, for performing an operation called "spaying" on certain sows. It was instituted under sect. 2 of the Prevention of Cruelty to Animals Act 1849 (12 & 13 Vict. c. 92); and it is said that the defendant did cruelly abuse and torture three sows within the meaning of that section. There is no doubt whatever that he did inflict pain, and may be torture, on these sows. But the question is whether he cruelly did so within that section. The meaning of "cruelty," like that of many other words, is uncertain; and it is for the court to ascertain what was the meaning which the Legislature intended to attribute to it. It cannot be used merely in the sense of inflicting pain, or even torture, for there are operations which could well be defined as torture, and which are performed even on human beings, such as cauterising wounds, and firing in the case of horses, which are attended with beneficial results; such are torture in one sense, they are cruel torture while they last. Cruel torture within the statute must be taken to be that which is inflicted for no legitimate purpose, and which cannot be justified. The word "wanton," it is true, has been omitted in the later statute. I do not profess to know the reason for its omission, but that word has a double meaning, and was perhaps left out for that very reason. I would define "cruel torture" to be the infliction of grievous pain without some legitimate object existing in truth, or honestly believed in. I do not believe that a person who inflicts pain in the honest belief that it is conferring a benefit upon man can be punished under this section on the motion of those who do not agree with him that his acts are beneficial. In this case the defendant practises the profession of a veterinary surgeon in a district where it is the custom to have sows spayed when not kept for breeding purposes. It is supposed to increase their bulk and value; perhaps it is a vulgar error, I do not know whether it is so or not; it is not before us. It is deemed to be beneficial to the owners of the animals and so to mankind, and that no doubt is the reason for the maintenance of the practice. It may be observed that the principal witness, while agreeing with the report of the Committee of the British National Veterinary Congress (1881), which condemned the spaying of female animals and recommended its abolition himself, performs over four thousand of these operations a year. That is to say, he with his opinion on the subject continues to practise the operation solely for the money he thereby earns. The defendant on the other hand has done that which is in accordance with the uniform practice of the district for (as it is there supposed) the good of man. The magistrates, in using the word "cruelty" in the above sense, came to a sound conclusion, for, although the operation undoubtedly caused pain, the evidence did not show that any cruelty had been committed within the meaning of the statute. I am of opinion that the magistrates were right, and the appeal ought to be dismissed.

WILLS, J.—I am of the same opinion. I am fully aware of the importance of a question of this kind. On the one hand, the Act under discussion was passed to preserve animals from unnecessary cruelty and ill-treatment, and should be fully administered; on the other hand, it is of equal importance to the liberty of the subject and the rights of persons subjected to its operation that a reasonable construction be put upon it. We ought not to make innocent persons victims of the law. The difficulty here arises in construing the word "cruelty." The word must obviously have some meaning. It cannot, I think, be the mere infliction of pain, because, if so, many things not within the scope of the Act, such as "firing" of horses, would be included. There must therefore be something of a moral element imported into the word. This is in accordance with the case of *Murphy* v. *Manning* (*ubi sup.*). It was there held that many acts, cruel in the extreme if the word were applied merely to the pain inflicted, were not cruel if done for some lawful purpose. Here the question is, was the operation done for a lawful purpose? The question is not whether in the opinion of the tribunal the particular act was or was not beneficial, for if it were it might often expose a person to prosecution for such acts as firing a horse, if it turns out after the operation

that he has mistaken the malady, and that the real disease from which the horse is suffering is one for which firing would be useless, and that, therefore, the great suffering which firing must entail has been, in one sense, purposelessly inflicted. The operator may have made a mistake, though his belief in its necessity was honest. But if the appellant's contention be correct, such a person ought to be convicted, for the operation would be neither necessary nor beneficial to the animal, nor beneficial to the owner in making the animal more valuable. I think some such meaning must be given to the word as would prevent its application to the case I have just mentioned. The proper view is, that the section does not apply if there is an honest belief that that which is done will benefit the animal itself or be good for mankind. It cannot yet be held clear whether this operation is or is not distinctly cruel and unnecessary. In a recent case (*Penny* v. *Hanson*, *ante*, p. 235), it was held that a plea that a person really believed in his capacity to tell fortunes by the stars could not be taken into consideration, for public opinion has arrived at such a stage that a belief of that sort could not now be really and honestly entertained; but a century ago it might have been necessary to give evidence upon the point. One ground of my decision is, that there was no evidence that this question is removed from the category of legitimate doubt whether or not the operation is beneficial, and that the respondent did not believe in the utility and success of his own operations. The evidence of the witness Cowan was rightly discounted by the justices. The case would have been very different if, instead of the present respondent, one of the witnesses called for the prosecution had been made the defendant. A gentleman who admits that, for payment, he performs in the course of a year some thousands of operations which he believes to be at once extremely painful and perfectly useless, could have no possible ground of complaint if he were prosecuted, convicted, and severely punished. It is said that the evidence of the appellant's witnesses as to the inutility of the process was uncontradicted. To prove that it is useless, however, is but one step. It sufficiently appeared that there is a very widespread belief in its utility, and I feel bound to say that, upon the mere question of opinion, the justices were under no obligation to accept or act upon the evidence of persons who admitted that they were in the daily habit of performing for pay an operation in their judgment both useless and cruel. In the case of the respondent there was no such evidence against him, nor anything to show that he did not honestly believe the operation to be beneficial. I think, for these reasons, this appeal ought to be dismissed.

Appeal dismissed.

Solicitor for the appellant, *A. Leslie.*

Saturday, Feb. 26, 1887.

(Before Denman and Mathew, JJ.)

The Guardians of the Parish of St. Pancras (apps.) *v.* The Guardians of the Norwich Incorporation (resps.). (*a*)

Poor law—Settlement—Child over sixteen at time of adjudication — Status of irremovability — Settlement derived from father — Divided Parishes Act 1876 (39 *&* 40 *Vict. c.* 61), *ss.* 34 *&* 35.

Upon a case stated, it was found that the pauper lunatic in question was born in the appellants' parish and was legitimate. Before he attained the age of sixteen his father, by whom he was supported and with whom he resided continuously, acquired a settlement in the parish of St. Mary, Lambeth, where they continued to reside until the pauper was over the age of sixteen. Subsequently the pauper and his father went to reside at Norwich, but they acquired no settlement there.

Held (quashing the order of the justices, who had adjudged him to be settled in the appellants' parish), that, under sect. 35 *of the Divided Parishes Act* 1876, *the pauper had derived a settlement from his father in the parish of St. Mary, Lambeth, by his residence there while under sixteen years of age, and that, no other settlement having been subsequently acquired by him, he retained such derivative settlement.*

Semble, that, in any case, the pauper had acquired a settlement by residence in the parish of St. Mary, Lambeth, within the meaning of sect. 34 *of the Divided Parishes Act* 1876.

This was a case stated by consent of the parties and by order of Field, J., dated the 9th of April 1886, under and by virtue of 12 & 13 Vict. c. 45, s. 11, for the opinion of the Queen's Bench Division of the High Court of Justice in an appeal against an order of the justices, dated the 15th of Feb. 1886, whereby it was adjudged that the place of the last legal settlement of William Henry Bandy was in the parish of St. Pancras in the county of Middlesex.

1. On the 6th Nov. 1885, William Henry Bandy (hereinafter called the pauper) was, under an order of two of Her Majesty's justices of the peace, acting in and for the city and county of Norwich, directed to the superintendent of Norwich Pauper Lunatic Asylum for the said city and county, removed to the said asylum and became chargeable to the respondent incorporation.

2. On the 15th Feb. 1886, an order was made by two of Her Majesty's justices of the peace, acting in and for the said city and county, adjudging the pauper to be legally settled in the appellants' parish, and it is this order which is now appealed against. A copy of the said order was annexed to and was read as part of this case.

3. The said order of the 15th of Feb. 1886 was duly served upon the appellants, and also a notice of the grounds of the said adjudication, including the particulars of the settlement relied upon in support thereof. A copy of such notice was annexed to and was read as part of this case.

4. Notice of appeal by the appellants against the said order of adjudication, dated the 18th of March 1886, with the grounds of appeal, was duly served upon the respondents. A copy of such

(*a*) Reported by F. A. Crailsheim, Esq., Barrister-at-Law.

notice of appeal and the grounds thereof was annexed to and was to be read as part of this case.

The facts of the case were as follows:

5. The pauper was the legitimate son of Williaim Henry Bandy, the elder, of Victoria Tavern, St. Stephen's-road, Norwich, tailor and licensed victualler, and Maria, his wife, and was born on the 12th of Sept. 1868 in a house then known as No. 5, Calthorpe-street, Gray's-inn-road, in the appellants' parish. The said William Henry Bandy, the elder, and his wife Maria, were married at St. Andrew's Church, Holborn, in the county of Middlesex, on the 2nd of May 1859.

6. On the 27th Sept. 1879, the pauper's father rented a separate and distinct tenement, situate and being No. 93, Dalyell-road, Brixton, in the parish of St. Mary, Lambeth, in the county of Surrey, at a rental of 36*l.* per annum, and resided in and occupied such tenement, and was assessed to and paid the poor rates and all other rates assessed in respect thereof, as well as the rent payable under such yearly hiring, during the whole of the period between the 27th Sept. 1879 and the month of May 1885, whereby he gained a settlement in the parish of St. Mary, Lambeth.

7. On the 12th Sept. 1884, when the pauper atttained the age of sixteen years, William Henry Bandy, the elder, was settled as aforesaid in the said parish of St. Mary, Lambeth.

8. During the whole of the period between the 27th of Sept. 1879 and the month of May 1885, the said William Henry Bandy, the elder, resided in the said 93, Dalyell-road, under such circumstances as in accordance with the statutes on that behalf rendered him irremovable from the said parish of St. Mary, Lambeth, and the pauper resided continuously with his father and the other members of and as part of his father's family in the said premises, and was during such period supported by him, and if the said pauper was by reason of the circumstances herein stated irremovable during the said years, then, beyond what appears in this case, nothing occurred whereby the pauper became removable from the said parish.

9. The pauper with his father and the other members of the family in or about the month of May 1885 went to reside in the said city of Norwich, the said pauper being of the age of sixteen years and eight months.

10. The said pauper lunatic has not, unless the facts stated herein establish that he had acquired a settlement by residence in the said parish of St. Mary, Lambeth, acquired any settlement of his own.

11. The appellants contended that previously to the pauper attaining the age of sixteen years he took the settlement gained by William Henry Bandy, the elder, his father, in the said parish of St. Mary, Lambeth, and that since attaining the age of sixteen years the pauper had retained the settlement so taken by him. And further, that sect. 34 of 39 & 40 Vict. c. 61 applied to any person, and that its provisions were not restricted by sect. 35 of the said Act, and that therefore the pauper had, under the said sect. 34, acquired a settlement by residence in the said parish of St. Mary, Lambeth.

12. The respondents, on the other hand, contended that, at the date of the said orders of the 6th Nov. 1885 and the 15th Feb. 1886, the settlement of the pauper was not in the said parish of St. Mary, Lambeth, but that the same was properly by the said order adjudged to be in the appellants' parish, and also that the fact that the pauper lived with his father in the said parish of St. Mary, Lambeth, during the time and in manner therein stated, did not confer upon him a settlement in the said parish within the meaning of the said statute.

13. Upon the argument of the case the court was to be at liberty to draw from the facts stated therein any inference, whether of fact or of law, which might have been drawn therefrom had such facts been proved at a hearing of this appeal before the Court of Quarter Sessions.

14. The question for the opinion of the court was whether the pauper was, at the time of the making of the order appealed against, settled in the appellant parish.

If the court should be of opinion that he was so settled, the said order was to be affirmed with costs, including the costs of the special case and of and incidental to the hearing and decision of the same to be paid by the appellants to the respondents; if otherwise, the said order was to be quashed with costs, including the costs of the special case and of and incidental to the hearing and decision of the same to be paid by the respondents to the appellants. Judgment in accordance with the decision of the court upon the case was to be entered upon the motion of either party at the sessions next or next but one after such decision should have been given.

By 39 & 40 Vict. c. 61, sect. 34:

Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise, provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed without such corroboration as the justices or court think sufficient.

By sect. 35:

No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or or its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born.

R. Cunningham Glen for the appellant parish.—It is submitted that the pauper has either acquired or derived a settlement in a parish other than the appellant parish, namely, in that of St. Mary, Lambeth. Under sect. 34 of 39 & 40 Vict. c. 61, all that is necessary to acquire a settlement is residence such as would confer a status of irremovability, and the pauper in this case comes within this section. Residence for three years, with or apart from parents, is sufficient to confer a status of irremovability, and the mere fact of the pauper being under sixteen years of age does not operate so as to prevent him or her from

becoming irremovable. That a child under the age of sixteeen could, previous to the statute of 1876, acquire a status of irremovability otherwise than by residence, is shown by the words of sect. 2 of 24 & 25 Vict. c. 55, which enacts that, "where a child under the age of sixteen years, residing with its surviving parent, shall be left an orphan, and such parent shall at the time of death have acquired an exemption from removal by reason of a continued residence, such orphan shall, if not otherwise irremovable, be exempt from removal in like manner, and to the same extent, as if it had then acquired for itself an exemption from removal by residence:"

Reg. v. *Inhabitants of Elvet*, 2 Ell. & Ell. 266;
Reg. v. *The Guardians of the Abingdon Union*, 22 L. T. Rep. N. S. 603; 39 L. J. 153, M. C.

A settlement can be acquired by a child under sixteen years of age by residence apart from its parents:

Reg. v. *Guardians of Leeds Union*, 4 Q. B. Div. 323;
Wolstanton and Burslem Union v. *Northwich Union*, 46 L. T. Rep. N. S. 528;
The Guardians of Holborn Union v. *The Guardians of Chertsey Union*, 52 L. T. Rep. N. S. 102; 14 Q. B. Div. 289; 15 Q. B. Div. 76;
The Guardians of the Salford Union v. *The Overseers of Manchester*, 48 L. T. Rep. N. S. 119; 10 Q. B. Div. 172.

A wife is in the same position as a child, as regards the acquisition of a status of irremovability. Formerly a status of irremovability was acquired by a pauper by five years' residence, and a period of residence before the age of sixteen may be added to residence after that age, so as to render him irremovable:

Reg. v. *The Inhabitants of Glossop*, 17 L. J. 171, M. C.

All that is necessary to confer the status is actual residence:

Reg. v. *The Inhabitants of St. George's-in-the-East*, 22 L. T. Rep. N. S. 440; L. Rep. 5 Q. B. 364.

For these reasons it is submitted that there is nothing to prevent the pauper in this case from having acquired a status of irremovability and a settlement in the parish of St. Mary, Lambeth. The cases of *Reg.* v. *The Inhabitants of Combs* (5 El. & Bl. 892), *Blackwell* v. *England* (8 E & B. 541), and *Rex.* v. *North Curry* (4 B. & C. 953) were also referred to.

Tindal Atkinson for the respondents.—The rule as to the acquisition of a settlement is different according as the pauper child in question is legitimate or illegitimate, and a legitimate or unemancipated child cannot acquire a separate settlement. The distinction was clearly drawn in the case of *The Salford Union* v. *The Overseers of Manchester* (48 L. T. Rep. N. S. 119; 10 Q. B. Div. 172), where Hawkins, J. in his judgment says that, "in our opinion the authorities cited have no applicability to the present case, for those authorities had reference to legitimate children, whilst we are dealing with an illegitimate pauper of full age . . . . So long as a legitimate child remains an unemancipated member of its father's family, no matter what its age may be, it follows and takes in law its father's settlement; it gains no independent status by reason of any residence in a parish so long as such residence is merely as a member of its father's family:"

Reg. v. *Much Cowarne*, 2 B. & Ad. 861;
Reg. v. *St. Mary Arches, Exeter*, 5 L. T. Rep. N. S. 637; 31 L. J. 77, M. C.

On the authority of those cases, it is submitted that the pauper has acquired no separate status of irremovability for himself. The case of *Reg.* v. *The Inhabitants of Glossop* (17 L. J. 171, M. C.) does not apply, because here there is no residence before the age of sixteen to coalesce with residence after that age, because the residence in each of the three years must have been such as would have created a status of irremovability, and a legitimate and unemancipated child under sixteen years of age cannot acquire such status:

The Guardians of e Dorchester Union v. *The Guardians of The Weymouth Union* 16 Q. B. Div. 31.

On the question of derivative settlement, the authorities are absolutely conclusive. If the pauper is above the age of sixteen at the time of adjudication, he cannot take the settlement of his father; this is clearly enacted by sect. 35 of the Act of 1876:

The Guardians of the Edmonton Union v. *The Guardians of St. Mary, Islington*, 53 L. T. Rep. N. S. 327; 15 Q. B. Div. 95 & 339.

Therefore it is submitted that the order of the justices was right, and that the legal settlement of the pauper is in the parish of St. Pancras, that is, the place of his birth.

Glen in reply.—If the pauper in this case does not come within the terms of sect. 34 of the Act, it is submitted that, at any rate, he has derived a settlement in the parish of St. Mary, Lambeth, from his father within the meaning of sect. 35:

Reg. v. *The Guardians of the Bridgnorth Union*, 48 L. T. Rep. N. S. 600; 11 Q. B. Div. 314.

DENMAN, J.—These enactments are extremely puzzling, and it is impossible to give any decision upon them with great confidence, more especially as there certainly are expressions in the last two cases on the subject decided by the Court of Appeal which seem to be difficult to reconcile; but, upon the whole, putting the best construction I can on these two sections, I think that the result of them is this: Sect. 34 of the Act of 1876 provides that, "where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise." Then there follows a proviso: "Provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or court think sufficient." Now, that section appears to me, applied to the facts of the present case, to have conferred upon the father of the pauper, whose settlement is here in question, a status of irremovability, which status of irremovability, by the terms of this very section, makes him a person who is to be deemed to be settled in that parish until he acquires a settlement in some other parish by like residence or otherwise, and the facts of the case preclude the supposition that that person had acquired any other settlement. Therefore, I think that, so far as the father of the pauper is concerned, he was a person who came within the meaning of sect. 34, and who had acquired a settlement in the parish of

St. Mary, Lambeth, which is here the place relied upon by the appellants as the place of settlement of the pauper. Then we come to sect. 35 of the Act, which has a negative proviso, to prevent persons obtaining a derivative settlement except under certain circumstances. But for those circumstances the pauper whose settlement is here in question would not have obtained the settlement of his parent. The negative proviso says that, "no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen." Now, stopping there for a moment, as long as the pauper in this case was a child under the age of sixteen down to the time when he attained that age, he was a person who would have had the settlement which his father had. That is not disputable; he would clearly have had the settlement of his father. We now come to the other words of the section, and they certainly do create very considerable difficulty. The section goes on to say "which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age." Well now, the words "up to that age" look as though they were in the first instance intended to apply only to the case of a child in whose case the question arises up to the age of sixteen, and that is a view which obviously has impressed itself on the minds of some of the learned judges who have had the matter before them. But then follow these words, "and shall retain the settlement so taken until it shall acquire another." How can we put any construction upon those words except the construction which in this particular case makes the pauper a person who has the settlement which, before he attained the age of sixteen, was the settlement of the father? Now, he has, in point of fact, gone on residing in the parish in which his father resided, and that does raise a question whether the two periods of residence can be put together, and I think the cases cited by Mr. Glen do warrant us in saying that there is nothing in the current of decisions upon these matters which will prevent us from holding that the pauper himself, putting these two periods together, might come within sect. 34 of the Act. But I do not think it necessary to decide this case solely on that ground, or on that ground at all, because I am of opinion that these subsequent words "and shall retain the settlement so taken until it shall acquire another," do necessarily compel us to hold that where the parent has obtained a settlement, which, if the question arose when the child was under sixteen, would be the settlement of the child, in such a case, the child is to retain the settlement of the father and not to go back to its birth settlement; it is to retain that settlement until it acquires another. What the object of the Legislature may have been is certainly only a matter of speculation, but it may have been this, that it is better and more reasonable that paupers should have their settlements in the place where their parents had a tangible and substantial period of residence when they were children up to the age of sixteen, and that they should retain that settlement which was the settlement of their parents, rather than that they should in every case go back to the only alternative settlement, namely, the place of their birth, and that they should retain that settlement until they should acquire another for themselves. It appears to me that this is a rational construction to put upon the Act, and it is obviously the one which was put upon it by the court in the case of *Reg.* v. *The Guardians of the Bridgnorth Union* (48 L. T. Rep. N. S. 600; 11 Q. B. Div. 314), which is a decision cited and relied upon by Mr. Glen on behalf of the appellants. I think, upon the whole, that we should be disregarding the effect of that decision if we were to hold otherwise than that the pauper in this case in fact gained a derivative settlement from his father in the parish of St. Mary, Lambeth. I think, therefore, that this appeal ought to succeed.

MATHEW, J.—I am of the same opinion. I do not understand it to be disputed, or that it could be disputed, that if this question had arisen before the child had reached the age of sixteen, its settlement would have been determined by the settlement of its parent. But it is argued by Mr. Tindal Atkinson that a totally different state of things arises the moment the child passes the age of sixteen, and that the meaning of the Divided Parishes Act 1876, is that whereas the settlement of the pauper on the last day of the sixteenth year of his age would be the settlement of his father, on the first day of the seventeenth year it would be the place of his birth. I cannot see any reason for legislation to that effect. It appears to me, on looking at the language in the latter part of the section, that such cannot have been the intention of the Legislature, because, in the first case put, where the settlement is inquired into before the age of sixteen is arrived at, the then settlement is to be retained subsequently. Why should not the same consequence follow when dealing with the settlement where the pauper is above the age of sixteen? The settlement once acquired before the age of sixteen is, under the language of the Act of Parliament, to be retained until another settlement is acquired. It seems to me that this is the meaning of the judgment delivered by the Master of the Rolls in the case of *Reg.* v. *The Guardians of the Bridgnorth Union* (*ubi sup.*). That judgment I understand to have been assented to by both the other Lords Justices, and we are bound by their decision, and we shall therefore follow it. That is apparently the best interpretation which can be put upon the statute, which is one which is by no means free of difficulty. Therefore we hold that the settlement of the pauper is in the parish of St. Mary, Lambeth, and consequently this appeal must be allowed and the order of the justices quashed.

Appeal allowed.

Solicitor for the appellants, *J. Rexworthy*.

Solicitors for the respondents, *G. F. Hudson, Matthews* and *Co.*, for *Bailey, Cross*, and *Barnard*, Norwich.

becoming irremovable. That a child under the age of sixteen could, previous to the statute of 1876, acquire a status of irremovability otherwise than by residence, is shown by the words of sect. 2 of 24 & 25 Vict. c. 55, which enacts that, "where a child under the age of sixteen years, residing with its surviving parent, shall be left an orphan, and such parent shall at the time of death have acquired an exemption from removal by reason of a continued residence, such orphan shall, if not otherwise irremovable, be exempt from removal in like manner, and to the same extent, as if it had then acquired for itself an exemption from removal by residence:"

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A wife is in the same position as a child, as regards the acquisition of a status of irremovability. Formerly a status of irremovability was acquired by a pauper by five years' residence, and a period of residence before the age of sixteen may be added to residence after that age, so as to render him irremovable:

Reg. v. *The Inhabitants of Glossop*, 17 L. J. 171, M. C.

All that is necessary to confer the status is actual residence:

Reg. v. *The Inhabitants of St. George's-in-the-East*, 22 L. T. Rep. N. S. 440; L. Rep. 5 Q. B. 364.

For these reasons it is submitted that there is nothing to prevent the pauper in this case from having acquired a status of irremovability and a settlement in the parish of St. Mary, Lambeth. The cases of *Reg.* v. *The Inhabitants of Combs* (5 El. & Bl. 892), *Blackwell* v. *England* (8 E & B. 541), and *Rex.* v. *North Curry* (4 B. & C. 953) were also referred to.

Tindal Atkinson for the respondents.—The rule as to the acquisition of a settlement is different according as the pauper child in question is legitimate or illegitimate, and a legitimate or unemancipated child cannot acquire a separate settlement. The distinction was clearly drawn in the case of *The Salford Union* v. *The Overseers of Manchester* (48 L. T. Rep. N. S. 119; 10 Q. B. Div. 172), where Hawkins, J. in his judgment says that, "in our opinion the authorities cited have no applicability to the present case, for those authorities had reference to legitimate children, whilst we are dealing with an illegitimate pauper of full age . . . . So long as a legitimate child remains an unemancipated member of its father's family, no matter what its age may be, it follows and takes in law its father's settlement; it gains no independent status by reason of any residence in a parish so long as such residence is merely as a member of its father's family:"

Reg. v. *Much Cowarne*, 2 B. & Ad. 861;
Reg. v. *St. Mary Arches, Exeter*, 5 L. T. Rep. N. S. 637; 31 L. J. 77, M. C.

On the authority of those cases, it is submitted that the pauper has acquired no separate status of irremovability for himself. The case of *Reg.* v. *The Inhabitants of Glossop* (17 L. J. 171, M. C.) does not apply, because here there is no residence before the age of sixteen to coalesce with residence after that age, because the residence in each of the three years must have been such as would have created a status of irremovability, and a legitimate and unemancipated child under sixteen years of age cannot acquire such status:

The Guardians of e Dorchester Union v. *The Guardians of The Weymouth Union* 16 Q. B. Div. 31.

On the question of derivative settlement, the authorities are absolutely conclusive. If the pauper is above the age of sixteen at the time of adjudication, he cannot take the settlement of his father; this is clearly enacted by sect. 35 of the Act of 1876:

The Guardians of the Edmonton Union v. *The Guardians of St. Mary, Islington*, 53 L. T. Rep. N. S. 327; 15 Q. B. Div. 95 & 339.

Therefore it is submitted that the order of the justices was right, and that the legal settlement of the pauper is in the parish of St. Pancras, that is, the place of his birth.

Glen in reply.—If the pauper in this case does not come within the terms of sect. 34 of the Act, it is submitted that, at any rate, he has derived a settlement in the parish of St. Mary, Lambeth, from his father within the meaning of sect. 35:

Reg. v. *The Guardians of the Bridgnorth Union*, 48 L. T. Rep. N. S. 600; 11 Q. B. Div. 314.

DENMAN, J.—These enactments are extremely puzzling, and it is impossible to give any decision upon them with great confidence, more especially as there certainly are expressions in the last two cases on the subject decided by the Court of Appeal which seem to be difficult to reconcile; but, upon the whole, putting the best construction I can on these two sections, I think that the result of them is this: Sect. 34 of the Act of 1876 provides that, "where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise." Then there follows a proviso: "Provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or court think sufficient." Now, that section appears to me, applied to the facts of the present case, to have conferred upon the father of the pauper, whose settlement is here in question, a status of irremovability, which status of irremovability, by the terms of this very section, makes him a person who is to be deemed to be settled in that parish until he acquires a settlement in some other parish by like residence or otherwise, and the facts of the case preclude the supposition that that person had acquired any other settlement. Therefore, I think that, so far as the father of the pauper is concerned, he was a person who came within the meaning of sect. 34, and who had acquired a settlement in the parish of

St. Mary, Lambeth, which is here the place relied upon by the appellants as the place of settlement of the pauper. Then we come to sect. 35 of the Act, which has a negative proviso, to prevent persons obtaining a derivative settlement except under certain circumstances. But for those circumstances the pauper whose settlement is here in question would not have obtained the settlement of his parent. The negative proviso says that, "no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen." Now, stopping there for a moment, as long as the pauper in this case was a child under the age of sixteen down to the time when he attained that age, he was a person who would have had the settlement which his father had. That is not disputable; he would clearly have had the settlement of his father. We now come to the other words of the section, and they certainly do create very considerable difficulty. The section goes on to say "which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age." Well now, the words "up to that age" look as though they were in the first instance intended to apply only to the case of a child in whose case the question arises up to the age of sixteen, and that is a view which obviously has impressed itself on the minds of some of the learned judges who have had the matter before them. But then follow these words, "and shall retain the settlement so taken until it shall acquire another." How can we put any construction upon those words except the construction which in this particular case makes the pauper a person who has the settlement which, before he attained the age of sixteen, was the settlement of the father? Now, he has, in point of fact, gone on residing in the parish in which his father resided, and that does raise a question whether the two periods of residence can be put together, and I think the cases cited by Mr. Glen do warrant us in saying that there is nothing in the current of decisions upon these matters which will prevent us from holding that the pauper himself, putting these two periods together, might come within sect. 34 of the Act. But I do not think it necessary to decide this case solely on that ground, or on that ground at all, because I am of opinion that these subsequent words "and shall retain the settlement so taken until it shall acquire another," do necessarily compel us to hold that where the parent has obtained a settlement, which, if the question arose when the child was under sixteen, would be the settlement of the child, in such a case, the child is to retain the settlement of the father and not to go back to its birth settlement; it is to retain that settlement until it acquires another. What the object of the Legislature may have been is certainly only a matter of speculation, but it may have been this, that it is better and more reasonable that paupers should have their settlements in the place where their parents had a tangible and substantial period of residence when they were children up to the age of sixteen, and that they should retain that settlement which was the settlement of their parents, rather than that they should in every case go back to the only alternative settlement, namely, the place of their birth, and that they should retain that settlement until they should acquire another for themselves. It appears to me that this is a rational construction to put upon the Act, and it is obviously the one which was put upon it by the court in the case of *Reg.* v. *The Guardians of the Bridgnorth Union* (48 L. T. Rep. N. S. 600; 11 Q. B. Div. 314), which is a decision cited and relied upon by Mr. Glen on behalf of the appellants. I think, upon the whole, that we should be disregarding the effect of that decision if we were to hold otherwise than that the pauper in this case in fact gained a derivative settlement from his father in the parish of St. Mary, Lambeth. I think, therefore, that this appeal ought to succeed.

MATHEW, J.—I am of the same opinion. I do not understand it to be disputed, or that it could be disputed, that if this question had arisen before the child had reached the age of sixteen, its settlement would have been determined by the settlement of its parent. But it is argued by Mr. Tindal Atkinson that a totally different state of things arises the moment the child passes the age of sixteen, and that the meaning of the Divided Parishes Act 1876, is that whereas the settlement of the pauper on the last day of the sixteenth year of his age would be the settlement of his father, on the first day of the seventeenth year it would be the place of his birth. I cannot see any reason for legislation to that effect. It appears to me, on looking at the language in the latter part of the section, that such cannot have been the intention of the Legislature, because, in the first case put, where the settlement is inquired into before the age of sixteen is arrived at, the then settlement is to be retained subsequently. Why should not the same consequence follow when dealing with the settlement where the pauper is above the age of sixteen? The settlement once acquired before the age of sixteen is, under the language of the Act of Parliament, to be retained until another settlement is acquired. It seems to me that this is the meaning of the judgment delivered by the Master of the Rolls in the case of *Reg.* v. *The Guardians of the Bridgnorth Union* (*ubi sup.*). That judgment I understand to have been assented to by both the other Lords Justices, and we are bound by their decision, and we shall therefore follow it. That is apparently the best interpretation which can be put upon the statute, which is one which is by no means free of difficulty. Therefore we hold that the settlement of the pauper is in the parish of St. Mary, Lambeth, and consequently this appeal must be allowed and the order of the justices quashed.

Appeal allowed.

Solicitor for the appellants, *J. Rexworthy.*

Solicitors for the respondents, *G. F. Hudson, Matthews* and *Co.*, for *Bailey, Cross*, and *Barnard*, Norwich.

Monday, Feb. 28, 1887.

(Before DAY and WILLS, JJ.)

THE GUARDIANS OF THE POOR OF THE KINGSBRIDGE UNION (apps.) *v.* CHURCHWARDENS AND OVERSEERS OF EAST STONEHOUSE (resps.).(*a*)

Poor law—Divided Parishes Act 1876—*Settlement—Widow—Children under sixteen—Birth settlement of mother—Derivative settlement*—39 *&* 40 *Vict. c.* 61, *s.* 35.

Upon appeal against an order for the removal of a widow and her children under sixteen, it appeared that the widow had acquired no settlement since the death of her husband. Her husband was born within the appellant union, and had acquired no other settlement. The widow was not born either in the appellant union or respondent parish.

Held, that, the word "wife" in 39 *&* 40 *Vict. c.* 61, *s.* 35, *did not include "widow," and that as only a "wife" at the time of the adjudication of her settlement could "derive" a settlement from her husband, the widow in the present case retained her birth settlement; and that the children took the settlement of their widowed mother, that is, her birth settlement, and that the order of removal of the justices was bad, and must be quashed.*

UPON appeal against an order of two justices of the peace for the removal of Elizabeth Phillips and three children from the parish of East Stonehouse, in the county of Devon, to the union of Kingsbridge, in the same county as the place of their last legal settlement, the said order was confirmed by the Court of Quarter Sessions subject to the following case:—

On the 5th of Feb. 1886, two justices of the peace for the county of Devon, sitting at East Stonehouse aforesaid, did, upon the complaint of the respondents, order that Elizabeth Phillips, aged about forty-nine years, a widow, Richard Henry Phillips, aged over seven, and Charles Sydney Phillips, aged about three, all being poor persons then chargeable to the respondents' parish, should be removed to the appellants' union.

The pauper, Elizabeth Phillips, formerly Steel, was born in the parish of Falmouth, in the county of Cornwall, and was married to Samuel Phillips on the 15th of June 1878. The children in question, viz., Richard Henry and Charles Sydney, were the issue of that marriage.

The said Samuel Phillips was born in a parish within the appellants' union, and acquired no later settlement.

Samuel Phillips died on the 1st of Jan. 1885, when the said paupers became chargeable to the respondents' parish, and remained so up to the time of the making of the said order of justices mentioned in paragraph 1.

On the hearing of the appeal it was contended on behalf of the respondents that the three paupers took the settlement of the said Samuel Phillips, deceased. For the appellants it was argued that Elizabeth Phillips was not then a wife but a widow, and unless it could be shown that her settlement had been adjudicated upon in her husband's lifetime, she did not derive her settlement from her husband, but retained her birth settlement, and that her children took the settlement of their widowed mother.

The Court of Quarter Sessions made an order confirming the order of removal subject to a special case.

The question for the opinion of the court was whether this order of quarter sessions was right.

If the court was of opinion that the said three paupers were all settled in the appellants' union, then the said orders of removal and quarter sessions are to stand, but if the court shall be of opinion that the said Elizabeth Phillips, Richard Henry Phillips, and Charles Sydney Phillips, or any or either of them were or was not so settled in appellants' union, then the said orders of removal and quarter sessions were to be varied accordingly.

By 39 & 40 Vict. c. 61, s. 35:

No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother as the case may be up to that age, and shall retain the settlement so taken until it shall acquire another.

If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born.

M. W. McKellar for the respondent parish.—The order of the justices is right. The father was born in the appellants' union, and that was the only settlement he ever had. The only exceptions to the abolition of derivative settlements are made in the case of a wife and child, who may derive a settlement from the father or husband as the case may be. Here the children take the birth settlement of their father, and their mother as his wife, takes the same:

The Guardians of Liverpool v. *The Overseers of Portsea*, 50 L. T. Rep. N. S. 296; L. Rep. 12 Q. B. Div. 303.

It is true that the later case of *The Guardians of Maidstone Union* v. *The Guardians of Holborn Union* (L. Rep. 17 Q. B. Div. 817) decides that a "wife" in sect. 35 of the Divided Parishes Act 1876 does not include a "widow," but it is to be observed that the case of *The Guardians of Liverpool* v. *The Overseers of Portsea* (*ubi sup.*) was not cited to the court; and the earlier case is of stronger authority, for it was cited to and approved by the Court of Appeal in *The Guardians of the Headington Union* v. *The Guardians of St. Olave's Union* (50 L. T. Rep. N. S. 444; L. Rep. 13 Q. B. Div. 293). Where the child is over sixteen another consideration altogether arises, and his derivative settlement cannot be inquired into:

The Guardians of Edmonton Union v. *The Guardians of St. Mary, Islington*, L. Rep. 15 Q. B. Div. 95.

J. Alderson Foote for the appellant union.—As regards the widow this appeal must be allowed. Sect. 35 of the Act provides that no person shall be deemed to have derived a settlement except in two cases. The time at which a person shall be deemed to have derived a settlement is the time of adjudication upon his or her settlement. It has been decided that a child over sixteen who

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

has not acquired a settlement for itself cannot derive a settlement from its father; but that its birth settlement alone can be looked at:

The Guardians of Edmonton Union v. *The Guardians of St. Mary, Islington* (*ubi sup.*).

So by analogy it has been extended to a woman who is a widow, and not a wife at the time of the adjudication upon her settlement:

The Guardians of Maidstone Union v. *The Guardians of Holborn Union* (*ubi sup.*).

The woman must be relegated to her birth settlement. The settlement from her late husband would be a derivative one, and a derivative settlement cannot be looked at except in one of the excepted cases. Parentage and marriage are the only two methods of acquiring a derivative settlement. In the last mentioned case Smith, J. held that a derivative settlement could not be inquired into unless the person from whom it was derived was alive at the date of adjudication upon it, in other words, a widow as distinguished from a wife could not have a derivative settlement from her husband because he was dead. The widow here, then, must go to her birth settlement; and her children will go with her, for under the same section they may take the settlement of their widowed mother, a provision to prevent young children from being separated from their parents.

DAY, J.—This is a case of removal of a widow and her children to the appellant union, the union in which her late husband and the father of the children was born. The counsel for the union contended that the order for removal was bad, as that settlement was a derivative one, and could not be inquired into, as a widow at the time of adjudication upon her settlement was not within either of the two exceptions in sect. 35 of the Divided Parishes Act 1876, which permit of an inquiry into derivative settlements. After hearing the whole of the arguments, I have come to the same conclusion, since the object of the statute is to abolish derivative settlements, except in such cases where injustice and hardship would ensue. I think the word "wife" in sect. 35 does not include "widow." The object of the section was not to separate wife from husband during marriage, or children from parents, but to get rid of derivative settlements because of the expense and delay, and even injustice involved in the inquiry. Therefore, when it becomes necessary to adjudicate upon the settlement of (at the time of adjudication) a wife or a child, a derivative settlement from a husband or a living parent is permissible. But when we come to deal with a widow a derivative settlement is in her case no longer permissible, and if she has acquired no other settlement for herself, she must be relegated to that of her birth. In the present case her children follow her, and take her settlement. I follow the decision of this court in the case of *The Guardians of Maidstone Union* v. *The Guardians of Holborn Union* (*ubi sup.*).

WILLS, J.—I am of the same opinion. This 35th section is no doubt puzzling. When we consider what was decided in the case of *The Guardians of Maidstone Union* v. *The Guardians of Holborn Union* (*ubi sup.*), I think the key to the decision is to be found in the condition or age of the parties at the time of adjudicating upon their settlement. The expression "deemed to be derived" would be equivalent to "deemed to be derived at the time of adjudication." Adopting that as a test, no person who at the particular moment of adjudication was not a wife or a child under sixteen would be able to derive a settlement from another. I think on consideration that that construction is on the whole right. Where then a woman is a widow, we are not permitted to inquire into her late husband's settlement, for that becomes a derivative one; consequently, if she has acquired no fresh settlement for herself, she retains that of her birth. The question of the children remains. It was the intention of the Act to keep parents and children together, and a provision to that effect is inserted in this section. If necessary, the children are to take the settlement of their widowed mother; in this case they will do so, for they will go with her to her birth settlement, and so be kept together.

Order of removal quashed.

Solicitors for the appellants, *Harris, Powell,* and *Goodale,* for *J. H. Square* and *Son,* Kingsbridge.

Solicitors for the respondents, *Crowders* and *Vizard,* for *R. R. Rodd,* East Stonehouse.

Saturday, Dec. 18, 1886.

(Before DENMAN and HAWKINS, JJ.)

HOWORTH (app.) *v.* MINNS (resp.). (*a*)

Licensing—Revenue—Beer licence—Botanic beer—Description of or substitute for beer—4 *&* 5 *Will.* 4, *c.* 85, *s.* 17; 43 *&* 44 *Vict. c.* 20, *s.* 2; 48 *&* 49 *Vict. c.* 51, *s.* 4.

The appellant sold a liquor called "botanic beer," without having a retail licence for the sale of beer. It contained sugar, herbs, and water, but no hops or malt, and had 6 *per cent. of proof spirit.*

Held, that such a liquor was "beer" within the meaning of sect. 4 *of* 48 *&* 49 *Vict. c.* 51, *and that the appellant was rightly convicted.*

CASE stated by the Deputy Recorder of Nottingham under 7 & 8 Geo. 4, c. 53, s. 84.

1. On the 18th Nov. 1885, one Aldis, an officer of Inland Revenue, purchased from the respondent, at his shop in Nottingham, four half-pint bottles of Summers's Botanic Beer for which he paid 1*s.*, and on the 21st Jan. 1886 one Leah, an officer of Inland Revenue, purchased from the respondent at his said shop twelve half-pint bottles of Summers's Botanic Beer, for which he paid 3*s.*, the respondent not having on either occasion an excise retail licence for the sale of beer.

2. Such bottles were labelled "Summers's, E. Summers Botanic Beer, Station-street. Established 1852, Nottingham," and had also stamped in the glass of such bottles the words "Summers's Celebrated Botanic Beer, Nottingham."

3. Upon analysis made on the 28th Nov. of the beer in one of the bottles so purchased on the 18th Nov., it was found to be of 1054·09 original gravity, and to contain 5·40 per cent. of proof spirit. Upon analysis made on the 23rd March 1886 of the beer in another of the bottles so purchased on the 18th Nov., it was found to be of 1052·26 original gravity, and to contain 6·0 per cent. of proof spirit; upon analysis made on the

(*a*) Reported by DUNLOP HILL, Esq., Barrister-at-Law.

18th March of the beer in one of the bottles purchased on the 21st Jan., it was found to be of 1052·8 original gravity, and to contain 4·3 per cent. of proof spirit.

4. It was proved that the original gravity of table beers was less than that of the above samples, which were approximately of the same original gravity as London porter, that the quantity of proof spirit found in beer varies from 2 to 12 per cent. in Bass's pale ale reaching 12 per cent., in ordinary table beers ranging from 2 to 8 per cent.

5. Summers's Botanic Beer contains a large quantity of saccharine matter flavoured with four kinds of herbs, and is in a state of active fermentation from the presence of yeast. It has the colour of beer, and by a witness who had tasted it and whose evidence was uncontradicted, it was said to have the taste and flavour of a beer.

6. The ordinary process of brewing from malt and hops consists in extracting the saccharine matter from the malt and then boiling this infusion with hops, which are added for the purpose of flavouring and preservation. After cooling to about 60° Farenheit, the liquor is run into fermenting vessels, where yeast is added to cause fermentation, and so convert a portion of the saccharine matter into alcohol.

7. The process of manufacturing this botanic beer is to place 42lb. of herbs in a tub and pour 150 gallons of boiling water upon them, and leave them to soak for a day or so, subsequently to pour the decoction into a copper containing 182lb. of sugar, and boil it for twenty minutes, and afterwards to add 3lb. of yeast and run the liquor into fermenting coolers and casks and then bottle it off for sale, no malt or hops being used in its composition.

8. The botanic beer is made without either malt or hops, and beer in the popular acceptation of the term has not unfrequently of late years been made in the United Kingdom without either malt or hops, the use of sugar as a substitute for malt having been allowed from 1847 to 1880, after which latter date any substitute for malt might be used, and quassia and any other substitute for hops having been allowed to be used since 1862.

9. Spruce beer is made without either malt or hops, and the process of manufacture of spruce beer is the same as that of botanic beer, with the exception that spruce tops, or extract of spruce, are used for flavouring instead of herbs.

10. Ordinary ginger beer brewed with yeast and sugar and sold at a halfpenny or a penny per bottle has been known to attain by process of fermentation to as much as 8 per cent. of proof spirit.

11. This botanic beer was the same in manufacture and alcoholic strength, and was admitted to be to all intents and purposes the same article as the liquor bearing the same name which formed the subject of the case of *Leah* v. *Minns*, reported in 47 J. P. 199.

12. The justices who heard the said information determined that the respondent was not guilty of the offences charged against him.

13. It was contended on behalf of the appellant that upon the facts proved Summers's Botanic Beer was beer within the meaning of the Acts relating to excise licences for the sale of beer as interpreted and extended by 43 & 44 Vict. c. 20, s. 2, and by 48 & 49 Vict. c. 51, s. 4, and that the respondent required an excise licence for the sale of it by retail not to be drunk or consumed upon the house and premises, where sold under the provisions of the said Acts, and had by reason of not having such licence become liable upon each of the said informations to the penalty of 10*l.* imposed by sect. 17 of the Act 4 & 5 Will. 4, c. 85.

14. It was contended on behalf of the respondent that the article was not beer within the meaning of those Acts, and that therefore no licence was required for its sale by the respondent. The respondent further contended that the case of *Leah* v. *Minns* decided that Summers's Botanic Beer was not any description of beer within the meaning of the interpretation clause of the Inland Revenue Act of 1880, and that I was bound by such case, inasmuch as, according to the respondent's argument, the Inland Revenue Act of 1885 had given no such new definition of "beer" as would include the liquor in question.

15. I was of opinion that Summers's Botanic Beer was beer, and as such came within the provisions of the above-mentioned Acts. If the court should be of opinion that I was right the convictions and orders allowing the appeals are to stand. If the court should be of opinion that I was wrong, then the appeals are to be dismissed with 10*l.* costs to the respondent.—M. C. Busyard, Q.C.

Sect. 17 of 4 & 5 Will. 4, c. 85, imposes a penalty of 10*l.* upon every person who shall sell beer, cider, and perry by retail not to be drunk or consumed on the premises without having an excise retail licence in force authorising him to do so.

By 43 & 44 Vict. c. 20, s. 2, beer includes all porter, spruce beer, and black beer, and any other description of beer.

Sect. 4 of 48 & 49 Vict. c. 51, provides that the term beer in the Inland Revenue Act 1880 shall be construed to extend to any liquor which is made or sold as a description of beer, or as a substitute for beer, and which on analysis of a sample thereof at any time shall be found to contain more than the per centum of proof spirit.

Alfred Young for the appellant.—It was never contemplated by the Legislature that botanic beer should be subject to duty under the Revenue Act. I rely on the case of *Leah* v. *Minns* (47 J. P. 198), where Pollock and Huddleston, BB. held that this particular beer was not beer within the meaning of 4 & 5 Will. 4, c. 85, and the 43 & 44 Vict. c. 20, s. 3. It has not been found that it is a "substitute for beer," and therefore the extended meaning pointed out in the Act of 1885 does not apply.

Sir *R. E. Webster*, A.-G., Sir *E. Clarke*, S.-G., *J. H. Etherington Smith*, and *E. W. Garrett* for the Crown.

DENMAN, J.—It is unnecessary, I think, to go into all the statutes that have from time to time been passed as to what is and what is not beer. It is sufficient to allude only to the Acts of 1880 and 1885. The former has the following definition of beer, viz., "beer includes ale, porter, spruce beer, and black beer, and any description of beer." Now this very article which is now in dispute, Summers's Botanic Beer, became the subject of a case under that statute, and Pollock and Huddleston, BB., who heard that case, held

that this article was not within the definition. Then came the 48 & 49 Vict. c. 51, which contains a fresh definition of beer, and it appears to me, when that definition is read, it is impossible to escape from the conclusion that what the Legislature there intended, and what they have effected, was to remedy the defect of *Leah* v. *Minns*, which held that this article was not a description of beer liable to be dealt with by the excise, and they use fresh words with the very intention, as it seems to me, of including it, because what they say is that "beer in that Act shall be construed to extend to any liquor which is sold as a description of beer, and which on analysis of a sample thereof shall be found to contain more than 2 per cent. of proof spirit. Now, what is the meaning of those words? It appears to me it is, you shall not sell anything calling it a kind of beer which shall have in it more than a certain amount of proof spirit, without being liable to pay and to be dealt with by the Excise exactly as if it was beer made of malt and hops, or any other beer. That appears to me to be the plain intention of the Legislature. The words "sold as a description of beer" seem to me to mean sold as beer with any epithet describing it, and "botanic" is an epithet describing it, so that it is sold as a description of beer. There is no way of construing the clause consistently with the ordinary use of the English language, which would not include this beer. With regard to the doubts which may exist as to whether or not *Leah* v. *Minns* was rightly decided upon the former statute, or how far the words there used would have covered any particular article, or any particular liquor, I think we have nothing to do with them now, except so far as the decision in that case enables us to see what the Legislature were dealing with in this particular section. I think the object of the Legislature was to get rid of the doubt which was raised by that case, or even of the decision of that case, assuming it to be not doubtful, and to include this very thing which was then in question and which then escaped.

HAWKINS, J.—I am of the same opinion. The question here is whether or not the present appellant is liable to pay for an excise licence as for the sale of beer. Under the Act of 1880, if the decision of *Leah* v. *Minns* is correct, as to which I have much doubt, it has been held that selling botanic beer would not make him so liable. The Legislature thought fit however, in the year 1885, that decision having taken place in 1833, to pass this enactment: "The term beer in the Inland Revenue Act 1880 shall be construed to extend to any liquor which is made or sold as a description of beer or as a substitute for beer, and which on analysis of a sample thereof at any time, shall be found to contain more than 2 per cent. of proof spirit." But it is said that botanic beer, which on analysis is found to contain more than 2 per cent. of proof spirit, does not come within the meaning of the Act. I must say I think it does. It is a liquor which is undoubtedly made and sold and described as beer, therefore it is sold as a description of beer, or at all events, if it is not so, it must be sold as a substitute for beer, and I cannot see how there can be a doubt about it. Looking at paragraph 5 of the case I find this description of the liquor: It has the colour of beer, and by a witness who tasted it, and whose evidence was uncontradicted, it was said to have the taste and flavour of beer. Then it is admitted to be indistinguishable in its essential ingredients from spruce beer, which was found to be beer under the statute of 1880. Upon the learned judges holding in *Leah* v. *Minns* that botanic beer was not a beer, the Legislature, in order to correct what seems to me, if that decision is right, an omission in the Act of 1880, proceeded to pass this 4th section with the very object as it would seem of rectifying the omission. I am of opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant, *Aldridge, Thorn*, and *Morris*, for *Acton* and *Marriott*, Nottingham.

Solicitor for respondent, *Solicitor for Inland Revenue.*

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, Dec. 10, 1886.

(Before Lord ESHER, M.R., LINDLEY and LOPES, L.JJ.)

VILMONT *v.* BENTLEY. (*a*)

Sale of goods—Contract of sale obtained by false pretences—Conviction of fraudulent buyer—Revesting of property—Bonâ fide purchaser—Order of restitution—24 & 25 Vict. c. 96, *s.* 100.

By 24 *&* 25 *Vict. c.* 96, *s.* 100, "*If any person guilty of any such . . . misdemeanour as is mentioned in this Act . . . (which includes the misdemeanour of obtaining goods by false pretences) . . . shall be indicted for such offences by or on behalf of the owner of the property . . . and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid, the court before whom any person shall be tried for any such felony or misdemeanour shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner.*

Held, that if a contract for the sale of goods has been obtained by false pretences, and the owner of the goods has prosecuted the misdemeanant to conviction, the property in the goods revests in the owner at the time of the conviction, and he can then recover them from any person in whose possession they are, even though that person purchased them bonâ fide in market overt or without notice of the fraud.

Moyce *v.* Newington (39 *L. T. Rep. N. S.* 535; 4 *Q. B. Div.* 32) *overruled.*

Judgment of Denman, J. reversed.

THIS was an appeal from a judgment of Denman, J. upon an interpleader issue.

The goods which were the subject of the interpleader issue were sold by Galpin and Crochard, who carried on business at Amiens, in France, to one Hodder in England. The contract of sale was induced by false pretences on the part of Hodder. The goods having been sent to Hodder, he pledged them to Dobree, who stored them in the shop of one Starbuck, in the city of London.

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

While they were exposed for sale in the shop of Starbuck the defendant Bentley purchased them, and Starbuck was instructed by Dobree to old them to the defendant's order.

The fraud having been discovered, Hodder was indicted and convicted for having obtained the goods by false pretences, but an application made at his trial for an order for the restitution of the goods to Galpin and Crochard was refused.

The plaintiff Vilmont, as trustee in the liquidation of Galpin and Crochard, claimed the goods from Starbuck, who interpleaded, and thereupon the issue was directed to try the right to the goods.

The issue was tried by Denman, J. without a jury and judgment was given for the defendant, the learned judge holding, on the authority of *Moyce* v. *Newington* (39 L. T. Rep. N. S. 535; 4 Q. B. Div. 32), that in a case of obtaining goods by false pretences the property in them does not revest in the owner, under 24 & 25 Vict. c. 96, s. 100, upon his prosecuting the misdemeanant to conviction, as against a *bonâ fide* purchaser for value without notice of the fraud.

The plaintiff appealed.

By 21 Hen. 8, c. 11: "If any felon hereafter do rob or take away any money, goods, or chattels from any of the king's subjects, from their person or otherwise, within this realm, and thereof the said felon or felons be indicted and after arraigned of the same felony and found guilty thereof, the party so robbed or owner shall be restored to his said money, goods and chattels;" and the justices before whom the felon is found guilty may "award writs of restitution for the said money, goods, and chattels in like manner as though any such felon were attainted at the suit of the party in appeal."

By 24 & 25 Vict. c. 96, s. 100:

If any person guilty of any such felony or misdemeanour as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor, or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid, the court before whom any person shall be tried for any such felony or misdemeanour shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: provided that if it shall appear before any award or order made that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanour been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the court shall not award or order the restitution of such security.

Arbuthnot and *Charles Matthews* for the plaintiff.—The judgment of Denman, J. was founded upon the case of *Moyce* v. *Newington* (39 L. T. Rep. N. S. 535; 4 Q. B. Div. 32), which no doubt supports his judgment, but which was wrongly decided. That case is in opposition to the principles laid down in former decisions. *Horwood* v. *Smith* (2 T. R. 750) and *Scattergood* v. *Sylvester* (15 Q. B. 506) were decisions upon the statute 21 Hen. 8, c. 11, but those cases decided that the property in the goods stolen revested in the original owner as against an innocent purchaser in market overt. At the time of *Scattergood* v. *Sylvester* that law was so certain that the only contest was whether the obtaining of an order of restitution was a condition precedent to the recovery of the goods:

Parker v. *Patrick*, 5 T. R. 175;
Peer v. *Humphrey*, 2 A. & E. 495; 2 Inst. 714;
Walker v. *Matthews*, 46 L. T. Rep. N. S. 915; 8 Q. B. Div. 109.

The latter statute, 24 & 25 Vict. c. 96, s. 100, ought to be construed the same way. Moreover, it has been construed the same way in the case of *Lindsay* v. *Cundy* (34 L. T. Rep. N. S. 314; 1 Q. B. Div. 348). The only explanation of the decision in *Moyce* v. *Newington* is that the learned judge in that case misapprehended the effect of *Horwood* v. *Smith* (*ubi sup.*) and of *Lindsay* v. *Cundy* (*ubi sup.*). They also cited

Reg. v. *Stanclife*, 11 Cox C. C. 318;
Nickling v. *Heaps*, 21 L. T. Rep. N. S. 754.

Lumley Smith Q.C. and *C. E. Jones* for the defendant.—The defendant was a purchaser in market overt, he was also a purchaser from a person who held them under a voidable title, but whose title had not been avoided at the time of the sale. As such he is even in a better position than a purchaser in market overt: (*Moyce* v. *Newington*, *ubi sup.*) That case was a considered judgment of the Queen's Bench, and is exactly on all fours with the present case, and is directly in the defendant's favour. In *Lindsay* v. *Cundy* (*ubi sup.*) the goods were not in the defendant's possession, and therefore the court has really to construe 24 & 25 Vict. c. 96, s. 100 for the first time. The reasonable construction is that where goods have been so obtained from an owner that the property in them never passed from him, *e.g.*, by a bare false pretence, then he is to have the additional remedy of an order of restitution; but when the property has passed from him, then he, having enabled a fraud to be committed, is, of the two innocent persons, the one who ought to suffer the loss: (*Babcock* v. *Lawson*, 41 L. T. Rep. N. S. 252; 4 Q. B. Div. 394, at p. 400.)

Lord ESHER, M.R.—I think that this appeal must be allowed. The question depends on the construction to be placed on the statute 24 & 25 Vict. c. 96. By the old statute of 21 Hen. 8, c. 11, it was enacted that when goods had been stolen and the thief had been convicted by means of evidence given by the owner, then the owner should be "restored to his goods," and that provision was held to apply even though the goods had been sold in market overt. Lord Coke stated it at 2 Inst. 714, and the decision which so decided was the case of *Horwood* v. *Smith* (*ubi sup.*). I will for a moment consider the effect of that decision. The thief of stolen goods, or someone who has obtained possession of them from him, sells them in market overt, the result of that is that at common law the right of the purchaser who has bought them in market overt cannot be challenged. At common law the property has passed to the purchaser upon the sale, and therefore the property has passed away from the original owner. But then comes the statute of Hen. 8, which says that under certain circum-

stances the owner shall be "restored to his goods." That statute was not wanted except in the case where the goods had been sold in market overt, because that was the only case in which the property passed away from the original owner. In order to induce persons from whom goods had been stolen to prosecute the thief, the Legislature thought it right to intervene between a real owner and the person who had purchased the goods in market overt. The Legislature thought that, of the two persons interested in the goods, they ought to prefer the original owner when he prosecuted the thief to conviction, and in that case, and in that case only, the property is to be restored to the owner, and the court is to order the restitution of the property. Against whom is such an order of restitution to be made? It clearly can only be made against the person who has the goods in his possession at the time of the order, and the making of the order or not is in the discretion of the court, although the first part of the section says that the goods shall be restored. When are the goods to be restored to the original owner? The evident meaning of the statute is that they are to be restored, or rather the property in them is to pass again to the original owner, at the moment of the conviction. If the goods were sold in market overt and the property in them had passed by that sale to the purchaser, then in the interval between the sale and the conviction of the thief the property was not in the original owner, and he cannot complain of anything which has been done with the goods during that interval. That was in effect the construction which was placed upon the statute of Hen. 8 in *Horwood* v. *Smith* (*ubi sup.*) and afterwards acted upon in *Scattergood* v. *Sylvester* (*ubi sup.*), and I do not think that anyone has ever attempted to overrule it. Now we come to the statute 24 & 25 Vict. c. 96, s. 100. That statute deals with a new series of transactions, but it deals with them precisely in the same way as the old statute dealt with goods which had been stolen and sold in market overt, and it must, I think, be inferred that it was intended to regulate the rights of the parties interested in the same way. It deals with the case of goods obtained by false pretences. Now, there are two ways of obtaining goods by false pretences. They may be obtained by a bare false pretence, in which case the property in them does not pass, and there is no reason for the statute; or they may be obtained by a false pretence on which is founded a contract of sale, and in that case the property in the goods passes to the purchaser. The contract of sale is not void, it is only voidable, and until the time when it is avoided the property in the goods remains in the purchaser; and the contract never could in the absence of the statute be avoided against any person who had innocently bought the goods from the misdemeanant. This latter case, therefore, was the only case in which the statute was wanted, and it is against that case only that the statute is aimed. Therefore, if I were now considering this statute for the first time, I should clearly be of opinion that it was intended to apply to the case where the goods had passed from the hands of the misdemeanant into the hands of the innocent person, and that it was intended to deal with those goods just in the same way as goods stolen and sold in market overt had been dealt with by the statute of Hen. 8. Upon the conviction of the thief or the misdemeanant, the original owner can recover the goods from any innocent person in whose hands they are. But I am not now considering the statute for the first time, the construction which I have placed upon it is in accordance with what was said by the judges in deciding *Lindsay* v. *Cundy* (*ubi sup.*). In that case Blackburn J. refers to the judgment of Buller J. in the case of *Horwood* v. *Smith* (*ubi sup.*) and continues in these words: "Altering the words very slightly they would apply to the present case. When did the plaintiff's property begin, that is to say, begin after the time the defendants had got the goods in this case? Not till after the conviction of the person guilty of the fraud, because before that time the property had been altered by a *bonâ fide* purchase from a person who held them under a voidable but not void contract. Altering these few words, everything in the judgment of Buller, J. is applicable to the present case." Further on in his judgment Blackburn, J. says: "And certainly, looking to the plain meaning of the words 'if the guilty person shall be convicted the property shall be restored,' one would say it means the property shall be restored from that time, not that it shall be considered to have been restored. The case of *Horwood* v. *Smith* shows decidedly that the latter is not the meaning. And in the case of *Scattergood* v. *Sylvester*, though that was not the point before the court, the court used language which shows very strongly that they had in their minds that the right to the stolen property was only from the conviction, and that then it was a fresh title that was given." What can be plainer than that? Lush, J. in the same case said: "It appears to me that this case is precisely analogous to the case of *Horwood* v. *Smith*. The difference between that case and the present is that, there the goods had been stolen, but then they had been sold in market overt which passed the property, and the defendant in that case bought them in market overt, and therefore he acquired a good title; just as the defendants here acquired a good title by the *bonâ fide* purchase from the fraudulent buyer. The defendant in that case sold the goods again, and after that the thief was convicted. Then arose the question whether the original owner of the goods could claim them against the defendant, who had bought the goods in market overt and sold them before conviction, and the court held he could not." I think it cannot be doubted that in that case of *Lindsay* v. *Cundy* the court was of opinion that the later Act was intended to operate in the same manner as the earlier Act. Now, the case of *Moyce* v. *Newington* (*ubi sup.*) no doubt presents a difficulty, and the difficulty is increased by the fact that the judgment in that case was a considered judgment of the Queen's Bench Division. That judgment, however, is directly in conflict with what was said in *Lindsay* v. *Cundy*, and I think it is plain that Cockburn C.J. misunderstood the intention of the decision in that case and also in the case of *Horwood* v. *Smith*. I am obliged to come to the conclusion that *Moyce* v. *Newington* was wrongly decided, because I cannot see how it is consistent with the ordinary meaning of the words of sect. 100 of 24 & 25 Vict. c. 96. If the case of *Nickling* v. *Heaps* (*ubi sup.*) really decided what it is supposed to have decided, then I think it is wrong, but I confess that, as reported, the case is

unintelligible to me. I think that the plaintiff is entitled to recover these goods from the defendant, and that this appeal must be allowed.

LINDLEY, L.J.—In this case it is conceded that, except for 24 & 25 Vict. c. 96, s. 100, the defendant would have a valid title to these goods, because he was a *bonâ fide* purchaser from a swindler, who had a voidable title and who sold them to the defendant before his title was avoided. But then sect. 100 says that, on the conviction of the swindler "the property shall be restored to the owner," and by the owner is no doubt meant the person who was cheated. The Act does not say who it is that is to restore the property, but of course it can only be the person who has possession of it. I am of opinion that the construction which has been put upon this Act and the earlier Acts is a right construction, and that the person who is to restore the property is the person who has it at the time of the conviction. It is old law that a purchaser of stolen property in market overt must, on the conviction of the thief, restore the property to the original owner, if he then has the goods in his possession, and it has been decided that a *bonâ fide* purchaser for value from a person who has a voidable title stands for this purpose in the same position. In *Lindsay* v. *Cundy* (*ubi sup.*) the foundation of the decision was that the purchaser had not the goods in his possession when he was sued by the owner, he had sold them again. I cannot find any difference of opinion as to applying the Act to the case of a *bonâ fide* purchaser who has the goods in his possession, except in the cases of *Moyce* v. *Newington* (*ubi sup.*) and *Nickling* v. *Heaps* (*ubi sup.*). *Moyce* v. *Newington* was no doubt exactly on all-fours with the present case, but I think it was wrongly decided, and was founded on a misapprehension of *Lindsay* v. *Cundy* and *Horwood* v. *Smith*. I do not gather from the report what was the real *ratio decidendi* in *Nickling* v. *Heaps*. I decide the present case upon that which I believe to be the true construction of the Act as is shown by *Horwood* v. *Smith* (*ubi sup.*) and *Scattergood* v. *Sylvester* (*ubi sup.*).

LOPES, L.J.—I think that *Horwood* v. *Smith* (*ubi sup.*) and *Lindsay* v. *Cundy* (*ubi sup.*) govern the present case. They decide that, upon the conviction of a person for felony or for misdemeanour in fraudulently obtaining goods, the property in the goods is restored to the owner by the statute, and that it is restored to him both as against a purchaser in market overt and as against a *bonâ fide* purchaser from the fraudulent buyer whose title is voidable. But the restoration of the property to the original owner is to date from the conviction, and it follows that it is to be restored only as against the person in whose possession the goods are at the time of conviction, and it does not render a *bonâ fide* purchaser responsible for any dealings with the goods prior to the conviction. I think that *Moyce* v. *Newington* was wrongly decided, and that the effect of the earlier cases was misapprehended in the judgments. As to the case *Nickling* v. *Heaps* (*ubi sup.*), I confess I do not understand it. I am of opinion that this appeal should be allowed.

Appeal allowed.

Solicitors for plaintiff *Blunt* and *Lawford*.

Solicitors for defendant, *Phelps*, *Sidgwick*, and *Biddle*.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Saturday, Dec. 4, 1886.

(Before Lord COLERIDGE, C.J., POLLOCK, B., and SMITH, J.)

HERSANT (app.) *v.* HALSE (resp.). (*a*)

Parliament—Registration of voters—Lodger franchise—Qualification—Notice of claim to be registered—The Representation of the People Act 1867 (30 *&* 31 *Vict. c.* 102), *s.* 4; *s.* 30, *sub-sect.* 2—*The Parliamentary and Municipal Registration Act* 1878 (41 *&* 42 *Vict. c.* 26), *ss.* 22, 28—*The Registration Act* 1885 (48 *&* 49 *Vict. c.* 15), *sched.* 2, *ss.* 34, 42; *sched.* 3, *Form D, No.* 3; *Form H, No.* 2.

It is an essential part of the qualification for the lodger franchise that the claimant should send to the overseers notice of his claim to be registered.

Where a person entered on a register of voters in respect of lodgings did not send to the overseers notice of his claim to be entered on the next register in respect of the same lodgings, but the overseers by mistake inserted his name in the old lodgers' list:

Held, that it was the duty of the revising barrister to expunge the name, the qualification of the claimant being insufficient by reason of his omission to send in a claim.

THIS was a case stated by Lionel Lancelot Shadwell, Esq., one of the barristers appointed to revise the lists of parliamentary voters for the county of Middlesex and boroughs therein, in which Thomas Henry Hersant, of No. 4, Burton-street, in the county of Middlesex, was the appellant, and Clarence Richard Halse, of No. 17, Old Burlington-street, in the county of Middlesex, returning officer for the borough of St. Pancras, was the respondent.

The facts stated in the case were, so far as material, as follows:—

At a court held on the 25th Oct. 1886, by the said revising barrister, for the purpose of revising the lists for the borough of St. Pancras, within the said county, the name of William Henry Humphrey appeared on the old lodgers' list for the south division of the said borough, the entry relating to him being as follows:

Names of claimants, in full, surname being first.	Description of rooms occupied, and whether furnished or not.	Street, lane, or other place, and number, if any, of house in which lodgings are situate.	Name and address of landlord, or other person, to whom rent is paid.
Humphrey, William Henry.	Two on third floor, unfurnished.	103, Gray's-inn-road.	Alfred H. Wright, 103, Gray's-inn-road.

The appellant duly objected to the said name being retained in the said list, upon the ground that the said William Henry Humphrey had not claimed to be registered in manner provided by sect. 22 of 41 & 42 Vict. c. 26.

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

The evidence, which the revising barrister received *de bene esse*, showed that the said William Henry Humphrey had made no claim of any kind, but his name had been inserted in the said list by a mistake, which had arisen as stated in the next paragraph.

The overseers, in making out the said list, instead of causing it to be printed *de novo* from the old lodger claims served upon them, had caused it to be printed from a copy of the lodgers' list contained in the current register for the said division, from which copy they had erased, or intended to erase, those names in respect of which no claims had been received. They had, however, omitted to erase the name of William Henry Humphrey, which was on the said register, and failed to discover their mistake before the said old lodgers' list had been signed and published.

It was contended on behalf of the appellant that the principle established by *Davies* v. *Hopkins* (27 L. J. 6, C. P.; K. & G. 118) and *Leonard* v. *Alloways* (48 L. J. 81, C. P.) did not apply to lodgers, (1) because by 30 & 31 Vict. c. 102, s. 4, the making of a claim was an indispensable part of the qualification for the lodger franchise (see *Cullen* v. *Patterson*, 18 L. Rep. Ir. 274); (2) because by sect. 30, sub-sect. 3 of the same Act, lodger claimants were placed in the same position, as to proof of claims, as claimants omitted from the overseers' lists of voters, and consequently they were subject to the law laid down in *Re Sale* (50 L. J. 113, C. P.); and (3) because the decisions in *Meade* v. *Cooper* (1 Ir. Rep. R. & L. App. 12), *Mathews* v. *Magrath* (Ib. 14), and *Edwards* v. *Lang* (Ib. 24) were inconsistent with *Re Sale*, and ought not to be followed; and that the revising barrister ought to admit the evidence and expunge the name of the said William Henry Humphrey.

The revising barrister held that it was not competent for him to require proof of the making of a claim by the said William Henry Humphrey, on the grounds: (1) That though it might be admitted that *Re Sale* applied to the lodgers' list as existing before the Act 41 & 42 Vict. c. 26, and to the new lodgers' list as existing since, yet that the old lodgers' list was by sect. 22 of the last-cited Act to be deemed a list of voters, and was thereby brought within the principle of *Davies* v. *Hopkins* and *Leonard* v. *Alloways*; (2) that, besides the reasons given in *Davies* v. *Hopkins*, there was an additional reason for refusing to go behind the list in the case of an old lodger, namely, that he might, by seeing his name in the list, have been deterred from making a valid claim in time to be entered on the register as a new lodger

The revising barrister accordingly rejected the evidence, and retained the name of the said William Henry Humphrey in the said old lodgers' list. Due notice of appeal from his decision was given.

The question for the decision of the court was, whether the revising barrister ought to have required proof of the making of a claim by William Henry Humphrey.

If this question was answered in the affirmative the register was to be amended by erasing the name of the said William Henry Humphrey from the old lodgers' list.

Bompas, Q.C. for the appellant.—The revising barrister ought not to have retained the name upon the list. The 22nd section of the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26) provides that where a person is entered in respect of lodgings on the register of voters for the time being in force, and desires to be entered on the next register in respect of the same lodgings, he may claim to be so entered by sending notice of his claim to the overseers of the parish in which his lodgings are situate on or before the 25th July. Then the duty of the revising barrister is defined by the 3rd and 11th sub-sections of the 28th section of the same Act. By the 3rd sub-section "he shall expunge the name of every person, whether objected to or not, whose qualification as stated in any list is insufficient in law to entitle such person to be included therein," and by the 11th sub-section, "if such proof is given by the objector as herein prescribed, then unless the person objected to appears by himself, or by some person on his behalf, and proves that he was entitled on the last day of July then next preceding to have his name inserted in the list in respect of the qualification described in such list, the revising barrister shall expunge the name of the person objected to." If therefore the sending in of a claim was, as the appellant contends, a part of the qualification of the claimant, he is not entitled to have his name retained upon the list. The qualification of a lodger is defined by the 4th section of the Representation of the People Act 1867 (30 & 31 Vict. c. 102) (*a*), and that section makes it an essential part of a claimant's qualification that he shall have "claimed to be registered as a voter at the next ensuing registration of voters." This is not only plain from the very words of the section, but it has been so decided by the Irish Court of Appeal in the case of *Cullen* v. *Patterson* (18 L. Rep. Ir. 274). That case arose under the Irish Registration Act 1868 (31 & 32 Vict. c. 49), the words of the 4th section of which are similar to those of the 4th section of the Representation of the People Act 1867, and there May, C.J. and Fitzgibbon, Barry, and Naish, L.JJ. held that, as a lodger claimant had not sent in his claim, his qualification was incomplete, May, C.J. saying: "In my opinion, sub-sect. 3 of sect. 4 of the Act of 1868 creates one of the requirements which ought to have been satisfied before the claimant can be admitted as a lodger. I think that this was a condition precedent with which the claimant has not complied, and that the revising barrister was right in declining to put him on the list." In the case of a lodger, the sending in of the claim is made by the Act a matter of substance, and not merely a matter of form. The fact that the claim is to be sent in before the

(*a*) The 4th section of the Representation of the People Act 1867 (30 & 31 Vict. c. 102) is as follows:

"Every man shall be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in Parliament for a borough, who is qualified as follows: (that is to say) (1) Is of full age, and not subject to any legal incapacity: and (2) As a lodger has occupied in the same borough separately and as sole tenant for the twelve months preceding the last day of July in any year the same lodgings, such lodgings being part of one and the same dwelling-house, and of a clear yearly value of, if let unfurnished, of ten pounds or upwards; and (3) Has resided in such lodgings during the twelve months immediately preceding the last day of July, and has claimed to be registered as a voter at the next ensuing registration of voters."

25th July, whereas the qualifying year of residence does not end until the 31st July, further shows that it was the intention of the Legislature that not only the completion of the year of residence, but also the sending in of the claim must be proved. The cases of *Davies* v. *Hopkins* (3 C. B. N. S. 376; 27 L. J. 6, C. P.; K. & G. 118) and *Leonard* v. *Alloways* (40 L. T. Rep. N. S. 197; 48 L. J. 81, C. P.), on which the revising barrister relied, are not in point, since they were decided under 6 Vict. c. 18, an Act which does not make the sending in of the claim a part of the claimant's qualification. Neither are the three cases of *Meade* v. *Cooper* (1 Ir. Rep. Reg. & Land App. 12), *Mathews* v. *Magrath* (1 Ir. Rep. Reg. & Land App. 14), and *Edwards* v. *Lang* (1 Ir. Rep. Reg. & Land App. 24) of any weight at the present time, as they have been overruled by *Cullen* v. *Patterson* (*ubi sup.*), and also by *Re Sale* (43 L. T. Rep. N. S. 635; 50 L. J. 113, C. P.), where it was held that the revising barrister is entitled, under sects. 37 and 38 of 6 Vict. c. 18, to require proof that a person, who claims in consequence of the omission of his name from the 12*l.* occupiers' list, gave due notice of his claim to be inserted in such list.

Bray for the respondent.—The revising barrister was right in retaining the claimant's name upon the list. It is not disputed that the claimant was in all other respects qualified, if his claim had been duly sent in, and therefore the only question is, whether, the overseers having placed his name upon the list, he is disqualified by reason of not having sent in a claim. It is submitted that it was not the intention of the Legislature to make any difference in this respect between lodger claimants and other claimants, and that, the name having been placed upon the list, the list was conclusive, and the revising barrister could not go behind it. The point was fully discussed and decided in the cases of *Davies* v. *Hopkins* (*ubi sup.*) and *Leonard* v. *Alloways* (*ubi sup.*), and those decisions ought to be followed. Further, an injustice would be done to persons in the position of the claimant, if, when their names are entered on the old lodgers' list, they can be objected to on this ground. The 3rd schedule of 48 & 49 Vict. c. 15, prescribes the mode of making out and publishing the lists, and by rule 30 of part 2 the overseers are to make out before the last day of July the old lodgers' list, and by rule 35 they are to make out before the 25th Aug. a list of persons claiming to be inserted in a list of parliamentary voters as lodgers, but not comprised in the old lodgers' list. In this case the claimant's name was inserted by the overseers in the old lodgers' list, and he was therefore debarred from claiming as a new lodger. This being so, it would be unjust that the revising barrister should be entitled to go behind the list and strike off his name on the ground that no claim had been sent in. No importance can properly be attached to the fact that in the description of the qualification it is mentioned that there should be a claim.

Bompas, Q.C. was not called upon to reply.

Lord COLERIDGE, C.J.—I am of opinion that in this case the revising barrister was wrong. It appears to me that it is an essential part of the qualification of a lodger voter that he should have "claimed to be registered as a voter at the next ensuing registration of voters," in accordance with the 3rd sub-section of the 4th section of the Representation of the People Act 1867 (30 & 31 Vict. c. 102). That section confers the franchise on lodgers in boroughs, and gives the elements of qualification. It provides that every man shall be entitled to be registered as a voter, and when registered to vote for a member or members to serve in Parliament for a borough, who is qualified as follows; that is to say: (1) is of full age, and not subject to any legal incapacity; (2) as a lodger has occupied in the same borough separately and as sole tenant for the twelve months preceding the last day of July in any year the same lodgings, such lodgings being part of one and the same dwelling-house and of a clear yearly value, if let unfurnished, of ten pounds or upwards; and (3) has resided in such lodgings during the twelve months immediately preceding the last day of July, and has claimed to be registered as a voter at the next ensuing registration of voters." Then the 2nd sub-section of the 30th section of the Act provides that "the claim of every person desirous of being registered as a voter for a member or members to serve for any borough in respect of the occupation of lodgings shall be in the form numbered 1 in schedule G., or to the like effect, and shall have annexed thereto a declaration in the form, and be certified in the manner in the said schedule mentioned, or as near thereto as circumstances admit; and every such claim shall after the last day of July, and on or before the 28th day of August in any year, be delivered to the overseers of the parish in which such lodgings shall be situate, and the particulars of such claim shall be duly published by such overseers on or before the 1st day of September next ensuing in a separate list, according to the form numbered 2 in the said schedule (G.)." The Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26) proceeds on the same lines. By the 22nd section of that Act "where a person is entered in respect of lodgings on the register of voters for the time being in force, and desires to be entered on the next register in respect of the same lodgings he may claim to be so entered by sending notice of his claim to the overseers of the parish in which his lodgings are situate on or before the 25th day of July," and the overseers are on or before the last day of July to make out a list of persons so claiming, and the lists so made out are to be signed, published, and otherwise dealt with in a certain manner there prescribed. Then the 28th section sets out the duties and powers of the revising barrister. He is to correct any mistake which is proved to him to have been made in any list, or in any claim or notice of objection, and to expunge the name of any person whose qualification, as stated in the list, is insufficient in law, or who is dead. And then, by sub-sect. 6, he "shall expunge the name of every person, whether objected to or not, whose name or place of abode, or the nature of whose qualification, or the name or situation of whose qualifying property, if the qualification is in respect of property, or any other particulars respecting whom by law required to be stated in the list, is or are either wholly omitted, or, in the judgment of the revising barrister, insufficiently described for the purpose of being identified, unless the matter or matters so omitted or insufficiently described be supplied to the satisfaction of the revising bar-

rister before he shall have completed the revision of the list in which the omission or insufficient description occurs, and in case such matter or matters shall be so supplied, he shall then and there insert the name in such list." From these sections it is, to my mind, as clear as anything possibly can be that the making of the claim is a part of the qualification of a lodger claimant. Then, subsequently, as there were old lodgers and also new lodgers, the Registration Act 1885 (48 & 49 Vict. c. 15), sched. 2, ss. 34, 42, and sched. 3, form D, No. 3, and form H, No. 2, dealt with the matter and provided that the claim of the old lodger should be in one form and of the new lodger in another. Here the claimant has not sent in a claim in either of the forms provided, but by a mistake of the overseer his name was allowed to stand in the old lodgers' list without his having made any claim at all. The overseer, however, had no authority to place it there, and, as the sending in of the claim is a part of the qualification, the mere fact of his name having been placed there can avail nothing. I think, therefore, that the revising barrister ought to have disallowed the claim and expunged the claimant's name from the list. This construction of the statutes, I think, places the matter on an intelligible footing. Several cases have been referred to. The principal case—I allude to *Davies* v. *Hopkins* (*ubi sup.*)—is distinguishable from the present case. That case is one of a number of cases decided on the machinery of the old Registration Acts, and the decision was to the effect that, where all the elements of qualification exist, a claimant ought not to lose his vote because a condition precedent devolving upon him or upon the overseer has not been complied with in form. No one, I imagine, can doubt the justice of a rule that a mistake in form in a condition precedent ought to be waived where a complete qualification exists. But here a complete qualification does not exist, and that case is therefore not in point. There is, however, a case—that of *Cullen* v. *Patterson* (18 L. Rep. Ir. 274)—which is directly in point. We in this court are not indeed bound by it, inasmuch as it is a decision of the Court of Appeal in Ireland, but we ought, I think, to treat such a case with the greatest respect. There a person claimed the parliamentary borough franchise as an inhabitant householder, and his name duly appeared in the town clerk's list as a claimant in respect of that qualification; but, on the revision, it turned out that his true qualification would be that of a lodger, if he had claimed as such, and it was held that the revising barrister had no power under the 4th section of the Parliamentary Registration (Ireland) Act 1885 (48 Vict. c. 17) to expunge the name from the list in which it appeared, and insert it with the true qualifiaction in the originally appropriate list. With that decision I entirely agree, and I think that the register must be amended by expunging the claimant's name from the old lodgers' list. There will be no order as to costs.

POLLOCK, B.—I have arrived at the same conclusion, and, in my opinion, to hold otherwise would be to misconstrue the words and the intention of the statute by creating a qualification not contemplated thereby. In the case of *Davies* v. *Hopkins* (3 C. B. N. S. 376; 27 L. J. 6, C. P.; K. & G. 118) the question of qualification, it is quite clear from the report, was never interfered with. On the contrary, WILLIAMS, J. considered it a question of the waiver of a matter of form. "It may be" he says, "that the notice was so imperfect and fell so far short of the requirements of the statute that the overseer was not bound to put the name on the list, but he having chosen to do so, *factum valet quod fieri non debuit*, and the name being on the list, all the revising barrister has to do is to see whether the qualification as stated is sustained." He clearly, therefore, did not think that the qualification in that case was in any way wrong.

SMITH, J.—I am of the same opinion.

Appeal allowed.

Solicitor for the appellant, *J. M. McDonnell.*

Solicitors for the respondent, *Halse, Trustram,* and *Co.*

Saturday, Dec. 4, 1886.

(Before Lord COLERIDGE, C.J., POLLOCK, B., and SMITH, J.)

DOULON (app.) *v.* HALSE (resp.). (*a*)

Parliament — Registration of voters—"Incapacitated by any law or statute from voting"—Metropolitan police constable—10 *Geo.* 4, *c.* 44, *s.* 18—*The Parliamentary and Municipal Registration Act* 1878 (41 *&* 42 *Vict. c.* 26), *s.* 28, *sub-sect.* 7.

It is the duty of a barrister revising a list of parliamentary voters within the metropolitan police district to expunge, under the Parliamentary and Municipal Registration Act 1878 (41 *&* 42 *Vict. c.* 26), *s.* 28, *sub-sect.* 7, *the names of all persons belonging to the metropolitan police force, they being, by the operation of* 10 *Geo.* 4, *c.* 44, *s.* 18, "*incapacitated by statute from voting*" *for the election of a member of Parliament within the district.*

THIS was a case stated by Lionel Lancelot Shadwell, Esq., one of the barristers appointed to revise the list of parliamentary voters for the county of Middlesex and boroughs therein, the appellant being Peter Doulon, and the respondent Clarence Richard Halse.

The case was, so far as material, as follows:—

1. At a court held by the revising barrister on the 22nd Oct. 1886 for the purpose of revising the lists for the borough of St. Pancras, Middlesex, the name of the appellant appeared in the occupiers' list for the south division of the borough, as qualified in respect of the occupation of a dwelling-house described as 20, Brighton-street.

2. It was proved to the revising barrister, and admitted by the appellant, that he was on the last day of July 1886, a constable in the Metropolitan Police Force, appointed by virtue of the Act 10 Geo. 4, c. 44.

3. The borough of St. Pancras is within the metropolitan police district.

4. No objection had been made to the appellant's name being retained in the said list on the ground of his being such constable as aforesaid, though an objection had been made on other grounds, which was not sustained.

5. It was contended on behalf of the appellant that, notwithstanding the provisions of 10 Geo. 4, c. 44, s. 18, he was entitled to have his name retained on the said list for the following reasons:

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

(1) That the incapacity (if any) imposed by that section was merely an incapacity to vote and did not extend to registration. In support of this contention 2 Will 4, c. 45, s. 36, and 48 Vict. c. 3, s. 4, were referred to as showing that where the Legislature intended to disqualify from registration it did so in express terms. (2) That by imposing a penalty of 100*l.* on police constables voting at parliamentary elections the Legislature had shown an intention that such persons should be placed on the register, since, unless registered, they could not vote, and therefore could not incur the penalty. (3) That although the earlier part of 10 Geo. 4, c. 44, s. 18, did in terms render metropolitan police constables incapable of voting within the metropolitan police district, the true construction of the whole section was that they were entitled to vote subject to a liability to the prescribed penalty. (4) That to exclude a police constable from the register would indirectly create an incapacity to vote, or at all events would extend such incapacity beyond the time fixed for its termination—namely, six months after retirement from the force. (5) That even if the appellant was, as a metropolitan police constable, incapable both of voting and of being registered as a voter for the said borough, his incapacity was of a temporary and casual nature, and not such as to justify the revising barrister in expunging his name without objection duly made on the ground of such incapacity.

6. The revising barrister decided against the appellant's contention for the following reasons: (1) That the distinction between an incapacity to vote and an incapacity to be registered as a voter had no existence in law. That most incapacities to vote arose either at common law or, as in the present instance, under statutes passed before any system of registration was in force. That the "legal incapacity" mentioned in sect. 3 of the Representation of the People Act 1867 (under which the appellant claimed), and in other enactments conferring the franchise, meant an incapacity to vote, and that those enactments themselves made the absence of such legal incapacity a condition of the right to be registered. That this view was confirmed by the language of 41 & 42 Vict. c. 26, s. 28, sub-sect. 7, which required a revising barrister to expunge the name of every person "incapacitated by any law or statute from voting." (2) That there was nothing in the latter part of 10 Geo. 4., c. 44, s. 18, to cut down the incapacity to vote expressly enacted by the earlier part. That the imposition of a penalty on voting was in no way inconsistent with an intention to disfranchise, but was at a time when no register existed a useful provision for securing the observance of the law by persons whose incapacity could not be discovered or suspected from outward signs, as that of peers, women, infants, or aliens could be from their titles, names, appearance, or language. That since the establishment of a register, conclusive at the time of election, the retention of the provision was still necessary to prevent the voting of persons who had been registered by mistake, or had become incapable after the lists were made. (3) That for the purpose of registration the incapacity of the appellant was to be ascertained on the last day of July preceding the revision, and that it was immaterial that he might cease to be incapable before or during the currency of the register settled at such revision, the case being in that respect undistinguishable from *Lord Rendlesham* v. *Haward* (L. Rep. 9 C. P. 252) and *Hargreaves* v. *Hopper* (1 C. P. Div. 195). (4) That the case fell within 41 & 42 Vict. c. 26, s. 28, sub-sect. 7 (as appeared from *Stowe* v. *Joliffe* (30 L. T. Rep. N.S. 299, 795; L. Rep. 9 C. P. 734, followed as a binding authority with regard to this sub-section in *Hayward* v. *Scott*, 41 L. T. Rep. N. S. 476; 5 C. P. Div. 231), and that he was bound to expunge the appellant's name, though no objection had been made to him, on the ground of his being such police constable.

7. The revising barrister accordingly expunged the appellant's name from the said occupiers' list.

The questions for the decision of the court were: (1) Whether the appellant, as a constable in the metropolitan police force, was incapacitated from being registered as a voter in the said borough. (2) If he was so incapacitated, whether the revising barrister was right in expunging his name, though not objected to on the ground of such incapacity? If either of those questions were answered in the negative, the register was to be amended by restoring the name of the appellant in the said occupiers' list.

Beddall for the appellant. — The revising barrister ought not to have expunged the name of the appellant from the list of voters. By the 28th section of the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), "a revising barrister shall, with respect to the lists of voters for a parliamentary borough which he is appointed to revise, perform the duties and have the powers following: (7) He shall expunge the name of every person, whether objected to or not, where it is proved to the revising barrister that such person was on the last day of July then next preceding, incapacitated by any law or statute from voting at an election for the parliamentary borough to which the list relates." The appellant was not "incapacitated by any law or statute" within the meaning of this section, which, according to its true construction, relates only to a permanent incapacity to vote, such as that of a peer, a woman, or a child, and not to a temporary disqualification, such as that of a member of the metropolitan police force. That disqualification was created by the 18th section of 10 Geo. 4, c. 44, (*a*) the Act

(*a*) The 18th section of 10 Geo. 4, c. 44, provides that no justice of the peace or receiver appointed by virtue of this Act shall, during the continuance of such appointment, be capable of being elected or of sitting as a member of the House of Commons; and no justice, receiver, or person belonging to the police force appointed by this Act shall, during the time that he shall continue in any such office, or within six calendar months after he shall have quitted the same, be capable of giving his vote for the election of a member to serve in Parliament for the counties of Middlesex, Surrey, Hertford, Essex, or Kent, or for any city or borough within the metropolitan police district, nor shall by word, message, writing, or in any other manner, endeavour to persuade any elector to give, or dissuade any elector from giving, his vote for the choice of any person to serve in Parliament, for any such county, city, or borough, and if any such justice, receiver, or person belonging to the police force shall offend therein, he shall forfeit the sum of 100*l.*, to be recovered by any person who will sue for the same, by action of debt, to be commenced within six calendar months after the commission of the offence; and one moiety of the sum so recovered shall be paid to the

constituting the metropolitan police district, the effect of which is that a police constable, by accepting that office, is disqualified from voting during his continuance in the office and for six months afterwards. The case is analogous to that of the receipt of parochial relief, which disqualifies the recipient during its continuance, and for twelve months afterwards. Both are cases of temporary incapacity to vote, the only difference being that in the case of a police constable the disqualification lasts for six months after he has ceased to hold the office; in the case of a recipient of parochial relief for twelve months after its cessation. In *Hayward* v. *Scott* (41 L. T. Rep. N. S. 476; 5 C. P. Div. 231) it was held that the incapacity referred to in 41 & 42 Vict. c. 26, s. 28, sub-sect. 7, means such incapacities as those mentioned in *Stowe* v. *Joliffe* (30 L. T. Rep. N. S. 299, 795; L. Rep. 9 C. P. 734), not a mere temporary disqualification by reason of the receipt of parochial relief during the qualifying period. The passage in the judgment of Lord Coleridge, C.J. in *Stowe* v. *Joliffe* (*ubi sup.*) is clear. "The receipt," he says, "of parochial relief, non-residence within the proper distance of the borough, non-occupation, insufficient qualification—none of these things appear to satisfy the words of this proviso. It does not mean persons who from failure in the incidents or elements of the franchise could be successfully objected to on the revision of the register; it means persons who from some inherent, or for the time irremovable, quality in themselves have not, either by prohibition of statutes or at common law, the status of parliamentary electors. Such, for example, are peers, whether of the United Kingdom, or of Scotland, or of Ireland, women, persons holding certain offices or employments, the subjects of statutory prohibitions, and persons convicted of crimes which disqualify them from voting." [Lord COLERIDGE, C.J.—*Hayward* v. *Scott* (*ubi sup.*) professes to be founded on *Stowe* v. *Joliffe* (*ubi sup.*), but the foundation scarcely appears to me to support the superstructure.] At any rate, *Hayward* v. *Scott* decides that, in the absence of notice of objection, the revising barrister ought not to expunge the name of a person in receipt of parochial relief; and it is submitted that this case comes within the same rule. But, further, while 10 Geo. 4, c. 44, s. 18, enacts that no person belonging to the police force "shall be capable of giving his vote," 2 Will. 4, c. 45, s. 36, provides that no person "shall be entitled to be registered" in any year as a voter who shall within twelve months previous to the last day of July in such year have received parochial relief. It is submitted that the difference in the language is material. [Lord COLERIDGE, C.J.—The words of the sub-section under which the revising barrister acted are, "incapacitated by any law or statute from voting."] The effect of this construction may be to disenfranchise a police constable leaving the force for over twelve months instead of for six months as in terms provided by the Legislature.

informer, and the other moiety thereof to the receiver appointed under this Act, to be by him added to and applied as part of the funds for the purposes of the police under this Act; provided always, that nothing in this enactment contained shall subject any such justice, receiver, or person belonging to the police force, to any penalty for any act done by him at or concerning any of the said elections in the discharge of his official duty.

Bray, for the respondent, was not called upon.

Lord COLERIDGE, C.J.—I am of opinion that the decision of the revising barrister was correct, and ought to be affirmed. The words of the 9th sub-section of the 28th section of the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), in my opinion, admit only of the construction which the revising barrister has placed upon them. By 10 Geo. 4, c. 44, no person belonging to the police force appointed by that Act for the metropolitan police district, shall, during the time he shall continue in such office, or within six calendar months after he shall have quitted the same, be capable of giving his vote for the election of a member to serve in Parliament for any constituency within the metropolitan police district. It seems to me that, on the proper construction of this statute, members of the metropolitan police force come exactly within the words of the judgment in *Stowe* v. *Joliffe*, which have been cited to us in favour of the appellant. They are "persons who from some for the time irremovable quality in themselves have not by prohibition of a statute the status of parliamentary electors." Now, what does the Act of 1878 (41 & 42 Vict. c. 26), s. 28, sub-sect. 7, say on this point? The revising barrister "shall expunge the name of every person, whether objected to or not, where it is proved to the revising barrister that such person was on the last day of July then next preceding incapacitated by any law or statute from voting at an election for the borough to which the list relates." The appellant was a person not objected to upon the ground on which his name was expunged from the list, although he was objected to upon other grounds; but in the course of the argument before the revising barrister it turned out that he was incapacitated by statute from voting, and his name was thereupon struck off the list. It was objected that, if this is the correct construction to be placed upon the sections defining the duty of the revising barrister, a person who was not incapacitated by law or statute from voting might be struck off without notice. In this case no such objection can be raised because the appellant was present, and, if he was not a policeman, had an opportunity of denying it on the spot. No harm was therefore done to him; nor was any harm done to any one, for the following sub-section directs that, "before expunging from a list the name of any person not objected to, the revising barrister shall cause such notice, if any, as shall appear to him necessary or proper under the circumstances of the proposal to expunge the name, to be given to or left at the usual or last known place of abode of such person." A revising barrister would certainly, if he considered that a man was being objected to on a ground which might be explained, take care that direct notice was given to him of the objection. I cannot, therefore, see anything unjust or unfair in the construction, which appears to me to be the true construction of these sub-sections. It seems to me that the words of the statute are quite plain, and as far back as the case of *Stowe* v. *Joliffe* the same construction was placed upon similar words. The revising barrister was, in my opinion, quite right, and the appeal must be disallowed.

POLLOCK, B.—I also think that the revising

barrister was right in his decision, notwithstanding the exhaustive argument which Mr. Beddall has addressed to us. It was his duty to construe sub-sect. 7 of 41 & 42 Vict., c. 26, s. 28, the words of which are, "the revising barrister shall expunge the name of every person, whether objected to or not, where it is proved to him that such person was on the last day of July then preceding 'incapacitated by any law or statute from voting at an election for the parliamentary borough, or an election for the municipal borough, as the case may be, to which the list relates.'" The question, therefore, was whether the appellant was "incapacitated by any law or statute from voting at an election for the parliamentary borough of St. Pancras? The statute 10 Geo. 4, c. 44, s. 18, provides that, "no person belonging to the police appointed by that Act shall, during the time he shall continue in any such office, or within six calendar months after he shall have quitted the same, be capable of giving his vote for the election of a member to serve in Parliament for any borough within the metropolitan police district." As far as words can be the same without being absolutely identical, these words are so. In the one Act the words are, "no person shall be capable of giving his vote," in the other, "every person incapacitated by any law or statute from voting." We are asked, however, to give a different meaning to the words in the later Act, because in the case of *Stowe* v. *Joliffe* a different construction was placed by the court upon certain entirely different words which occur in the 7th section of the Ballot Act 1872 (35 & 36 Vict. c. 33). It was in that case held, and held for very good reasons, that the words "persons prohibited from voting by any statute or by the common law of Parliament," contained in the section of the Ballot Act which I have mentioned, mean persons who from some inherent and for the time irremovable quality in themselves have not, either by prohibition of statutes or at common law, the status of parliamentary electors, such as peers, women, persons holding certain offices or employments under the Crown, persons convicted of crimes which disqualify, or the like, and that those words are not pointed at disqualification by reason of the receipt of parochial relief or other alms since the date of the register. But the words used in that section are "persons prohibited from voting by any statute or by the common law of Parliament," and these words are, in my opinion, very different from the words of the sub-section which we have to consider in the present case. I think that where there is a series of Acts of Parliament and the different Acts use different words and phrases, it is the intention of the Legislature that those different words should have different meanings assigned to them. This is, I think, a safe and also a convenient rule, and I think that it is the rule upon which we ought to act in this case.

SMITH, J.—The statute 10 Geo. 4, c. 44, s. 18, says that no person belonging to the police force appointed by that Act shall during the time he shall continue therein be capable of giving his vote for the election of a member of Parliament within the metropolitan police district. Do those words mean that the members of the metropolitan police force are to be incapacitated by that statute from voting within the metropolitan police district? I think that they do; and, as that is their meaning, the appellant, being a member of the metropolitan police force, was incapacitated by statute from voting, and the revising barrister had no option but to expunge his name from the list in accordance with the instructions given to him by the Legislature in the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 28, sub-sect. 7.

Appeal dismissed with costs.

Solicitor for the appellant, *G. B. Crook.*

Solicitors for the respondent, *Halse, Trustram,* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, Nov. 17, 1886.

(Before Lord ESHER, M.R., LINDLEY and LOPES, L.JJ.)

REG. v. THE JUSTICES OF THE CENTRAL CRIMINAL COURT. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Jurisdiction of Court of Appeal—Criminal cause or matter—Order for restitution of proceeds of stolen goods—Money in hands of innocent agent of prisoner—Discharge of rule for certiorari—Error of law apparent upon the record—36 & 37 Vict. c. 66, s. 47—24 & 25 Vict. c. 96, ss. 1, 100.

The discharge of a rule for a certiorari to remove into the Queen's Bench Division an order of a judge of the Central Criminal Court, under sect. 100 of 24 & 25 Vict. c. 96, for the restitution of the proceeds of a sale of goods which had been obtained by false pretences, is a judgment in a criminal cause or matter, within sect. 47 of the Judicature Act 1873.

Such an order of restitution may be made not only when the proceeds are in the hands of the convict, but also when they are in the hands of an agent who holds them for him.

THIS was an appeal from the discharge of a rule calling upon the justices of the Central Criminal Court to show cause why an order made by them on the 8th March 1886 should not be brought up to the Queen's Bench Division and quashed on the ground of excess of jurisdiction.

On the 10th Feb. 1886 one Allen Foisard, *alias* Jules Maloche, was indicted at the Central Criminal Court for unlawfully obtaining by false pretences from Francois de Greve eighteen bales of flax with intent to defraud, and attempting to obtain 150 bales with a like intent.

It appeared from the evidence then given that Francois de Greve, a flax merchant at Eclos, in Belgium, received a letter signed Maloche, and, in pursuance of the order contained therein, believing it to be an order from a good firm with a warehouse at the Liverpool-street station of the Great Eastern Railway, sent eighteen bales of flax to J. Maloche at that station, and the delivery order to 43, Barbican, the residence of a tobacconist, who by arrangement received letters at that address for the prisoner. The prisoner obtained delivery of the goods on producing the delivery order, and indorsing it with the name "J. Maloche," and

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

signing the same name in a book, and immediately conveyed them by the Great Northern Railway to Hull, where he appeared on the next morning with a Frenchman whom he introduced to a member of Corrie, Hanson, and Co., one of the principal firms of flax merchants and commission agents there, as a flax merchant from Lille. The prisoner, apparently acting as interpreter for the other man, commissioned the agents to sell the flax, whereupon the agents made an advance of 72*l.* by cheque to the man accompanying the prisoner, who indorsed it and cashed it. Corrie, Hanson, and Co. subsequently sold the flax for about 115*l.*, from which their expenses had to be deducted; and at the time of the trial they held the difference between the advance and the price realised. No objection was at any time taken to their part in the matter.

The prisoner having been convicted, an application was made to the court on behalf of the prosecutor for the restitution to him of the proceeds of the sale of the flax by Corrie, Hanson, and Co. The court adjourned the application to enable Corrie, Hanson, and Co. to instruct counsel; and at the next sessions, after hearing counsel on both sides, made an order reciting that, on the 8th Feb. 1886, one Allen Foisard, otherwise Jules Maloche, was convicted of unlawfully obtaining, on the 16th Dec. 1885, by false pretences from one Francois de Greve eighteen bales of flax, and that it had been made to appear to the court that the said bales were, on the 1st Jan. 1886, in the possession of Corrie, Hanson, and Co., flax merchants, of Hull, who, in the said month of January, sold the same for 108*l.*, and ordering Corrie, Hanson, and Co. to restore and deliver to De Greve the said sum of 108*l.*

An application was thereupon made to the Queen's Bench Division, on behalf of Corrie, Hanson, and Co., for a rule calling upon the justices of the Central Criminal Court to show cause why a writ of *certiorari* should not issue to bring up the order so made to be quashed on the ground of excess of jurisdiction. The rule *nisi* was granted; but, upon cause being shown against it, the Court (Lord Coleridge, C.J. and Cave, J.) gave judgment discharging the rule (55 L. T. Rep. N. S. 486). From this judgment an appeal was now brought by Corrie, Hanson, and Co.

By 24 & 25 Vict. c. 96, s. 100, it is enacted that,

If any person guilty of any such felony or misdemeanour as is mentioned in this Act in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattels, money, valuable security, or other property whatsoever, shall be indicted for such offence by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid the court before whom any person shall be tried for any such felony or misdemeanour shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner.

By sect. 1 of the same Act it is enacted that,

The term property shall include every description of real and personal property, money, debts and legacies, and all deeds or instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and shall also include not only such property as shall have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

The Judicature Act 1873, s. 47, after vesting in the judges of the High Court the jurisdiction in relation to questions of law arising in criminal trials reserved for their consideration under 11 & 12 Vict. c. 78, enacts that,

The determination of any such question by the judges of the said High Court in manner aforesaid shall be final and without appeal; and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges under the said Act of 11 & 12 Vict.

Abrahams, for the respondent, took the preliminary objection that the judgment of the Divisional Court was in a criminal cause or matter, and therefore no appeal would lie.

E. Wilberforce for the appellants.—The test is whether the proceeding upon which, or upon any step in which, the judgment was given might result in fine or imprisonment. In every case in which the proceeding has been held to be a criminal cause or matter either the appellant or the respondent might have been fined or imprisoned as a consequence of the decision from which the appeal was brought. That was the ground of the decision in *Reg.* v. *Fletcher* (35 L. T. Rep. N. S. 538; 2 Q. B. Div. 43). The present Master of the Rolls, in his judgment in that case, says: "There has been a conviction in a criminal matter by justices, and a motion in the Queen's Bench Division for a *certiorari* for the purpose of determining whether that conviction is good or ought to be quashed; and the Queen's Bench has determined, by discharging the rule for a *certiorari*, that the conviction ought to stand; in other words, the court has affirmed the conviction. If that is not a proceeding in a criminal matter, I am at a loss to see what is. It is in effect a judgment or decision on the question whether a man shall be fined or imprisoned or not." In the recent case of *The Loughborough Highway Board* v. *Curzon* (55 L. T. Rep. N. S. 50; 17 Q. B. Div. 344) the same test was applied by the then Lord Chancellor (Lord Herschell), who says: "I think that the order of the justices is not 'a judgment in a criminal cause or matter;' disobedience to the order does not result in either fine or imprisonment." The same test was applied in *Mellor* v. *Denham* (42 L. T. Rep. N. S. 493; 5 Q. B. Div. 467). The order against the appellants was made under sect. 100 of 24 & 25 Vict. c. 96, which enables the court either to award writs of restitution or to order restitution in a summary manner. A writ of restitution can be pleaded to:

Burges v. *Coney*, Tremaine's Pleas of the Crown, p. 315;
Bishop of Worcester's case, Moore, 360; Kelyng's Crown Cases, 35, 48.

[LOPES, L.J.—This order could only be made after a criminal trial.] It is submitted that it is a civil matter arising out of a criminal matter. [Lord ESHER, M.R.—Your argument is, that there are three ways in which this money might be recovered —by action, by writ of restitution, or by a summary order; and that, as the first two would not be criminal matters, neither is the last. LOPES, L.J. —Is not this an order in consequence of a criminal proceeding? And if so, is not *Reg.* v. *Steel* (35 L. T. Rep. N. S. 534; 2 Q. B. Div. 37)

against you?] That case was as to whether the taxation of the costs of a criminal information could be reviewed. There the taxation was the inevitable consequence of the judgment in the criminal trial: not merely a consequence of it. [Lopes, L.J.—Is not this part of the procedure in a criminal matter?] It is submitted that nothing can be any part of the procedure in a criminal matter that is not a proceeding against the criminal. [Lopes, L.J.—There would have been no right of appeal before the Judicature Acts in this case.] The right of appeal is given by sect. 19 of the Act of 1873, which gives jurisdiction to the Court of Appeal to hear "appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice." The object of a criminal proceeding is punishment; the object of a civil proceeding is redress:

Attorney-General v. *Radloff*, 10 Exch. 84.

The Master of the Rolls, in *Attorney-General* v. *Bradlaugh* (52 L. T. Rep. N. S. 589; 14 Q. B. Div. 667), said: "I agree with the opinion of Martin, B., in *Attorney-General* v. *Radloff*, that when it is found that the Attorney-General can either bring an information in the Exchequer or bring an action of debt, it is inconsistent with the true view of the criminal law of England to say that, by proceeding in one form rather than in the other, he, under the same circumstances, can make in the one case that a crime which in the other can only be treated as a debt." The object of the present proceeding is recovery of the goods or their proceeds. The only mode in which that could be effected, before 21 Hen. 8, c. 11, was by an appeal in felony, which was a civil proceeding. By that Act he could either bring an action or obtain a writ of restitution. Then by 7 & 8 Geo. 4, c. 29, he could obtain a summary order for restitution. It is submitted that the new remedy so given is, like the previous ones, a civil proceeding. Then, secondly, there is here an error of law apparent upon the record. It appears on the face of the order that the appellants had sold the goods before the conviction took place. The judgment of the Divisional Court, as drawn up, embodies the rule for a *certiorari*, which rule incorporated the order of Mr. Commissioner Kerr by reference, speaking of the goods "which have been converted and exchanged as in the said order mentioned." It therefore appears upon the record that the goods were sold in January, and that the conviction took place in February. In *Lindsay* v. *Cundy* it was decided in the court of first instance (34 L. T. Rep. N. S. 314; 1 Q. B. Div. 348) that the definition of the word "property" in 24 & 25 Vict. c. 96, s. 1, does not apply to "property" in sect. 100, and that where goods have been obtained by false pretences and sold to an innocent purchaser who has resold them before the conviction of the criminal, sect. 100 does not give the prosecutor a title to the purchase money of the goods in the hands of the innocent vendor. That case was reversed in the Court of Appeal (36 L. T. Rep. N. S. 345; 2 Q. B. Div. 96) and in the House of Lords (38 L. T. Rep. N. S 573; 3 App. Cas. 459), but upon other grounds. That case was followed by *Moyce* v. *Newington* (39 L. T. Rep. N. S. 535; 4 Q. B. Div. 32), which decided that the goods could not be restored to the prosecutor if they had been sold to an innocent purchaser before the conviction. (*a*) In the judgment now appealed from, Lord Coleridge, C.J. says: "There are several cases, such as that of *Harris* (Noy, 128), and that of *Hanberrie* (cited in *Holiday* v. *Hicks*, Cro. Eliz. 661), and *Reg.* v. *Powell* (7 C. & P. 640), which show that under both the 21 Hen. 8, c. 11, and the 7 & 8 Geo. 4, c. 29, s. 57, which are similar in terms to the 24 & 25 Vict. c. 96, s. 100, the courts before which the prisoners have been convicted of larceny have been in the habit of ordering restitution either of the goods stolen, or of their proceeds, according to circumstances." In the cases there cited, the proceeds of the larceny were in the hands of the thief at the time of conviction. Both *Harris's* case and *Reg.* v. *Powell* are distinguished on that ground in *Horwood* v. *Smith* (2 T. R. 750). The fact that the applicants in the present case did not purchase the flax from the convict, but sold it for him and have only a lien on the purchase money, makes no difference. A pledge gives rise to the same rights as a sale:

Attenborough v. *London and St. Katherine's Docks Company*, 38 L. T. Rep. N. S. 404; 3 C. P. Div. 450.

[Lopes, L.J.—The court below seem to have avoided saying that the order was right. What they say is that there was clearly jurisdiction to make it.] How can there be jurisdiction to order a person who has nothing to do with the proceedings to give up his goods? The only jurisdiction that is given to make an order of restitution is "in every case in this section aforesaid;" that is, where the property is to be restored to the owner. The cases of *Lindsay* v. *Cundy* (*ubi sup.*) and *Moyce* v. *Newington* (*ubi sup.*) (*a*) both decide that, under circumstances such as the present, the property cannot be recovered by the owner in an action of trover. It follows, therefore, that an order of restitution ought not to have been made in the present case. A court can never give itself jurisdiction by erroneous findings of fact; those findings are subject to review on *certiorari*. He also cited

Chichester v. *Hill*, 48 L. T. Rep. N. S. 364; 52 L. J. 160, Q. B.

Abrahams in reply.—As to the last point, the only question that can be raised on *certiorari* is as to jurisdiction; the correctness of the order in law or in fact cannot be questioned:

Reg. v. *King*, 14 Cox Cr. C. 434.

Reg. v. *Steel* (*ubi sup.*) is an answer to the argument that this is not a criminal matter. [He was stopped by the Court.]

Wilberforce in reply.

Lord Esher, M.R.—In this case a criminal was tried at the Central Criminal Court for obtaining flax by false pretences, and was convicted. After his conviction the judge made an order upon the appellants to restore to the prosecutor money that was the proceeds of a sale of the flax. The appellants are brokers, who had sold the flax in question, acting for and by the instructions of the criminal. Then a motion was made in the Queen's Bench Division for a *certiorari* to bring up the order in order to quash it. Upon the hearing the Queen's Bench Division discharged the rule.

(*a*) Since this case was decided, *Moyce* v. *Newington* has been overruled (*Vilmont* v. *Bentley*, *ante*, p. 325).

Then there is an appeal to this court. It was urged, in the first place, by the respondents that the order for the restitution of this money was an order in a criminal cause or matter. The other side say that this was not in a criminal, but in a civil matter, after the criminal matter was over. That depends upon the view one takes of the statute that gives the power to make such an order. It is to be made by the judge who tries the prisoner. I should think that it ought to be made at or about the time of the trial. I am of opinion that such an order is made in a criminal cause or matter. There is therefore no appeal here, unless the alleged defect appears on the face of the order of the Queen's Bench Division. I have great doubt whether it does appear in the present case. It is unnecessary to decide that, because, if the order for restitution made at the trial does appear upon the face of the order of the Queen's Bench Division, it is an order upon persons who hold the proceeds of the sale as agents of the convicted prisoner, not upon a stranger. It is the same thing as if the money was in the hands of the prisoner. All the cases show that the court has power to order the restitution not only of the things themselves but also of the proceeds of their sale in the hands of the prisoner. If the proceeds are in the hands of an agent, who holds them for the prisoner, that is enough. Further than that I do not go. I think that the judge of the Central Criminal Court had jurisdiction to make the order in question upon the ground that the appellants were holding the money for the prisoner at the time of his conviction. It is true that they had a lien upon the money; but that would only enable them to retain a part of the money in accounting to him. They held the whole of the proceeds of the sale for him, subject to an account. I am of opinion, therefore, that the judge had jurisdiction to make this order. Consequently, even if we assume that the terms of that order appear upon the record, they show no error of law.

LINDLEY, L.J.—This is an appeal from a decision of the Queen's Bench Division discharging a rule for a *certiorari*, which had been obtained on the 19th March, to remove into the Queen's Bench Division an order of Mr. Commissioner Kerr for the restitution of certain money, the proceeds of a sale of property which had been fraudulently obtained by a convicted prisoner. The ground of the application for a *certiorari* was, that there was no jurisdiction to make that order. The first question that we have to decide is, whether the decision of the Queen's Bench Division is a judgment in a criminal cause or matter. Mr. Commissioner Kerr's order was made under sect. 100 of the Larceny Act. It was made in the course of the exercise of the criminal jurisdiction conferred upon him. Consequently, although it affects property, it seems to me that it was made in a criminal cause or matter. It follows that the decision of the Queen's Bench Division was also in a criminal cause or matter. Is that decision a judgment within sect. 47 of the Judicature Act 1873? Having regard to the decisions in *Reg.* v. *Foote* (48 L. T. Rep. N. S. 394; 10 Q. B. Div. 378) and *Reg.* v. *Whitchurch* (45 L. T. Rep. N. S. 379; 7 Q. B. Div. 534), it cannot be contended that this order of the Queen's Bench Division discharging a rule for a *certiorari* is not a judgment within that section. There is therefore no appeal to this court unless that order is erroneous on the face of it. I assume that Mr. Commissioner Kerr's order is to be looked at as being incorporated in that order. If Mr. Commissioner Kerr appears from the terms of his order to have had jurisdiction to make it, there is no appeal. It seems to me impossible to say that he had no jurisdiction to make the order. I think that it appears that the persons against whom the order is made held the money obtained by the sale of the goods for the prisoner.

LOPES, L.J.—In this case an order was made under sect. 100 of 24 & 25 Vict. c. 96, which enables the court to make an order for the restitution of stolen goods. The first question is, is this a criminal cause or matter within sect. 47 of the Judicature Act 1873? It is an order made by a judge exercising criminal jurisdiction, and he could not have made the order but for his criminal jurisdiction. It is made under a statute that deals with nothing but crime. The heading of it is in the form of a criminal order. It is impossible to say that it was not made in a criminal matter. Then, is there any error of law on the face of the record? I do not desire to express any opinion upon the question as to what is an error of law apparent upon the record within the meaning of sect. 47 of the Act of 1873, or upon the question whether the alleged error is apparent upon the record. It can only appear, if at all, by incorporation. But it is unnecessary to decide whether the terms of the order do appear upon the record, because, assuming that they do, no error at all appears in them. There is no doubt that the court can order restitution of the proceeds of a sale of stolen property in the hands of the convict. I take it that the money being in the hands of an agent of the convict is the same as being in the hands of the convict himself.

Appeal dismissed.

Solicitor for appellants, *Oldham.*

Solicitors for respondents, *Michael Abrahams, Son,* and *Co.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Saturday, Dec. 4, 1886.

(Before Lord COLERIDGE, C.J., POLLOCK, B., and SMITH, J.)

SPITTALL (app.) *v.* BROOK (resp.). (*a*)

Parliament—Registration of voters—Occupation—Franchise — Soldier in barracks—Compulsory absence on duty—Constructive inhabitancy—The Representation of the People Act 1884 (48 & 49 *Vict. c.* 3), *s.* 3.

A non-commissioned officer who is compulsorily absent from a dwelling-house allotted to him by the military authorities during twenty-seven days of the qualifying year, does not inhabit such dwelling-house within the meaning of the 3rd *section of the Representation of the People Act* 1884 (48 *Vict. c.* 3), *notwithstanding that the dwelling-house continues to be occupied by his family and furniture, and that reasonable leave to return thereto during the period of compulsory*

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

absence is usually granted to persons in his position as of course.

THIS was a case stated for the opinion of the court by the revising barrister for the south-eastern division of the county of Lancaster.

The facts stated in the case were, so far as material, as follows:—

At the revision of the lists of voters for the borough of Warrington, the appellant and nineteen others, whose names were inserted in a schedule annexed, appeared in the second division of the occupiers' list for the township of Warrington. They were duly objected to, and their names were struck off by the revising barrister upon such objection, as not being inhabitant occupiers within sect. 3 of the Representation of the People Act 1884 (48 Vict. c. 3). The following facts in support of the objection were laid before the revising barrister:

The appellant is a married non-commissioned officer residing with his wife and family in the Orford Barracks, Warrington, in separate rooms allotted to him by the military authorities, such rooms constituting a dwelling-house partly furnished by himself.

The rooms occupied by him had been assigned by the quartermaster, and might be changed at his (the quartermaster's) discretion, but had been retained by the appellant during the qualifying year.

The appellant had been compulsorily absent on duty at Altcar, in the county of Lancaster, for twenty-seven days during the qualifying year, but while so absent on duty his name was retained on the strength of the Warrington regimental depôt in the monthly return of the forces made by the commanding officer to the War Office, and the rooms continued to be occupied by his furniture and family.

It was not denied that the quartermaster could resume possession of the rooms at any time by allotting the appellant other premises, but in fact no such resumption had taken place.

Neither the appellant nor any of the persons referred to in the schedule hereto, with one exception—James Logan (a warrant officer)—could, while compulsorily absent on duty at Altcar or elsewhere, return to personal inhabitancy of his rooms without a written permission or pass signed by the colonel or commanding officer, prescribing the number of hours and the purpose for which it was granted, as well as the hours between which the pass could be used. In the case of the said James Logan a verbal permission was deemed sufficient.

Reasonable leave was usually granted to persons in the position of the appellant as of course, and the majority of the persons named in the schedule, including the appellant, had availed themselves of the privilege accorded, and had returned to Warrington for one or more days during the period of compulsory absence aforesaid.

The objection taken to the name of the appellant being on the said occupiers' list was that he had not occupied the qualifying premises for the qualifying period.

The revising barrister held that the appellant had not occupied during the qualifying period, as he could not return, except by leave as aforesaid, without a breach of duty and without subjecting himself to a trial by court-martial, and struck out his name accordingly.

If the revising barrister was wrong in thus erasing the appellant's name, it ought to be reinstated in the said list, if the court is of opinion that the constructive inhabitancy of the appellant has been on these facts made out.

The schedule appended contained the names of other persons whose names were on like grounds erased by the revising barrister. In each case, and as to each of such names respectively, notice of appeal was given, and the appeal in each case depended on the same facts. The revising barrister, therefore, consolidated the appeals; and named the above appellant and respondent to be appellant and respondent in the consolidated appeal.

Pierpoint for the appellant.—The decision of the revising barrister was wrong. It was founded upon the case of *Ford* v. *Barnes* (53 L. T. Rep. N. S. 675; 16 Q. B. Div. 254, sub nom. *Atkinson* v. *Collard*), but, although that case bears a *primâ facie* resemblance to the present case, it is distinguishable. In that case the facts were insufficiently stated; and it did not appear that leave to return during the period of training could have been procured, while here it is stated in the case that reasonable leave was usually granted to persons in the position of the appellant as of course, and the appellant had actually returned to Warrington for one or two days during the period. Cave, J., in delivering the judgment of the court in *Ford* v. *Barnes* (*ubi sup.*) says: "In this case unfortunately the facts are very briefly stated, and we do not know whether, when the claimant was sent to Okehampton, it was the intention of those who sent him that he should return to Exeter, or whether leave to return during the twenty-one days would have been procured, and, if not, why it would have been refused. If it could have been shown that it was always the intention of the authorities that he should stay at Okehampton three weeks only, and should then return to Exeter, and that leave to return to Exeter every night would have been granted as a matter of course, or, if refused, only refused on account of difficulty of communication, and not because his presence was required at Okehampton in the night time, we should have thought there were strong grounds for contending that there was a constructive inhabitancy.' [LORD COLERIDGE, C.J.—Is not the point whether the appellant had the power of returning without violating any legal obligation?] If that were so, it would be impossible for any soldier to retain his qualification. [LORD COLERIDGE, C.J.—If an extreme case should arise, it must stand upon its own merits. Cave, J. in *Ford* v. *Barnes* says, "If leave to return to Exeter every night would have been granted as a matter of course" the case would be arguable, but here the appellant only returned on one or more days during the period of compulsory absence.] It is stated that leave was granted as of course. [POLLOCK, B.—In the case referred to, Cave, J. also says that it is necessary that his presence should not be required in the night time. A guard is always mounted in the night time in cases such as this, and the appellant, it must be presumed, had to take his turn, and, if so, how can you say that his inhabitancy at Warrington was not broken by the

rules of the service?] An absence of twenty-seven days during which the appellant more than once revisited his home, which continued to be occupied by his family and furniture, is not sufficient to break the appellant's inhabitancy of his dwelling-house according to the true meaning of the word in the third section of the Representation of the People Act 1884 (48 Vict. c. 3). (a)

Henn Collins, Q.C., for the respondent, was not called upon.

Lord COLERIDGE, C.J.—I am of opinion that, notwithstanding the distinctions which the learned counsel for the appellant has pointed out between this case and the case of *Ford* v. *Barnes* (*ubi sup.*), which has been cited, we cannot decide in favour of the appellant without overruling that case. The material part of the judgment of the court in *Ford* v. *Barnes* is this: "The respondent did not therefore, in fact, inhabit at Exeter during the whole of the 365 days making up the qualifying period. We think, however, that actual inhabitancy during every one of the days is not necessary, and that it is sufficient if the claimant can make out a constructive inhabitancy. But, in order to make out a constructive inhabitancy, there must be an intention of returning after a temporary absence, and a power of returning at any time without breach of any legal obligation." In this case there was not the power of returning at any time without breach of the rules of the service to which the appellant belongs. His inhabitancy of the quarters allotted to him was therefore broken during the qualifying period by a compulsory absence, and there was neither an actual nor a constructive inhabitancy entitling him to be placed upon the register under the 3rd section of the Representation of the People Act 1884 (48 Vict. c. 3).

POLLOCK, B. and SMITH, J. concurred.

Solicitors for the appellant, *Gregory, Rowcliffes, and Co.*

Solicitor for the respondent, *W. H. Brook*, Warrington.

Saturday, Dec. 4, 1886.

(Before Lord COLERIDGE, C.J., POLLOCK, B., and SMITH, J.)

HONEYBONE (app.) *v.* HAMBRIDGE AND OTHERS (resps.). (b)

Parliament—Registration of voters—"Medical or surgical assistance"—Uncertificated midwife—The Medical Relief Disqualification Removal Act 1885 (48 *& 49 Vict. c.* 46), *ss.* 2 *and* 4.

The term "medical or surgical assistance" in the 2nd section of the Medical Relief Disqualification Removal Act 1885 (48 *& 49 Vict. c.* 46), *includes assistance of a medical or surgical character rendered by persons other than medical men or surgeons, e.g., the attendance of an uncertificated midwife at a confinement.*

THIS was a case stated by Arthur Chichele Plowden, Esq., the barrister appointed to revise the list of voters for the Banbury or Northern Division of the county of Oxford, in which Thomas Honeybone was the appellant, and Robert Hambridge and William Harvey Lardner the respondents.

The case was, so far as material, as follows:—

At a court held by the revising barrister, to revise a list of voters for the said division, Thomas Honeybone, the appellant, duly claimed to be inserted on the list of occupation voters as an inhabitant householder.

It was proved that the appellant had duly given notice of his claim to the overseers of the parish, and that he was in all respects entitled to be registered as a voter for the said division unless disqualified by the matters hereinafter stated.

The following facts were established by the evidence: On or about the 20th Nov. 1885 Naomi Honeybone, the wife of the appellant, made an application to the relieving officer for the Chipping Norton Union, in which the said parish is situate, that she might be attended during her then approaching confinement by a medical man. The said application was laid before the board of guardians for the said union on the 25th Nov. 1885, and the guardians passed a resolution permitting the relieving officer to give the said Naomi Honeybone an order for the medical man to attend her during her confinement.

The said Naomi Honeybone made no further application to the relieving officer; and at her confinement, which took place in Jan. 1886, she was attended, not by a medical man, but by a midwife named Mrs. Large.

It was admitted, in answer to questions by the revising barrister, that Mrs. Large held no certificate as a midwife, and that she attended the appellant's wife at the instance of the relieving officer, and not at the request or apparently with the knowledge of the medical officer.

On or about the 15th Jan. 1886, the relieving officer, on the application of the midwife, paid her the sum of 4*s.* in respect of her attendance on the wife of the appellant.

Neither the appellant nor his wife asked the relieving officer to pay the said sum of 4*s.*, or any other sum, to the midwife as aforesaid.

It was stated to be the usual practice in the district of the said relieving officer for the guardians to pay the sum of 10*s.* 6*d.* to the medical man for attendance at a confinement under an order, and that if a midwife attended in place of a medical man the relieving officer was authorised by the guardians to pay such midwife the sum of 4*s.* in respect of her attendance.

Upon these facts it was objected that the appellant was not entitled to be registered as a voter by reason of his having during the qualifying year received parochial relief.

It was contended on behalf of the appellant that the relief proved to have been given to his wife was "medical or surgical attendance," within the meaning of the Medical Relief Disqualification Removal Act 1885, and that by virtue of that Act its receipt did not disqualify him from being so registered.

The revising barrister was of opinion—(1) that inasmuch as the relief given was afforded by an uncertificated midwife, and might well be something very different from assistance at all, it could

(a) The Representation of the People Act 1884 (48 Vict. c. 3), s. 3, provides: Where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of this Act and of the Representation of the People Acts to be an inhabitant occupier of such dwelling-house as a tenant.

(b) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

not be said to be either "medical or surgical attendance" within the meaning of those terms as employed in the Medical Relief Disqualification Removal Act 1885; (2) that as the evidence showed that the midwife attended at the instance only of the relieving officer, and that the medical officer had no voice in the matter, the relief afforded could not be said to be "a matter or thing" supplied on the recommendation of the medical officer, so as to bring it within the further definition of medical or surgical assistance as set out in sect. 5 of the Medical Relief Disqualification Removal Act 1885; (3) that the right of the appellant to be registered must depend not on the nature of the request made by his wife to the relieving officer, but on the quality of the relief which she actually received, and which by the circumstances of the case she must be taken to have acquiesced in.

The revising barrister accordingly decided in favour of the objection, and disallowed the claim of the appellant.

If the court should be of opinion that his decision was wrong the register was to be amended by inserting the name of Thomas Honeybone on the list of occupation voters.

Asquith for the appellant.—The revising barrister was wrong in allowing this objection and in striking out the name of the appellant. The Medical Relief Disqualification Removal Act 1885 (48 & 49 Vict, c. 46) is a remedial and enfranchising Act, and its intention ought not to be lightly defeated by unsubstantial objections. The 2nd section of the Act provides that, "where a person has received for himself, or for any member of his family, any medical or surgical assistance, or any medicine at the expense of any poor rate, such person shall not by reason thereof be deprived of any right to be registered or to vote as a parliamentary voter;" and by the 4th section, "the term 'medical or surgical assistance' in this Act shall include all medical and surgical attendance, and all matters and things supplied by or on the recommendation of the medical officer having authority to give such attendance and recommendation at the expense of any poor rate." It is submitted that the relief provided by the relieving officer in this case, although rendered by an uncertificated midwife, was "medical or surgical assistance" within the meaning of the Act. The words "medical attendance" include all attendance for a medical purpose. [Lord COLERIDGE, C.J.—Can it be said that a midwife is a matter or thing supplied by or on the recommendation of the medical officer?] The application to the relieving officer was that the appellant's wife might be attended by a medical man, and the relieving officer paid a midwife to perform the same services which would have been performed by the medical man. [Lord COLERIDGE, C.J.—How do you say relief of this kind is "medical," which if any medical emergency had arisen would have been useless?] A confinement is an illness within the meaning of the provisions allowing evidence to be taken on commission. The question is, what, upon a fair interpretation of the words, did the Legislature mean by "medical assistance," and it is submitted that the Legislature cannot have intended that the vote should depend upon the qualification of a person rendering assistance in cases of illness. A proper application was made by the appellant's wife for a medical man, and a proper order for medical assistance was made by the guardians. [POLLOCK, B.—The relief was not supplied by or on the recommendation of the medical officer, for he apparently had no knowledge of the matter at all, but at the instance of the relieving officer. You must, therefore, make out that all relief of this kind is "medical" within the meaning of the Act.] That is so. The relief in this case was "medical" in its value, and it is immaterial by whom it was rendered.

The respondent did not appear by counsel.

Lord COLERIDGE, C.J.—I am of opinion that the revising barrister was wrong in the decision at which he arrived in this matter, and that the register must be amended by inserting the appellant's name on the list of voters. I have come to this conclusion because I think it is in consonance with the object which the Legislature had in view in passing this Act. The Act was passed for the purpose of removing the disqualification from persons who have received for themselves or any member of their families "any medical or surgical assistance" or any medicine at the expense of any poor rate, and "medical or surgical assistance" is defined as including "all medical and surgical attendance, and all matters and things supplied by or on the recommendation of the medical officer having authority to give such attendance and recommendation at the expense of any poor rate." I think that the words "all medical and surgical assistance" mean all such assistance as is usually rendered by a medical man or a surgeon, but which if rendered by anyone else is not the less for that reason "medical or surgical assistance." In this case Naomi Honeybone made an application to the relieving officer that she might be attended during her approaching confinement by a medical man, and the board of guardians, on the application being laid before them, passed a resolution permitting the relieving officer to give her an order for the medical man to attend her during her confinement. If the relieving officer had thereupon instructed the medical man to attend her—*cadit quæstio*—there could have been no ground for saying that the husband had lost his vote. But the relieving officer did not so instruct the medical man. Instead of doing so, he sent a midwife, as he was apparently authorised to do, paying her 4*s.* instead of the 10*s.* 6*d.* which he would have had to pay to the medical man, if he had attended. The argument therefore comes to this: If the assistance which was rendered to this woman had been rendered by a regular practitioner at a cost of 10*s.* 6*d.* it would not have disqualified the husband from being registered as a voter, but being rendered by a midwife instead of a surgeon, and at a cost of 4*s.* instead of at a cost of 10*s.* 6*d.*, it does disqualify him. When so stated—and I am not conscious that I have stated it otherwise than accurately—the matter seems to me to be free from difficulty. The assistance rendered in this case was to my mind exactly of that kind which the Legislature has said is not to disqualify a man from voting. I therefore think that the revising barrister was wrong, and that the vote ought to be allowed.

POLLOCK, B.—I must confess that I have felt considerable doubt as to what my decision ought

to be in this case. I have no doubt that the relief afforded in this case comes within the spirit of the Act which we have to construe. That Act was passed for the purpose of preventing a man otherwise qualified from being deprived of his vote by the receipt of medical and surgical relief only from the poor rate. I think, however, it is clear that the question whether certain relief provided out of the poor rate is medical relief or not cannot depend upon the actual character of the medical man or other person who renders it, but upon the medical or surgical nature of the relief itself. That being so, as the guardians passed a resolution permitting the relieving officer to give the woman an order for the medical man to attend her during her confinement, whereas he sent a midwife instead, I think it is only a reasonable construction of the Act to say that the assistance rendered was none the less "medical or surgical attendance" within the meaning of the Act, and that the revising barrister was wrong in expunging the appellant's name from the list.

SMITH, J.—I am of the same opinion, for the reasons stated by my Lord.

Solicitors for the appellant, *Mackeson, Taylor,* and *Arnould,* for *Kilby* and *Mace,* Chipping Norton.

CROWN CASES RESERVED.

Saturday, March 5, 1887.

(Before Lord COLERIDGE, C.J., POLLOCK, B., STEPHEN, MATHEW, and WILLS, JJ.)

REG. *v.* GIBSON. (*a*)

Criminal law—Reception of evidence—Inadmissible evidence allowed to go to the jury—Objection not taken until jury retire—Duty of judge presiding over Criminal Court.

Where evidence has been received in a prosecution for felony which should not have been admitted, the verdict of the jury must be taken to have been founded upon such evidence as well as upon the evidence properly admitted, and if the prisoner is convicted the conviction is bad notwithstanding there was sufficient evidence, apart from the evidence improperly received, to support the conviction.

It is the duty of the judge who presides over a criminal court to see that no improper evidence is given, or, if such evidence is inadvertently admitted, to see that the verdict of the jury is not founded upon any evidence but that which is legally admissible.

Where, therefore, inadmissible evidence is received, it is immaterial whether objection be taken at the time the evidence is given or after it has been allowed to go to the jury.

CASE reserved by the Quarter Sessions for the West Derby hundred of the county of Lancaster holden at Liverpool, on the 19th Jan. last, upon an indictment charging the prisoner with unlawfully and maliciously wounding one Thomas Simpson.

The following facts were proved:—

About 11 p.m. on the 4th Dec. 1886 the prisoner and Charles Simpson (a son of the prosecutor) had an altercation opposite the Bold hotel, Wigan. Charles Simpson got hold of the prisoner, and said, "What do you want? I'll soon shift you." The latter ran away in a direction opposite to his own house.

Shortly afterwards Charles Simpson, Thomas Simpson (the prosecutor), Smith, and two others proceeded from the Bold hotel towards their own home in Wigan. Their road home was past the prisoner's house.

After proceeding about sixty-five yards from the hotel, and when opposite the prisoner's house, the prosecutor was struck on the head by a stone. The stone hit the left side of his head from the direction of the prisoner's house. The blow caused the prosecutor to fall against the railings at the side of the road farthest from the prisoner's house.

Charles Simpson, who had just previously seen the prisoner come up behind from the direction of the Bold hotel, and pass on the opposite side of the road when opposite the prisoner's door, heard Smith, who was walking with the prosecutor, call out, "My arm is broke." Charles Simpson then saw the prisoner go into his own house, no other person was on that side of the road on which the prisoner's house is situate.

Charles Simpson then went to the prosecutor, who was on the footpath against the palisade, on the opposite side of the road to the house of the prisoner, the road being eleven or twelve yards in width.

The prosecutor, while walking on the said footpath, was struck before the prisoner went into his house, and was knocked against the palisade aforesaid.

The prosecutor stated, but not in answer to any specific question put to him, "Immediately after I was struck by the said stone a lady going past, pointing to prisoner's door, said, 'The person who threw the stone went in there.'"

Charles Simpson went to the front door of prisoner's house, called to his brother to go to the back and called for a policeman. Charles Simpson broke the panel of the door before the policeman came. Admission was demanded by a policeman and refused. The front door was eventually broken open by the policeman, when the prisoner, standing with his cap on and clothed as he was at the Bold Arms, and his father, were found to be the only men in the house, and the father being drunk and asleep on the sofa the policeman brought the prisoner outside, when Charles Simpson at once said, "That's the man that threw the stone."

Save as above there was no direct evidence as to whether the prisoner did or could hear the said words uttered by the said woman.

There was no evidence as to who the said woman was, and she was not called as a witness.

In summing up the learned Chairman directed the jury's attention, among other matters, to the said evidence as to the said words uttered by the said woman.

After he had summed up the case the jury retired to consider their verdict. After the jury had retired the prisoner's counsel contended: (1.) That the evidence as to the said words uttered by the woman was not admissible, inasmuch as the said words were not proved by the prosecution to have been uttered in the presence

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

or hearing of the prisoner. (2.) That the evidence as to the said words uttered by the woman should be withdrawn from the consideration of the jury. (3.) That the fact that counsel did not ask immediately after the evidence as to the said words uttered by the woman had been given that the said evidence should be struck out, or raise any objection to the same before the jury retired, could not be allowed to prejudice the prisoner in a criminal case.

The learned Chairman did not accede to the contentions of the prisoner's counsel on the ground that they were made too late, but consented to state this case.

The case found that there was ample evidence of identification against the prisoner to go to the jury other than the evidence as to the statement made by the said woman.

The prisoner was found guilty.

The question for the consideration of the court was: Does the fact, that the evidence as to the said statement made by the woman was left to the jury, vitiate the verdict? If so, the conviction was to be quashed, otherwise to stand.

No one appeared on behalf of the prisoner.

Shand, on behalf of the prosecution, admitted that the evidence as to the woman's statement was inadmissible, but submitted that, inasmuch as it was a statement volunteered by the witness, and not made in answer to any question, and as no objection had been made to its reception until after the chairman had left it to the jury, and commented upon it, it was too late to object now. The case found that, apart from the evidence objected to, there was ample evidence of the identification of the prisoner, and that being so, the admission of the statement was immaterial, and the conviction should be upheld. According to the report of the case of *Rex* v. *Ball*, in Russ. & Ry. C. C., at p. 133, although it appears upon a case reserved that evidence has been admitted at the trial which ought not to have been received, yet, if the judges are of opinion that there is ample evidence to support the indictment, after rejecting such improper evidence, they will not set aside the conviction. *Rex* v. *Ball* was also reported in 1 Camp. 324, from which it would appear that all the judges were of opinion that the evidence there objected to was really admissible. In what appears to be a note of the reporter in Russ. & Ry., however, it is said that: "Whether the judges on a case reserved would hold a conviction wrong on the ground that some evidence had been improperly received, when other evidence had been properly admitted that was sufficient of itself to support the conviction, the judges seemed to think must depend on the nature of the case and the weight of the evidence. If the case were clearly made out by proper evidence in such a way as to leave no doubt of the guilt of the prisoner in the mind of any reasonable man, they thought that, as there could not be a new trial in felony, such a conviction ought not to be set aside because some other evidence had been given which ought not to have been received; but if the case, without such improper evidence, was not so clearly made out, and the improper evidence might be supposed to have had an effect on the minds of the jury, it would be otherwise." In support of this note *Margaret Tinkler's* case (1 East P. C. 354) is cited, and it is stated that there "all the judges thought the evidence of a witness of the name of Parsons ought not, in strictness, to have been received; but, as the evidence was ample without it, the judges did not think themselves bound to stop the course of justice. In *Rex* v. *Oldroyd* (Russ. & Ryan C. C. 89) *Margaret Tinkler's* case is mentioned as an authority for the proposition that where there is sufficient evidence apart from the inadmissible evidence the court will not quash a conviction. In *Reg.* v. *Fuidge* (7 L. T. Rep. N. S. 777; 9 Cox C. C. 430; L. & C. 390; 10 Jur. N. S. 160) a prisoner having been committed on one charge of false pretences only was indicted without leave on a second charge, and it was held that the part of the indictment as to the second charge should have been quashed; and that, evidence having been received in support of that charge which would have been inadmissible had the first charge stood alone, the conviction could not be supported. In that case, however, objection was taken to the admissibility of the evidence before it was admitted.

Lord COLERIDGE, C.J.—I am of opinion that this conviction must be quashed. Evidence was received at the trial of a statement made by a lady as to where the prisoner had gone, which tended to his identification; and it is stated that there was no evidence as to whether the prisoner did or could hear such statement. The statement not being made in the hearing of the prisoner was, therefore, not admissible. The prisoner was defended by counsel, who in the exercise of his discretion did not object at the time the evidence was given, and the case proceeded, and the chairman summed-up the case to the jury. Now, the chairman very justly tells us he did leave this bit of chatter, I will call it, which was not evidence, to the jury, and, amongst the other evidence which was properly received, this statement which ought not to have been received went to the jury. The prisoner's counsel objected that it ought not to have been left to the jury, but the learned chairman refused to withdraw it. I express no opinion, how far the technical withdrawal of the statement would have been sufficient; anyhow, the learned chairman refused to withdraw it, and the question is, can the conviction under such circumstances stand? If it had been the verdict of a jury in a civil action prior to the Judicature Act, it certainly could not have stood, because the rule with regard to civil actions then was, that if any evidence, however small, which was not admissible evidence, but which might have affected the verdict, had been received and allowed to go to the jury, the party against whom the verdict was given was entitled as of right to a new trial. The court always said that they could not, and would not, weigh the evidence and consider what effect it might or might not have had upon the minds of the jury. Therefore, in such a case a new trial would have been granted as a matter of right according to the unvaried practice. Can it be said that, when the Judicature Act was passed, there was any difference between a civil and a criminal case in that respect? I am clearly of opinion that it cannot, and for this reason, that the consequences of the two proceedings would be quite different. In a civil case it is true that the error might have been redressed by means of a second trial;

but in a criminal case the error could not have been redressed. In each case, therefore, the decision would have been vitiated by the admission of evidence part of which was legal and part illegal. I am of opinion, therefore, that in this case evidence having gone to the jury, which evidence should not have been left to them, their verdict must be taken to have proceeded upon improper evidence, and the conviction cannot therefore be sustained. That would have been my opinion had there been no cases on the matter. The cases brought to our notice, however, do not appear to me to warrant the inferences which have been drawn from them. The case with regard to the forgery of bank-notes turns upon a clear rule of law, and decides clearly what has been the invariable practice, that acts done by a prisoner of the same character as the act charged in the indictment are to a certain extent admissible in evidence in order to show guilty knowledge; that is to say, that where an act is a guilty act or not according to the knowledge of the prisoner, acts of his of the same sort tending to show his knowledge are receivable in evidence. The case in Lord Campbell's Reports turns entirely upon the reception of evidence to show guilty knowledge, and has nothing to do with this case. Nor has *Tinkler's* case anything to do with this case, because there the question was whether the declarations made by a woman before her death were receivable in evidence, and two objections to its reception were made: the first, because she was *particeps criminis* in her own death, and therefore her evidence required corroboration; and the second, because the declarations were not made under the well-established rule which required that all hope of recovery should have gone from her mind when they were made. Now, these objections were overruled on the grounds: the first, because there was another count in the indictment in which the woman was not charged as *particeps criminis*, and also because there was abundant evidence of corroboration if it were necessary; and the second objection, because the time at which the state of mind of the deceased was to be considered was the time when she made the declarations, and the fact that between that time and her death her hopes revived did not affect the rule admitting her declarations as dying declarations. Therefore, the only two cases cited before us are not cases which have any bearing upon the present case. In criminal cases, a judge must take care that evidence is not admitted which is inadmissible, and that the verdict of the jury is not founded upon any evidence but that which is by law allowed; and evidence having been improperly left to the jury in the present case, the conviction must, in my opinion, be quashed.

POLLOCK, B.—I have come to the same conclusion, and am of opinion that the question is of some importance, because it might arise also where a judge had allowed documentary evidence to be put in which should not have been put in. It is clear to my mind that, if on a prosecution for bigamy the judge allowed an informal certificate of the marriage to go to the jury with the evidence of any person who was present on the occasion, a conviction under such circumstances could not stand, and it could not be sufficient after that to say there was ample evidence from bystanders that the marriage took place. If it were so, the consequence would be to put on this court the functions of the jury. I am therefore of opinion that this conviction should be quashed.

STEPHEN, J.—I am of the same opinion. There are two cases which have been cited, the first of which was *Rex* v. *Ball* (*ubi sup.*) in 1807. Upon that case there are two observations which arise: the first, that the last paragraph of the report on p. 133 of Russell and Ryan's Crown Cases is obviously not a part of the judgment of Chambre, J. at all, but merely an observation made by the reporter of the case; secondly, that observation appears to be entirely unsupported by any authority at all, and appears to have arisen from a misunderstanding of *Tinkler's* case. The note as to that case says that, "in *Margaret Tinkler's* case, all the judges thought the evidence of a witness of the name of Parsons ought not, in strictness, to have been received; but, as the evidence was ample without it, the judges did not think themselves bound to stop the course of justice." Now, from the statement of the facts in 1 East P. C. it appears that the judges thought that the evidence of the statements made by the deceased woman Parkinson, not Parsons, ought to have been received; and it was not because they thought the evidence was ample without the evidence then in question that they upheld the conviction. They said nothing about the evidence being ample without it, for they all thought that the statements of the deceased woman had been properly received, the only difference being that some thought the statements required corroboration, while others thought they did not. The note, therefore, is wholly incorrect, and conveys an entirely wrong idea of what the law is. In my opinion, this evidence being inadmissible, and having been received, renders the conviction bad, and it must be quashed.

MATHEW, J.—I am of the same opinion. We have to lay down a rule which shall be applicable whether a prisoner is defended by counsel or not. In either case it is the duty of the judge to lay down the law, and above all to warn the jury against acting on evidence which they ought not to act on. Here the judge directed them to act on evidence which was not evidence, and I am therefore of opinion that the verdict ought not to stand.

WILLS, J.—I am of the same opinion; and I do not think any fault can be found with the prisoner's counsel for assuming that a proper direction would be given to the jury. However, that is immaterial, for, if a mistake has been made by counsel, it would not relieve the judge from his duty of seeing that the jury did not act on improper evidence. It is sometimes said, and very erroneously, that the judge is bound to be counsel for the prisoner; but, although he is not to act as counsel, he must at least take care that the prisoner is not convicted on any evidence but that which is legal. The conviction must, in my opinion, be quashed. *Conviction quashed.*

Solicitor for the prosecution, *E. H. Woodcock*, Wigan.

Saturday, March 5, 1887.

(Before Lord COLERIDGE, C.J., POLLOCK, B., STEPHEN, MATHEW, and WILLS, JJ.)

REG. *v.* HANDS AND OTHERS. (*a*)

Criminal law — Larceny — Automatic box containing cigarettes — Cigarette lawfully obtainable by dropping a penny into box—Attaining cigarette by means of a brass disc of no value.

Against the wall of a public passage was fixed what is known as an "automatic box," the property of a company. In such box was a slit of sufficient size to admit a penny piece, and in the centre of one of its sides was a projecting button or knob. The box was so constructed that upon a penny piece being dropped into the slit and the knob being pushed in, a cigarette would be ejected from the box on to a ledge which projected from it. Upon the box were the following inscriptions: "Only pennies, not halfpennies;" "To obtain an Egyptian Beauties cigarette place a penny in the box and push the knob as far as it will go." The prisoners went to the entrance of the passage, and one of them dropped into the slit in the box a brass disc about the size and shape of a penny, and thereby obtained a cigarette, which he took to the other prisoners.

Held, that the prisoners were guilty of larceny.

CASE reserved by the Quarter Sessions for the county of Gloucester, as follows:—

Prisoners Hands and Phelps were severally indicted for that on the 29th Nov. 1886, they did feloniously steal, take, and carry away one cigarette, of the goods and chattels of Edward Shenton, against the peace of our said Lady the Queen.

Prisoner Jenner was indicted for an attempt to steal, &c.

Prisoners Jenner and Phelps pleaded guilty.

Prisoner Henry Hands pleaded not guilty and was given in charge to the jury.

J. D. S. Sim appeared for the prosecution.

Moore appeared for the prisoner Hands.

This is a case of larceny from what is known as an "automatic box," and the circumstances are as follows:

Mr. Edward Shenton is the lessee of the Assembly Rooms at Cheltenham, and has fixed against the wall of the passage leading from the High-street to the rooms an "automatic box."

This box presents the appearance of a cube of about eight or ten inches, and in the upper right-hand corner (facing the operator) of the front face there is a horizontal slit or opening of sufficient size to admit a penny piece.

In the centre of the face is a projecting button or knob about the size of a shilling.

In the lower left-hand corner is a horizontal slit or opening of sufficient size to allow of the exit of a cigarette.

There is an inscription on the face of the box:

Only pennies, not halfpennies.

Also:

To obtain an Egyptian Beauties cigarette place a penny in the box, and push the knob as far as it will go.

If these directions are followed a cigarette will be ejected from the lower slit on to a bracket placed to receive it.

The box is the property of the Automatic Box Company. The cigarettes with which it was charged belonged to Mr. Shenton.

For some time past Mr. Shenton has found, on clearing the box, which he did once or twice a day, that a large number of metal discs (brass and lead) of the size and shape of a penny had been put in, and a corresponding number of cigarettes had been taken out.

In consequence of this discovery a watch was set upon the box, and, upon the day named in the indictment, the box having been previously cleared, two gentlemen were seen to go to it, each put something in, and each took a cigarette, as it appeared.

The box was then examined and found to contain one English penny and one French penny. These coins were left in. The box was locked and the watch was again set.

Shortly after this, three lads (afterwards proved to be the three prisoners) were seen to come to the entrance of the passage, one of them came in, went to the box, put something in, obtained a cigarette, and then rejoined the other two at the entrance. This was repeated a second time. The third time it was observed that the box would not work, and while the lad, who afterwards was found to be the prisoner Jenner, was pushing at the knob, the watchman came from his place of concealment and put his hand upon him.

The box was then opened, and a piece of lead was discovered stuck in the "valve," which had the effect of preventing the machinery of the box from working.

It was then found that the box contained (besides the English and French pennies already mentioned) two discs of brass about the size and shape of a penny.

No other coin or metal piece was found in the box, and no one (but the three lads as above-mentioned) had approached it after the two gentlemen who had put in the English and French pennies.

The prisoner Jenner was given in charge to the police, and the two other prisoners were subsequently apprehended.

Upon being brought together at the police station the prisoners all made statements more or less implicating themselves and each other.

The prisoner Hands said:

Me and Jenner met Phelps about 7.45 p.m., Phelps said, "I want to go to Dodwells." I did not go, and we went down into the High-street. Phelps and Jenner stopped by the Assembly Rooms and went in, I remained outside. I believe Jenner was caught at the box. Mr. Shenton's man took him inside. I afterwards put a penny in the box and had a cigarette myself. The pieces of brass produced are cut in our shop, the blacksmith's shop at Mr. Marshall's.

In leaving the case to the jury the learned Chairman told them that they would have to consider: First, was there a theft committed; that is, was Mr. Shenton unlawfully deprived of his property without his knowledge or consent? Secondly, if that were so, were they satisfied that the prisoner (Hands) took any part in the robbery? He also told them that if they thought that the prisoner was one of the three lads who came to the entrance of the passage, and that he was there with the others for the common purpose of unlawfully taking the cigarettes from the box, or that he afterwards partook of the proceeds of the robbery, or that he had taken a part in making the discs knowing for what purpose they were to

(*a*) Reported by R CUNNINGHAM GLEN, Esq., Barrister-at-Law.

be used, that they would be justified in finding him guilty, although he might not actually have put the discs into the box or have taken out a cigarette.

The jury found the prisoner (Hands) guilty, and, upon motion in arrest of judgment on the ground that "the facts as disclosed by the evidence were not sufficient to constitute a larceny," all the prisoners were allowed to stand out on bail until the next quarter sessions.

The question for the court was, whether the facts as disclosed by the evidence were sufficient to constitute a larceny?

No one appeared on either side.

Lord COLERIDGE, C.J.—In this case a person was indicted for committing a larceny from what is known as an "automatic box," which was so constructed that, if you put a penny into it and pushed a knob in accordance with the directions on the box, a cigarette was ejected on to a bracket and presented to the giver of the penny. Under these circumstances there is no doubt that the prisoners put in the box a piece of metal which was of no value, but which produced the same effect as the placing a penny in the box produced. A cigarette was ejected which the prisoners appropriated; and in a case of that class it appears to me there clearly was larceny. The means by which the cigarette was made to come out of the box were fraudulent, and the cigarette so made to come out was appropriated. It is perhaps as well to say that the learned chairman somewhat improperly left the question to the jury. He told them that, if they thought that the prisoner Hands was one of the three lads who came to the entrance of the passage, and that he was there with the others for the common purpose of unlawfully taking the cigarettes from the box, or that he afterwards partook of the proceeds of the robbery—he did not say, larcenously or feloniously; and he further directed them that, if they thought the prisoner had taken a part in making the discs knowing for what purpose they were to be used, they would be justified in finding him guilty, although he might not actually have put the discs into the box or have taken out a cigarette. Now I am not quite sure that simply the fact of doing an unlawful thing, as joining in the manufacture of a disc that someone else was to use, would make him guilty of larceny. He might be guilty of something else, but I doubt very much whether he could be convicted of larceny. As upon the facts of the case, however, I do not think that the jury could have been misled; and as upon the facts there was undoubtedly a larceny committed, I am not disposed to set aside the conviction.

POLLOCK, B., STEPHEN, MATHEW, and WILLS, JJ., concurred.

Conviction affirmed.

Saturday, March 5, 1887.

(Before Lord COLERIDGE, C.J., POLLOCK, B., STEPHEN, MATHEW, and WILLS, JJ.)

REG. *v.* RILEY. (*a*)

Criminal law—Attempt to rape—Denial by prosecutrix of previous connection with prisoner—Admissibility of evidence to contradict denial.

Upon an indictment which charges a prisoner with an attempt to commit a rape, the prosecutrix may be cross-examined as to the fact of her having had connection with the prisoner previously to the commission of the alleged offence; and should she deny the fact of such connection having taken place, evidence may be given in order to contradict such denial.

CASE reserved for the consideration of this court by the Chairman of Quarter Sessions for the hundred of Salford, in the county of Lancaster, in which it was stated that:—

1. At the intermediate sessions held at Manchester in the said county for the hundred of Salford, on the 18th Aug. 1886, James Riley was tried upon an indictment charging him with an assault upon one Alice Cresswell with intent to commit a rape upon her; there were two other counts in the indictment, one charging an indecent assault, the other a common assault.

2. The defence raised by the prisoner's counsel was, that whatever was done by the prisoner to the said Alice Cresswell was done with her consent. The said Alice Cresswell was at the time of the commission of the alleged offence by the prisoner a woman of or about thirty years of age.

3. She was cross-examined by the counsel for the prisoner as to previous repeated voluntary acts of connection with the prisoner at specified times and places before the time of the commission of the alleged offence, which she denied, and swore that she never at any time or place had had connection with the prisoner.

4. Counsel for the defence proposed to call several witnesses to prove these several alleged acts of connection between the prosecutrix and the prisoner, but the court refused to allow the said witnesses to be called or examined for the purpose of giving such evidence, upon the ground that such evidence was not admissible for the prisoner upon the said indictment, and that the counsel for the prisoner was bound to take the answer of the prosecutrix for the purposes of that trial, but the court reserved for the opinion of this honourable court the question as to whether it was right in so ruling.

The prisoner was convicted on the first count of the said indictment, but the court respited judgment and admitted him to bail pending the decision of this honourable court.

If the court should be of opinion that the court was right in rejecting the said evidence, the said conviction is to stand; otherwise to be quashed.

Addison, Q.C. for the prisoner.—There are two grounds upon which this evidence was admissible: the first, that it went directly to the issue, and not to a collateral matter; the second, that it went directly to the credibility of the witness as to a material issue. The relations between the man

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

and woman were immediately pertinent to the issue, whether or not the woman had consented to what the prisoner was alleged to have done. The rules as to cross-examination, with regard to connection with other men, did not apply, and even as to such cases the courts had held with considerable doubt that, as the evidence did not go directly to the question at issue or to the credibility of the witness, it was inadmissible. In the present case the doubt had arisen from the use of the word "probably," in art. 134 of Stephen's Digest of the Law of Evidence, where it is stated that a woman against whom an attempt to ravish has been committed may be asked whether she had connection on other occasions with the prisoner, "and if she denies it she probably may be contradicted." [STEPHEN, J.—That was merely intended to intimate a doubt on the authorities as they stood at that time.] I submit that, with the omission of the word "probably," the article is an accurate statement of the authorities as they now stand. The principle on which rebutting evidence is admissible is that, if it is as to a matter in issue, it may be given, but if it is entirely collateral it cannot be given. In *Harris* v. *Tippett* (2 Camp. 638), Lawrence, J. said: "I will permit questions to be put to a witness as to any improper conduct of which he may have been guilty, for the purpose of trying his credit; but when these questions are irrelevant to the issue on the record, you cannot call other witnesses to contradict the answers he gives. No witness can be prepared to support his character as to particular facts, and such collateral inquiries would lead to endless confusion." In *Rex* v. *Martin* (6 C. & P. 562) it was held by Williams, J. that, on the trial of an indictment for rape, the prosecutrix may be asked whether, previously to the commission of the alleged offence, the prisoner has not had intercourse with with her by her own consent, on the ground of the relevancy of the question; and in *Rex* v. *Aspinall*, referred to in the note to that case, but which is wrongly cited, for I have been unable to find it, Hullock, B. is said to have held that the prisoner might show that the prosecutrix had been previously connected with him. (*a*) In *Reg.* v. *Holmes* (25 L. T. Rep. N. S. 669; 12 Cox C. C. 137; 1 C. C. R. 334) Kelly, C.B., in holding that witnesses could not be called to prove that a witness had previously had connection with persons other than the prisoner, said: "The general rule of evidence is that, if a question be put in cross-examination as to a collateral point, the answer must be taken for better or worse;" and in referring to *Rex* v. *Martin*, he said that there "the evidence was as to the prosecutrix having previously had connection with the prisoner. And such evidence is undoubtedly admissible, for it has a direct bearing upon the question of consent." [POLLOCK, B.—You will find in the report of that case, in the Law Journal, *i.e.*, vol. 41, M. C., p. 12, that Byles, J. is reported as having said, in the course of the argument: "In the case of connection with the prisoner it is material to see on what footing she stood towards him, but that is not so with respect to other men."] In *Reg.* v. *Cockcroft* (11 Cox. C. C. 410), the question was again much the same as in *Reg.* v. *Holmes*; and Willes, J. said: "You may cross-examine the prosecutrix with respect to particular acts of connection with other men; but, if she denies them, you are bound by her answer. You may not call those men to contradict her; you may, however, examine her with respect to particular acts of connection with the prisoner, and if she denies them, you may call witnesses to contradict her." The evidence was therefore improperly rejected in the present case, and the conviction should not be upheld.

No one appeared in support of the conviction.

Lord COLERIDGE, C.J.—I am of opinion that this conviction must be quashed, on the ground that evidence material to the issue was rejected by the court. The indictment was for an assault committed by the prisoner upon a woman with intent to commit a rape upon her; and the questions and answers that were rejected were tendered for the following purpose; namely, that the woman having denied that she had had connection with the individual accused of assaulting her, it was sought *ab aliunde* to prove that at certain specified times and places before the time of the commission of the alleged offence, she had voluntarily had connection with the prisoner. It appears to me clear that such evidence was admissible. Now, it has been held over and over again, that where evidence is denied by the prosecutrix with regard to acts of connection committed by her with persons other than the prisoner, she cannot be contradicted. The rejection of such evidence is founded on good common sense, not only because it would put very cruel hardship on a prosecutrix, but also on the ground that the evidence does not go to the point in issue, that point being whether or not a criminal assault has been made upon her by the prisoner. To admit evidence of connection previously with persons other than the prisoner would be plainly contrary to the most elementary rules of evidence; but to reject evidence as to the particular person is another matter. Because not only does it render it more likely that she would or would not have consented, but it is evidence which goes to the very point in issue. Take the case of a woman having lived without marriage for two or three years with a man before the assault; could it be contended that, had she denied it, proof of that sort was not material to the issue; and, if material to the issue, that if denied evidence to contradict it could not be given. I see that Hullock, B. is reported to have decided practically the very point upon which our opinion is now sought. That appears from a note to the case of *Rex* v. *Martin* (6 C. & P. 562), where the case of *Rex* v. *Aspinall* is cited. If that case can be found it is directly in point, but like Mr. Addison I have looked, and I confess I cannot find the case. (*a*) It is enough for us to say, however, in the absence of that case, that the decision is common sense; and on the ground not only of

(*a*) The reference in the note to *Rex* v. *Martin* should have been to the 3rd edition of Starkie's Law of Evidence, vol. 3, p. 952, where the following note is to be found: "Nor can the prosecutrix be asked whether she has not had connection with another man, or with a person named. The prisoner may, however, show that the prosecutrix has been previously criminally connected with himself: (*Rex* v. *Aspinall*, cor. Hullock, B., York Spring Assizes 1827.)

(*a*) See note, *ante*.

authority but of good sense, I am of opinion, that this evidence ought not to have been rejected, and that, as it was rejected, the conviction must be quashed.

POLLOCK, B.—I agree. The only question is, was the evidence tendered relevant to the issue? If it is only as to evidence of character, as evidence with regard to connection with other men, it is inadmissible. But the moment it is to show that she had had connection with the prisoner previously to the assault it becomes material evidence and must be admitted. The conviction must therefore be quashed.

STEPHEN, J.—I am of the same opinion entirely, and have hardly anything to add. I think that the weight of authority was decidedly in the direction in which this decision will place it. Although some of the authorities were rather in the nature of dicta than of absolute judgments, I did not think when I wrote upon the subject that there could be much room for doubt; but at the same time, in the absence of direct authority, I did not feel that my statement could be made without suggesting that there might be doubt. Now, however, by this decision the doubt, if it existed, is removed. I may add, that our observations with regard to evidence as to connection with other men being inadmissible are not intended to exclude or conflict with the decisions as to the admissibility of evidence as to prostitution.

MATHEW and WILLS, JJ. were of the same opinion.

Conviction quashed.

Solicitor for the prisoner, *S. F. Butcher*, Bury.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 12 *and* 13, 1887.

(Before Lord ESHER, M.R., BOWEN and FRY, L.JJ.)

THE OWENS COLLEGE (apps.) *v.* THE OVERSEERS OF THE POOR OF CHORLTON-UPON-MEDLOCK (resps.). (*a*)

Poor rate—Rateable value—Premises vested in trustees for statutory purposes—Inability to rent premises—Possible tenant.

By certain private Acts of Parliament the appellants were incorporated for the purposes of establishing and maintaining an educational college. They were empowered to acquire and hold land as a site and erect college buildings thereon, but they had no power to sell or let the site so acquired.

The said college could not be carried on at a profit as a collegiate institution because the necessary annual expenses would always exceed the amount to be derived from students' fees.

The appellants having in pursuance of their Acts of Parliament purchased in fee simple certain land as a site for their college, and having erected buildings thereon which they used for the purposes of a college, were rated by the respondents in respect of such land and premises on a gross estimated rental of 3833*l. Upon an appeal by the appellants against the rate it was found as a fact that the college premises, if let for any purposes to which (without considerable structural alteration) they were capable of being applied, would not let for more than* 1300*l. per annum, which would make the rateable value* 1083*l.* 6*s.* 8*d. In arriving at that valuation the appellants themselves were not taken into consideration as possible tenants. The appellants were willing to be rated upon that rateable value, but not upon any larger amount.*

Held, that (assuming the appellants to be rateable upon more than a nominal amount), the rateable value must be reduced to 1083*l.* 6*s.* 8*d., because the appellants, being themselves unable to rent premises in consequence of the statutory provisions, were properly excluded from consideration as possible tenants.*

Reg. *v.* School Board for London (*ante*, p. 260; 55 *L. T. Rep. N. S.* 384; 17 *Q. B. Div.* 738) *explained.*

THIS was an appeal from a judgment of the Queen's Bench Division (Stephen and Smith, JJ.), reported *ante*, p. 285; and 55 L. T. Rep. N. S. 737.

Upon the special case stated the Queen's Bench Division (Stephen and Smith, JJ.) gave judgment in favour of Owens College: (*ante*, p. 285; 55 L. T. Rep. N. S. 737.)

The overseers appealed.

Hopwood, Q.C. and *Coghill* for the overseers.—The rental of 1300*l.*, which is the gross annual rental at which the appellants say they ought to be rated, has been arrived at without reference to the appellants themselves as possible tenants of the college buildings. That is a wrong principle, and has been decided to be so:

Reg. v. *The School Board for London*, *ante*, p. 260; 55 L. T. Rep. N. S. 384; 17 Q. B. Div. 738.

In that case it was held that the School Board itself ought to be considered as a possible tenant, and the values calculated upon the rent which the board might reasonably be expected to give for the premises for use as schools.

Henn-Collins, Q.C. and *Smyley* for the Owens College.—The governors of the college cannot possibly be tenants of the buildings. They have acquired the site under their Acts of Parliament, and those Acts in effect provide that the site when once acquired shall be held for ever for the purposes of the college, and the Acts in effect forbid the sale or transfer of the site. It is therefore impossible to consider the college authorities as themselves possible tenants of the site and buildings. [They were stopped.]

Hopwood, Q.C. in reply.

Lord ESHER, M.R.—In this case the question really seems to be at which of the two valuations found in the special case the Owens College ought to be rated. The case does not oblige us to decide whether the appellants are not rateable at all, or are only rateable at a nominal amount; it no doubt gives us the opportunity of so deciding, but I do not think that it becomes necessary to decide that question, inasmuch as the appellants are willing to be assessed upon a gross estimated rental of 1300*l.* The only question therefore is whether the assessment is to be upon a gross estimated rental of 1300*l.*, and a rateable value of 1083*l.* 6*s.* 8*d.*, or upon a larger

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

sum. Now paragraph 12 of the special case shows, and this was the view taken by the Divisional Court, that in arriving at the figure of 1300*l.* the arbitrator has abstained from considering what the appellants themselves would be willing to give as a rental for the site and buildings supposing that they themselves wanted to become the tenants of them. In that case it might be that the appellants would be willing to give more than anyone else because they have important duties to perform under their Acts of Parliament, to which such a site and buildings are essential. If then the appellants themselves can be considered as possible tenants, the valuation has been arrived at on a wrong basis, because that consideration has been left out of the calculation. The test for the determination of the question whether the appellants can properly be considered as possible tenants seems to depend upon whether in our view of their Acts of Parliament they can legally be tenants of their site and buildings for the purposes of their Acts; because, if our view is that they cannot, then I think it follows that they ought to be excluded from the class of possible tenants of the premises. In determining the question whether they can, under their Acts of Parliament, hold the site as tenants, I need not examine minutely all the provisions of the Acts. There may be no express prohibition against their taking lands as tenants for the purposes of a site; but, in looking at these Acts of Parliament, we must bear in mind that the appellants are created as a statutory corporation by the Acts, and exist only for the purposes of the Acts, and that consequently they can only have the powers which are given to them by the Acts. It seems to me that, looking at the terms of the various provisions of the Acts, it is a necessary implication that the governors could not become tenants of any site for the purposes of the college, but that the only site which they were authorised to acquire was a site which they were to take as owners in fee simple. It seems to me to follow from this that the appellants ought not to be taken into consideration as among the class of possible hypothetical tenants. Are they to be taken as seeking to become tenants of the site when their Acts of Parliament in effect say that they shall not be tenants of it? It seems to me that the proposition itself involves the answer to it. I abide by the view which I clearly had in my mind in the case of *Reg.* v. *School Board for London* (*ubi sup.*). What I decided in that case was, that the School Board ought to be taken into account as a possible tenant because the School Board could be tenant of the school premises, but I went on to say this: "If by the terms of any statute it could not legally be tenant it would be excluded from the calculation." I confess that I can see no answer to either part of this proposition. If the parties can be tenants, then I think they must be taken into consideration as part of the class of possible tenants; but if they cannot, by reason of some disability imposed on them by statute, then I cannot escape from the conclusion that it is impossible to take them into consideration. That is all that it is necessary to decide in this case, and I go no further. I put my judgment on this sole ground, that the arbitrator was right in excluding from his calculation the rent which the appellants themselves might be reasonably expected to give for these premises, because by reason of the statutes they never could be tenants of the premises. I think this case is a corollary upon the *School Board* case, and follows from it. For these reasons I think that this appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion. The site and buildings of the college has been purchased by the appellants and has passed to them. I do not think that we need consider whether they had originally power to rent a site; they have, as a fact, bought one, and they can neither sell it nor let it, but must, as a statutory corporation, continue to occupy it for their statutory purposes. Looking to the provisions of the Acts of Parliament by which the appellants are incorporated in order to see what their powers are and how they are limited, it appears, I think, to have been intended that their powers of sale and leasing should be confined to those cases expressly mentioned, which exclude the power of letting or selling the site of the college buildings, and, in my opinion, the true construction of the Acts is that the appellants have no power to sell or lease that site. That being so, how does that state of things affect the question of rating the site? Have we, in the terms in which the special case is stated, any material for holding that the premises ought to be assessed more highly than upon a gross estimated rental of 1300*l.*? The basis of rating is declared by the Parochial Assessment Act to be an estimate of the net annual value of the hereditament; that is to say, that it is founded on the supposition of rent, and that rent is such a rent as people might reasonably be expected to pay for the hereditament from year to year, subject to certain deductions. Now, if the premises were so circumstanced that they never could be let at all for any rent, then it might perhaps be said that they could not properly be rated, but we are not asked to consider that view of the case here. In estimating the rent at which the hereditament may reasonably be expected to let, while on the one hand you must not take into account what an unreasonable person might give, on the other hand it seems to me that you must take into consideration the fact that people who have statutory duties to perform, to which the premises are essential, would compete for the tenancy. So that if any class of persons, whether bound by statute to obtain the use of such premises or not, may reasonably be expected to rent the premises, then their existence must be taken into consideration. That seems to me to be the effect of the case of *Reg.* v. *School Board for London* (*ubi sup.*). Therefore, the material question which we have to consider here is, how far the governors of the Owens College ought to be excluded from the list of possible tenants of these premises. I think that they must be altogether excluded from the class of persons who might reasonably be expected to give a rent for these premises, because they cannot, as matters now stand, ever give a rent for the site and buildings of their college; they never can be asked to give one; their Act of Parliament imposes a fetter upon them, the result of which is that they can only now hold the premises as owners in fee simple. We then must consider what other possible tenants would give for them, and we must consider those other possible tenants as fettered in their use of the premises by the

restrictions existing under the Acts of Parliament applying to the appellants, and as only giving such a rent as the premises would command when thus affected by the statutory conditions, and in the state in which the Act of Parliament says they are to remain. Upon this point the arbitrator who has stated the case has found the respondents upon the case out of court, because he has found that no tenant would give a rent of more than 1300*l.* for the premises as they exist for any purpose, and the appellants do not seek to reduce the assessment below that figure. Therefore, excluding the existence of Owens College from consideration in this sense, that the appellants cannot be considered as being themselves in a position to rent the premises, I am of opinion that the judgment of the court below was right, and that this appeal must be dismissed.

Fry, L.J.—The respondents in this court support the judgment of the court below by two arguments. First, they say that there never could be any tenant of these premises at all in consequence of the restrictions imposed by the Acts of Parliament which deal with Owens College, and therefore that the premises are not rateable at all. I do not propose to go into that question. Next they say that, inasmuch as they are incapable of hiring premises for the purposes of their Acts, they cannot properly be considered as possible tenants of such premises, and therefore that any rent which they might reasonably be expected to give ought to be left out of the consideration. The question, therefore, seems to me to be whether the governors are prohibited by their statutes from hiring a site for their college. Looking to the Act of 1870, it appears to me that it contemplated not the foundation of an institution which could be carried on in a hired building, but the establishment and maintenance of a college to be used for ever for the purposes of education; and for that purpose it enables the governors to acquire and hold lands, and I think the language clearly points to the establishment of a permanent institution and structure. Under that Act the governors acquired the piece of land now in question, and then agreed with the trustees of Owens' will that the original Owens College established under the trusts of the will should be amalgamated with the new institution, and that the lands so purchased should be made over to the governing body of the two institutions; that agreement was incorporated by the Charity Commissioners in a scheme drawn up by them, which scheme received the sanction of the Legislature in the Act of 1871. It seems to me that from and after that time the land became dedicated for ever as the site of the buildings of the college, and that the appellants are now incapable of hiring any other lands for that purpose, and that therefore the respondents in this court are well founded in their contention that, being prohibited from hiring land, they cannot properly be taken into consideration as possible tenants. I therefore think that this case can be decided upon the smaller and narrower of the two arguments put forward, and that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants on the case, *Bower, Cotton*, and *Bower*, for *J. P. Aston* and *Harwood*.

Solicitors for respondents, *Hopwood* and *Sons*.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Monday, Nov. 29, 1886.

(Before Denman and Stephen, JJ.)

Reg. on the prosecution of John Pritchard *v.* The Mayor and Corporation of the Borough of Bangor. (*a*)

Municipal election — Councillor — Eligibility — Retiring alderman—Duty of returning officer—Declaration of result "forthwith"—Public notice of name of candidate elected—The Ballot Act 1872 (35 *&* 36 *Vict. c.* 33), *s.* 2, *and sched.* 1, *part* 1, *rr.* 45, 46—*The Municipal Corporations Act* 1882 (45 *&* 46 *Vict. c.* 50), *ss.* 53, 58.

At the close of the poll for the election of a councillor for a ward of a borough, P., one of the two candidates, objected that R., the other candidate, was ineligible on the ground that he was an alderman of the borough. The returning officer counted the votes, and found that R. had a majority. He communicated the numbers to the mayor, not intending thereby to declare R. to be elected within the meaning of sect. 2 *of the Ballot Act* 1872 (35 *&* 36 *Vict. c.* 33), *and the mayor publicly announced them from the steps of the building. On the next day the returning officer issued a public placard declaring P. elected, and P. made and subscribed the declaration required by sect.* 35 *of the Municipal Corporations Act* 1882, *and claimed to vote at a meeting of the council. The mayor having refused to receive P.'s vote:*

Held, on argument of rule for mandamus, that R., being an alderman of the borough, was thereby rendered ineligible for the office of councillor; that the declaration of the result on the night of the election had no effect; that the public notice issued by the returning officer on the next day was within the requirements of the Ballot Act and the rules thereunder; and that, P. being duly returned, a mandamus must issue commanding the mayor to receive and count his vote.

This was a rule *nisi* calling upon the mayor and corporation of the borough of Bangor to show cause why a writ of *mandamus* should not issue commanding them to receive and count the vote of John Pritchard at the meetings of the town council of Bangor, he having been duly elected a member of the town council.

It appeared that on the 23rd Oct. last John Pritchard and Meshack Roberts were duly nominated, in writing, as candidates for the office of councillor for the south ward of the borough of Bangor, Meshack Roberts being at that time an alderman of the borough, an office which he continued to hold until the 9th Nov. following.

On the 25th Oct. the mayor attended at the council chamber in accordance with the 9th rule of part 2 of the 3rd schedule of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50) to decide on the validity of every objection made in writing to a nomination paper, and John Pritchard then attended in person and duly objected in writing to the validity of the nomination paper of Meshack Roberts, on the ground that he, being an alderman of the borough, was ineligible for the office of councillor. The mayor

(*a*) Reported by Joseph Smith, Esq., Barrister-at-Law.

thereupon, by a decision given in writing, disallowed the objection.

On the 2nd Nov. the election took place, an alderman of the borough being duly assigned as returning officer. At the close of the poll, the ballot boxes were taken to the Masonic Hall in the borough, and the votes were then counted by the returning officer.

Both before the commencement of the counting and during its progress John Pritchard objected to the returning officer that Meshack Roberts was disqualified from being elected, on the ground that he was an alderman of the borough, and claimed himself to be elected.

At the close of the counting it was found that 171 votes had been given for Roberts, and 151 for Pritchard, and the returning officer verbally stated these numbers to the mayor, who then proceeded to the steps leading up to the door of the building and publicly announced them.

On the next day (Nov. 3) the returning officer, having considered and taken legal advice on the objection made by Pritchard to the qualification of Roberts, issued a public notice formally declaring that Pritchard was duly elected as councillor for the south ward, on the ground that, Roberts being an alderman of the borough, the votes given for him were invalid.

On the same day the town clerk of the borough sent Pritchard a notice informing him that he had been elected, and stating the time and place at which he might make the declaration required by the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), s. 35; and on the same day Pritchard attended at the town clerk's office, and made and subscribed the said declaration.

On the 9th Nov. Pritchard attended a meeting of the council, when the mayor refused to receive and count his vote.

On the same day Roberts made and subscribed the declaration required by the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), s. 35, and the mayor received and counted his vote.

Pritchard thereupon obtained a rule *nisi* calling upon the mayor and corporation to show cause why a writ of *mandamus* should not issue commanding them to receive and count Pritchard's vote at the meetings of the council; and this was the rule which now came on for argument.

R. S. Wright, for the Mayor and Corporation, showed cause against the rule.—This application is misconceived, as *mandamus* will not lie for the purpose of filling an office which is already *de facto* full. The only remedy in such a case is by *quo warranto*. In the case of *Frost* v. *The Mayor of Chester* (5 E. & B. 531; 25 L. J. 61, Q. B.) Campbell, C.J.: says "The return shows that an election was 'duly held' at a time when, at any rate, there was a vacancy. And it alleges that Smith, being duly qualified and duly elected, accepted the office of councillor and made and subscribed the declaration, and does still hold and continue in that office, wherefore the office is full of him . . . and it is a clear point in municipal law that where a man is *bonâ fide* in office his title is not to be tried by *mandamus*, but by *quo warranto*." [DENMAN, J.—Is not the question whether Roberts, being an alderman at the time, was an eligible candidate for the council?] Even if he were ineligible, *mandamus* does not lie, the proper mode of questioning the election being by *quo warranto*. [DENMAN, J.—Could the mayor's decision as to the validity of the nomination paper have been questioned in any way?] No; by the 14th rule of part 2 of the 3rd schedule of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), the decision of the mayor disallowing an objection is final. Secondly, assuming that Roberts was ineligible as being an alderman, Pritchard cannot be held to have been elected, because the mere fact that the electors knew that he was an alderman is not sufficient to prove that their votes were thrown away:

Reg. v. *The Mayor, &c., of Tewkesbury*, 18 L. T. Rep. N. S. 851; L. Rep. 3 Q. B. 629.

[DENMAN, J.—When did Roberts vacate the office of alderman?] His term of office expired on the 9th Nov., immediately after the election of mayor and before the election of aldermen: (the Municipal Corporations Act 1882, ss. 60 and 61.) In *Reg.* v. *Mayor &c., of Tewkesbury*, at the election of town councillors in a borough not divided into wards, there were four vacancies and five candidates. B., one of the four who had a majority of votes, was the mayor, and acted as returning officer, and was therefore incapable of being elected, and it was held that the mere knowledge on the part of the electors who voted for B. that he was mayor and returning officer did not amount to knowledge that he was disqualified in point of law as a candidate; and therefore their votes were not thrown away, so as to make the election fall on the fifth candidate. Thirdly, Roberts was not rendered ineligible for the office of councillor by reason of his being a retiring alderman. In *Reg.* v. *Coaks* (3 E. & B. 249) this was assumed without authority and without argument, and that case is therefore no authority for the proposition. All that Lord Campbell, C.J. says on the point is, "Blake was an alderman, and therefore ineligible, and that fact was known to the electors," and this judgment deals with other points. It does not even appear that Blake was a retiring alderman, as is the case here. [DENMAN, J.—Was there any act which he could have been called on to do as councillor before his term of office as an alderman expired?] No; he did not come into office as a councillor until after the election of mayor, which is the last business in which a retiring alderman can take part. [STEPHEN, J.—If we are of opinion that Roberts was disqualified as an alderman, does the *Tewkesbury* case apply? Is not the point here, which was the real declaration of the result of the election?] Pritchard cannot be elected, because the votes given for Roberts were not thrown away. In *Reg.* v. *Coaks* there was express notice to all the electors, here there was no sufficient notice; and in *Reg.* v. *Tewkesbury* (*ubi sup.*), Lush, J. says: "It is a very different question whether we are to say now that the candidate who was in the minority is to be declared duly elected, and that those persons who voted for Blizard must be taken to be in the same position as if they had not voted at all, merely because they knew the fact from which by construction of law the disqualification arose. Therefore I am of opinion that the *mandamus* cannot issue." The returning officer had no power to decide this question of qualification. In *Reg* v. *Ledgard* (8 A. & E. 535)

Patteson, J. says (p. 545): "If the returning officer were to take it on himself to decide on the qualification, no better mode of fraud could be devised, for he might assume the want of qualification and put the borough to a *quo warranto*. The Act (5 & 6 Will. 4, c. 76) studiously makes the returning officer ministerial for the purpose of summing up the votes and declaring the party who has the greatest number to be elected. It is no business of his whether the candidate be qualified or not. I do not know that he would be bound to notice his not being on the burgess roll." [DENMAN, J.—Suppose the returning officer returned an alien. Would the mayor be bound to take his vote?] He could not seat the other candidate. In *Reg.* v. *The Mayor, &c., of Leeds* (11 A. & E. 512) there was a second publication, and the court held it void, the person first declared to be elected being *de facto* in the office. No declaration is necessary in a municipal election. It is the fact of the majority of the votes which determines the election.

Willis, Q.C. and *Marshall*, for Meshach Roberts, did not argue.

Sir *Henry James*, Q.C., *M'Intyre*, Q.C., and *M. Douglas* for John Pritchard.—The returning officer has made one return only, declaring Pritchard elected, (*a*) and if wrong that return must be set right by petition or *quo warranto*, and until that is done the mayor is bound to receive his vote as a duly elected councillor. The mayor has no power to exercise any judicial function for the purpose of setting right the mistake, if one exists. By the 53rd section of the Municipal Corporations Act 1882, "At an election of councillors for a whole borough the returning officer shall be the mayor; at an election for a ward the returning officer shall be an alderman assigned for that purpose by the council at the meeting of the ninth of November." The mayor, therefore, had nothing whatever to do with making the return in the case of a ward election, but the returning officer appointed according to the Act alone has the power to declare any candidate elected. The objections to nominations which the mayor has to decide under sched. 3, part 2, r. 9 (*a*) are merely objections to the form of the papers, and the mayor could not go into the question whether a person was an alderman, or policeman, or had paid his rates, and he was therefore bound to find in favour of the validity of the nomination paper nominating Roberts:

Howes and Pierce v. *Turner and Wright*, 35 L. T. Rep. N. S. 58; 1 C. P. Div. 670.

By the 58th section of the Municipal Corporations Act 1872 the provisions of the Ballot Act 1872 (35 & 36 Vict. c. 33), relating to a poll at a parliamentary election (including the provisions relating to the duties of the returning officer after the close of the poll), shall apply to a poll at an election of councillors, but by the Municipal Corporations Act 1872, sched. 3, part 3, r. 6, and by the Ballot Act 1872, s. 20, sub-sect. 5, it is provided that no return shall be made in municipal elections to the Clerk of the Crown in Chancery. The provision, therefore, to that effect in the 2nd section of the Ballot Act 1872 is not applicable, but otherwise the duties of the returning officers are contained in that section, and in sched. 1, part 1, rr. 45, 46 of that Act. [DENMAN, J.—The 2nd section says, "shall forthwith declare to be elected the candidate to whom the majority of the votes have been given."] Those words mean "the majority of the votes which are in his judgment legal." The 45th and 46th rules of the schedule declare public notice only to be necessary, and this was duly given by the returning officer in this case. The case of *Reg.* v. *Owens* (2 E. & E. 86) shows that the functions of the returning officer are judicial, and not merely ministerial, and also that the mayor has no authority to make a return in the ward where he is not the returning officer. Crompton, J. there says: "I do not think that the duty of the mayor as returning officer is simply ministerial; he has sometimes to exercise judicial functions of considerable importance. . . . The mayor is eligible where he is not returning officer; as for instance, where a borough is divided into wards, in a ward where he is not returning officer." Here the mayor read out the numbers for the convenience of the public, but the reading of the numbers was not the public notice by the returning officer under the 45th and 46th rules, which is to be carried into effect by advertisements, placards, or handbills. The return under those rules was duly made on the next day by the returning officer. He returned Pritchard as duly elected, and the mayor cannot go behind the

(*a*) The argument turned to a great extent on the following statutory provisions:—The 58th section of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), provides: "If an election of councillors is contested, the poll shall, as far as circumstances admit, be conducted as the poll at a contested parliamentary election is by the Ballot Act 1872 directed to be conducted, and, subject to the modifications expressed in part 3 of the 3rd schedule, and to the other provisions of this Act, the provisions of the Ballot Act 1872, relating to a poll at a parliamentary election (including the provisions relating to the duties of the returning officer after the close of the poll) shall apply to a poll at an election of councillors." The 3rd schedule, part 3, r. 6, provides that "no return shall be made to the Clerk of the Crown in Chancery."

The Ballot Act 1872 (35 & 36 Vict. c. 33), s. 2, provides (par. 3): "After the close of a poll the ballot boxes shall be sealed up, so as to prevent the introduction of additional ballot papers, and shall be taken charge of by the returning officer, and that officer shall, in the presence of such agents, if any, of the candidates as may be in attendance, open the ballot boxes, and ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidates or candidate to whom the majority of votes have been given, and return their names to the Clerk of the Crown in Chancery. The decision of the returning officer as to any question arising in respect of any ballot paper shall be final, subject to reversal on petition questioning the election or return." The 45th and 46th rules of the 1st schedule, part 1, provide: "45. The returning officer shall, as soon as possible, give public notice of the names of the candidates elected, and, in the case of a contested election, of the total number of votes given for each candidate, whether elected or not. 46. Where the returning officer is required or authorised by this Act to give any public notice, he shall carry such requirement into effect by advertisements, placards, handbills, or such other means as he thinks best calculated to afford information to the electors."

(*a*) The Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), sched. 3, part 2, r. 9, provides that "the mayor shall attend at the town hall on the day next after the last day for delivery of nomination papers for a sufficient time, between the hours of two and four in the afternoon, and shall decide on the validity of every objection made in writing to a nomination paper.

return of the official duly assigned to make the return, and refuse to take his vote on the ground that he himself having nothing to do with it, had read out certain numbers on the night of the election. The cases, therefore, cited as to *quo warranto* being the proper remedy when an office is already *de facto* full do not apply, because here the office is not full of Roberts, but of Pritchard, and the mayor having refused to receive his vote at a meeting of the council, *mandamus* is the proper remedy to compel the mayor to do so. [Denman, J.—Do not the 2nd section of the Act and the 46th rule of the 1st schedule, part 1, apply to different things? The section says the returning officer shall open the ballot boxes, and ascertain the result of the poll by counting the votes given to each candidate, and shall "forthwith declare" to be elected the candidates or candidate to whom the majority of votes have been given. The 45th rule says: "The returning officer shall as soon as possible give public notice of the names of the candidates elected." Can a returning officer first "forthwith declare" one candidate to be elected, and then "give public notice" that another has been elected?] There was no declaration by the returning officer on the evening of the election. [Denman, J.—Then did he "forthwith declare" a candidate elected?] If he failed to do something "forthwith" which it was his duty to do forthwith, that would not invalidate the election. His breach of duty could not disenfranchise the constituency. The returning officer never declared Roberts elected. As to the ineligibility of an alderman for the office of town councillor *Reg.* v. *Coaks* (*ubi sup.*) is conclusive. The case of *R.* v. *The Mayor, &c., of Winchester* (7 A. & E. 215) was also cited.

Denman, J.—I am of opinion, upon the whole, although I am by no means free from doubt upon the point, that this rule should be made absolute. It would have been more satisfactory if the question could have been tested in some other way; but as a question of right is involved, the better course is, I think, that we should give judgment at once in accordance with our view of the case. There is a considerable difficulty in arriving at the true construction of the statutes which have been discussed, for it is difficult to find out how far it was the intention of the Legislature that the provisions of the one should be incorporated with the other. The two Acts in question are the Ballot Act 1872 (35 & 36 Vict. c. 33) and the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), and the case arises under these circumstances: In October last Mr. Roberts was one of the aldermen of the borough of Bangor, and being so, we think it follows that he was ineligible for the office of town councillor. There is perhaps no direct decision upon the point, but I cannot but think that the decision in *Reg.* v. *Coaks* (*ubi sup.*) goes a very long way in that direction, and we must, I think, hold in the present case that the law is so. Roberts, however, was nominated as a candidate, and the election came on and had to be conducted in accordance with the provisions of the Ballot Act 1872 and the Municipal Corporations Act 1882. Now I find great difficulty in placing a proper construction on two of the clauses which I find in the Ballot Act 1872—viz., the 3rd paragraph of the 2nd section and the 45th rule of part 1 of the 1st schedule. The 3rd paragraph of the 2nd section provides that "after the close of the poll, the ballot boxes shall be sealed up, so as to prevent the introduction of additional ballot papers, and shall be taken charge of by the returning officer, and that officer shall in the presence of such agents, if any, of the candidates as may be in attendance, open the ballot boxes and ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidates or candidate to whom the majority of votes have been given." I am of opinion that the facts disclosed, and not substantially in conflict, do not make out a proper declaration that Roberts was elected. What, then, really occurred? The question having been raised and largely discussed as to whether Roberts was ineligible by reason of his being an alderman, the returning officer, to whose notice the question had been brought, first counted the votes, and found that 171 had been given for Roberts and 151 for Pritchard, the other candidate, and at that time, as an objection to the eligibility of Roberts had been brought to his notice, he deliberately refrained from making any declaration of the result of the election. It was his duty to "forthwith declare" the result, but he did not. On the night of the election, therefore, there was no declaration of the result, but on the next day the returning officer took legal advice, and by placard declared Pritchard to be duly elected. Now, if an inquiry were duly set on foot before the proper tribunal as to whether, upon the true construction of the Act and rules, that was a proper declaration that Pritchard was elected, and as to what was the effect of the returning officer departing from the regulations, very serious questions might perhaps be raised, and it would have to be decided what length of time the words "forthwith" leaves to the returning officer before he makes a declaration of the result of the election. For the purposes of this application, however, we are clear that, as far as Roberts is concerned, there was no declaration of his election coming within the meaning of the regulations, but the returning officer, on the contrary, deliberately refrained from making such declaration. On the following day the returning officer caused to be printed a placard declaring in terms that John Pritchard was duly elected as councillor, and thereupon Pritchard took the necessary steps to qualify himself to sit and vote as a councillor. Having done so, he appeared, there being no petition or proceedings by *quo warranto* questioning his return, and, as the first person who had done the necessary acts entitling him to act as a councillor, claimed to be entitled to vote, and tendered his vote. The mayor then took upon himself to deny that right. I am of opinion that in doing so the mayor went beyond his duty, and had no right to declare Roberts elected contrary to the only declaration which he had received from the returning officer. The mayor's position is, that when he went on to the steps of the hall and publicly announced Roberts to be elected, he did so having been furnished with the numbers by the returning officer; but it appears that the returning officer, when he gave the numbers to the mayor, used language which warned him that he did not give those numbers as a return. I think that, upon the facts, it cannot be said that the mayor made that declaration as the mouthpiece of the returning officer. On the contrary,

he did it without authority, and the declaration had no effect, the returning officer being by rules 45 & 46 of sched. 1, part 1, of the Ballot Act 1872, the proper person to make it. The 45th rule says: "The returning officer shall, as soon as possible, give public notice of the names of the candidates elected." I think that that is an inconvenient rule, because it gives, as it were, a *locus pœnitentiæ* to the returning officer, of which he in this case took advantage, whereas the intention of the statute clearly was that the declaration should be made forthwith. I am not, however, prepared to say that the course taken by the returning officer was illegal. There being then a declaration in favour of Pritchard, and that declaration being given in time according to the regulations, and Pritchard being duly qualified, and having claimed to take his place, the mayor had, in my opinion, no right to set aside that declaration and to disallow the vote of a person duly declared to have been elected by the returning officer. The applicant has, I think, made out his right to a *mandamus*, and there will therefore be a rule absolute for a *mandamus* to issue.

STEPHEN, J.—I am of the same opinion.

Rule absolute.

Solicitors for the prosecutor: *Belfrage* and *Co.*, for *R. S. Chamberlain* and *Co.*, Llandudno.

Solicitors for the Mayor and Corporation of Bangor, *Simpson, Hammond*, and *Co.*, for *R. H. Pritchard*, Bangor.

Solicitors for Mr. Roberts, *Bloxams* and *Ellison*, for *J. B. Roberts* and *Roberts*, Bangor.

Tuesday, Nov. 30, 1886.

(Before DENMAN and HAWKINS, JJ.)

SAUL AND OTHERS *v.* THE WIGTON RURAL SANITARY AUTHORITY AND THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF THE PARISH OF BOWNESS-ON-SOLWAY. (*a*)

Rating — Rural sanitary authority — "Special expenses" — Retrospective rate — Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 229, 230.

Between 1874 *and* 1879 *the parish of B. and other parishes in the W. union were sewered. The treasurer of the W. rural sanitary authority, having no "special expense" funds in hand, paid the money out of the common fund of the union, of which also he was the treasurer, the amounts paid being posted in the rural sanitary authority's ledger to his credit. In* 1879 *the sum so paid amounted to* 831*l.* 5*s.* 4*d.*, *which balance was carried forward each half-year until* 1883, *when it was apportioned under the head of "special expenses" among the several parishes, according to the amount of work done in each, the amount debited to the parish of B. being* 280*l.* 2*s.* 5*d. This sum was carried forward each half-year against the parish up to* 1885, *when a rate was made which purported to be for special expenses chargeable under the Public Health Act* 1875 *on the contributory place of the parish of B. made in pursuance of the provisions of sect.* 230 *of the Act. The books of the rural sanitary authority were duly audited every half-year from and including* 1874 *to* 1884.

Held, on case stated, that, notwithstanding the audit, the court was bound to go back to the time at, and the purposes for, which the money was expended, and that there is a principle of law applying equally to poor rates and to sanitary rates that, except so far as a retrospective rate is affirmatively authorised by any statute, such rate is bad, and that the rate must be disallowed.

THIS was a case stated by justices of the county of Cumberland.

The case was, so far as material, as follows:—

CASE.

The parish of Bowness-on-Solway, in the county of Cumberland, is within the district of the Wigton Rural Sanitary Authority, who also are the guardians of the poor of the Wigton Union.

The rural sanitary authority and the Wigton Union have the same treasurer, but their accounts are kept separate.

Between 1874 and 1879 the parish of Bowness and several other parishes in the said union were sewered. The rural sanitary authority drew cheques on the treasurer to pay for the sewering as the work progressed; but he, having no "special expense" funds in hand belonging to the rural sanitary authority, paid the money as it was required out of the common fund of the union, and the amounts so paid were posted in the rural sanitary authority's ledger to the credit of the treasurer.

The said amounts were carried forward each half-year to the credit of the treasurer in the rural sanitary authority's ledger, along with other half-yearly expenses, under the head of "incidental expenses" until 1879.

The parishes in which the sewering was done did not contribute more to the common fund out of which the said advances were made than the other parishes in the union for which no sewering was done.

In 1879 the sum owing to the treasurer by the rural sanitary authority in respect of the said incidental expenses on account of the said parishes amounted to 831*l.* 5*s.* 4*d.*, which balance was carried forward each half-year until 1883. In 1883 the balance (831*l.* 5*s.* 4*d.*) then existing of the said incidental expenses was apportioned, under the head of special expenses, among the several parishes, according to the amount of work which had been done in each, and the amount then debited to the parish of Bowness was 280*l.* 2*s.* 5*d.*

The said sum of 280*l.* 2*s.* 5*d.* was from the year 1883 carried forward each half-year against the said parish in the books of the rural sanitary authority along with other sums expended each half-year up to the time the rate appealed against was made, and the sum of 302*l.*, for which the said rate was made, consisted of the said half-yearly balances and the said sum of 280*l.* 2*s.* 5*d.* The books of the board of guardians and of the rural sanitary authority were duly audited every half-year from and including 1874 to 1884.

The rate appealed against was

An assessment for the special expenses chargeable under the Public Health Act 1875, on the contributory place of the parish of Bowness, in the county of Cumberland, made in pursuance of the provisions of sect. 230 of the said Act made this 30th day of October 1885 after the rate of 1*s.* 6*d.* in the pound on rateable value of houses, and 4½*d.* in the pound on rateable value of land.

It was contended on the part of the appellants that the rate was bad on the grounds:

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

1. That the title of the said rate did not set forth the period for which the rate was estimated.

2. That it was retrospective.

3. That, as the books of the rural sanitary authority were audited every year, that authority could not dispute the validity of the audit.

4. That the great bulk of the expenditure having taken place, and having been paid before the Public Health Act 1875, the rate made under that Act was void.

The justices in quarter sessions disallowed all these objections, and affirmed the rate.

The questions for the opinion of the Divisional Court were, whether the said rate was bad for any or all of the reasons alleged. If so, then the order of the Court of Quarter Sessions was to be quashed; if not, then the decision of the Court of Quarter Sessions was to be affirmed.

Henry (with him *Page*) for the appellants.—The rate is retrospective, and therefore bad. *Waddington* v. *The City of London Union* (1 E. B. & E. 370) affirmed a principle which was well ascertained and agreed on before—viz., that a rate or call upon the inhabitants ought not to be retrospective. The principle is clearly enunciated by Erle, C.J., in *The Guardians of the City of London Union* v. *Acocks* (8 C. B. N. S. 760, 784). [He was stopped by the Court.]

Shee (with him *R. Cunningham Glen*) for the respondents.—There is no rule of law that every rate is bad because it is retrospective. [DENMAN, J.—What rule of law enables you to levy a rate for expenses incurred twelve years ago?] The decision in *The Guardians of the London Union* v. *Acocks* (*ubi sup.*) rested entirely upon 22 & 23 Vict. c. 49, the decision being that the 6th section of that Act was retrospective in its operation, and that the rate was thereby rendered invalid. In *Reg.* v. *Carpenter* (6 A. & E. 794) it was held that 43 Geo. 3, c. 110, s. 2, which provides that a twentieth part at least of the sums borrowed by visitors and guardians of the poor, under 22 Geo. 3, c. 83, s. 20, shall be paid off or provided for every year, does not extinguish the debt in cases where no such payment or provision has been made for twenty years; and on the application of a party who had advanced the money, since the passing of 43 Geo. 3, c. 110, more than twenty years before the application, where the parish had not paid or provided for any part of the principal, and some interest was due, the court granted a *mandamus* to the guardian, churchwarden, and overseer to pay the principal and interest. There is therefore no general principle of law by which a retrospective rate is bad. The observations of Erle, C.J. in *The Guardians of the London Union* v. *Acocks* (*ubi sup.*) are entirely founded on the cases of *Waddington* v. *The Guardians of the London Union* (1 E. B. & E. 370) and *Hall* v. *The Guardians of the London Union* (6 C. B. N. S. 863). The latter case turned on an entirely different point, the court holding that the guardians might by taking proper steps realise the amount required in another way, while in *Waddington* v. *The Guardians of the London Union* (*ubi sup.*) Campbell, C.J. says, "Retrospective rating as a general principle is prohibited, but this general principle is subject to exceptions," and the court held that case to be an exception. [DENMAN, J.—The court said that under the circumstances of that case, one of the officers having embezzled the funds, it would be too hard to press the rule. Have you any authority showing that a retrospective rate may be made to recoup the treasurer for borrowed money?] In *Ward* v. *Lowndes* (1 E. & E. 940) it was held that, for the purpose of defraying a debt transferred as the debt in that case was, the local board might levy a rate without any limitation as to time. The cases cited show that there is no rigid principle that a retrospective rate is bad. The rate in the present case is made under the 229th and 230th sections of the Public Health Act 1875, and in those sections no provision is to be found declaring or implying that a retrospective rate is bad. Secondly, the cases cited, even if they establish the principle contended for, are not in point, since they all deal with poor rates only. These being levied for the maintenance of the poor for the time being, there is perhaps some reason for arguing that they should be defrayed by the occupiers for the time being, no arrears being allowed. The same arguments, however, do not apply to a rate made for the construction of sewerage works, which are valuable permanent works benefiting future occupiers, and it would be highly unjust that a principle which applies to poor rates only should be extended to sanitary rates, to which it has no proper application. Further, the accounts having been audited in each year, it is not competent for the appellants to go behind the audit and reopen the accounts for the purpose of showing how these expenses originated. In *Reg.* v. *The Inhabitants of Cheddingstone* (2 B. & S. 294) an auditor disallowed the costs of the maintenance of a pauper lunatic for the previous six months, but refused to reopen the accounts previously audited, and it was held that the auditor was right, and that the accounts having been audited could not be reopened.

Henry in reply.—[DENMAN, J.—How do you explain the 6th section of 22 & 23 Vict. c. 49, which provides that no rate shall be illegal on the ground that it includes a balance due from any parish when the half-yearly accounts are made up and balanced?] The preamble of the Act states that the object of the Act was "to define and limit the period during which any debt hereafter incurred by guardians may be paid," and the 1st section provides that such debts shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards. The 6th section also confines itself to debts, "the payment whereof is authorised by this Act." To hold that a rate can be made for a debt of old standing by the simple method of carrying it forward from year to year in the accounts as a debit balance, would be to render this Act wholly nugatory.

DENMAN, J.—The point as to the auditing of the accounts which has just been discussed does not seem to me to touch the real question which we have to decide in this case. That question is, whether the rate which is appealed against is a good rate under the circumstances set out in the case stated for our opinion. In the year 1872 an Act of Parliament was passed—the Public Health Act 1872 (35 & 36 Vict. c. 79)—giving power to certain persons forming the rural sanitary autho-

rity in rural sanitary districts to levy rates for the purpose of defraying the expenses legally incurred by them. In 1875 another Act of Parliament—the Public Health Act 1875 (38 & 39 Vict. c. 55)—was passed, repealing the previous Act of 1872, but (s. 229 *et seq.*) giving rural sanitary authorities power to do the same things which rural sanitary authorities were authorised to do by the Act of 1872. In the year 1874, and down to the year 1879, certain rates were made on the inhabitants of the parishes contributing to the Wigton Union, to defray expenses incurred for works done under the powers of the Public Health Act 1875. From year to year these rates were made and paid by the persons who were from time to time the occupiers of the premises within the area of the Wigton Union, and it was not until the year 1883 that the question was raised as to whether the proper parishes had been made to pay for the works that had been done. Meanwhile the accounts were audited at the usual intervals, and in 1879 the auditor found that the inhabitants of the particular parishes in which the works had been done had not paid so large a sum as they ought for the work that had been done, and that a considerable balance was therefore due from them. After 1879 this balance was carried forward year after year until 1883, so that the balance in 1883 is the same as in 1879, and then in 1885 the rate was made which is now appealed against. A very proper course was taken by the justices, who stated a case to raise the question as to the validity of the rate. The second objection mentioned in the case—viz., that the rate is bad because it is retrospective—is the real point at issue; but that objection involves also the further question which has been argued by both sides—viz., that not only is the rate bad because it is retrospective in the sense of imposing on ratepayers now existing a rate which was legally payable by the ratepayers who existed fourteen years ago, but also because it is in respect of expenses, the first of which were incurred before the Act of 1875 came into existence, thus raising the question whether a rate can be made under the Act of 1875 in respect of such expenses. It was argued by Mr. Shee that there is no rule of law against a retrospective rate, and I agree that there is no absolute rule, because there are certain statutes which legalise retrospective rates. To this extent therefore, but only so far, Mr. Shee is right. The course of legislation however shows, I think, that there is a principle underlying all the statutes opposed to restrospective rates, and I think that this principle ought to be applied in all cases except where there is strong reason derived from the Acts themselves for the court to hold that retrospective rates were contemplated by the Legislature. Except so far as this I think the old principle applies. The question first arose under the statute of Elizabeth (43 Eliz. c. 2). There is indeed nothing in that Act making a retrospective rate illegal; but, looking at the injustice which would result if persons were to be called on to pay money which had been expended on the support of the poor, perhaps as much as ten years before, the courts of law held that retrospective rates were bad. That principle has been adhered to ever since, not only up to the time of the case of *Waddington* v. *The Guardians of the London Union* (1 E. B. & E. 370), but even in the very case on which Mr. Shee has relied as the foundation of his argument (*The Guardians of the London Union* v. *Acocks*) there is a recognition of the principle that unless there appears in the statutes themselves a clear intention on the part of the Legislature that it should be otherwise, it is not the law that the ratepayers of one year should be liable to be rated for expenses which ought to have been met by the occupants of the premises of the previous year. That principle is recognised in the passage of the judgment of Lord Campbell, C.J. in *Waddington* v. *The Guardians of the London Union* which was read in the course of the argument. There is, I think, nothing to show that a retrospective rate is legal. It is true that the cases deal with the question of poor rates, but the principle, I think, is equally applicable to sanitary rates. Mr. Shee has endeavoured to show that there is a difference between poor rates and sanitary rates, because sewerage works are more permanent; but the rates levied under the Public Health Act are not only for the construction of sewers, but also for cleansing and repairing them from year to year, and are for that reason more for the benefit of the person actually occupying the premises than for anyone coming afterwards. Indeed it is quite clear, if much reliance is placed upon that argument, that the persons who have the power of rating can rate the actual occupiers; and, if they can rate them for things which they are actually doing *de die in diem*, it would be very hard that they should be also able to rate them for things done long ago. The principle therefore that a retrospective rate is bad is as applicable to the case of sanitary rates as to poor rates.

HAWKINS, J.—I am of the same opinion, and have but little to add. This rate professes to be made for special expenses chargeable under the Public Health Act 1875 on the contributory place of the parish of Bowness, in the county of Cumberland, made in pursuance of the provisions of sect. 230 of that Act. In looking at the 229th section of the Act to see what the special expenses are which are chargeable under that section, I find that "special expenses" shall be the expenses of the construction, maintenance, and cleansing of sewers in any contributory place within the district, the providing a supply of water to any such place, and maintaining any necesary works for that purpose, if and so far as the expenses of such supply and works are not defrayed out of water rates or rents under this Act, the charges and expenses arising out of or incidental to the possession of property transferred to the rural authority in trust for any contributory place, and all other expenses incurred or payable by the rural authority in or in respect of any contributory place within the district, and determined by order of the Local Government Board to be special expenses. The question, therefore, which we have to decide is, whether the expenses to meet which this rate is made are special expenses within the meaning of that section. The history of the case is this: Certain works were begun in this parish by the order of the rural sanitary authority constituted under the Public Health Act of 1872. The Public Health Act 1875 was not passed until the 17th Aug. 1875. Between 1874 and 1879 the parish in question and several other parishes in the union were

sewered. The rural sanitary authority drew cheques on the treasurer to pay for the sewering as the work progressed; but he, having no special expense funds in hand belonging to the rural sanitary authority, paid the money as it was required out of the common fund of the union, and the amounts so paid were posted in the rural sanitary authority's ledger to the credit of the treasurer. The amounts were carried forward each half-year to the credit of the treasurer in the rural sanitary authority's ledger, along with other half-yearly expenses, under the head of "Incidental expenses" until 1879. The parishes in which sewering was done did not contribute more to the common fund out of which the advances were made than the other parishes in the union in which no sewering was done. In 1879 the sum owing to the treasurer by the rural sanitary authority in respect of these incidental expenses on account of these parishes amounted to 831*l.* 5*s.* 4*d.*, which balance was carried forward each half-year till 1883. In 1883 the balance (831*l.* 5*s.* 4*d.*) then existing of the incidental expenses was apportioned under the head of "special expenses" among the several parishes, according to the amount of work which had been done in each, and the amount then debited to the parish of Bowness was 280*l.* 2*s.* 5*d.* This sum of 280*l.* 2*s.* 5*d.* has since 1883 been carried forward each half-year against the parish in the books of the rural sanitary authority along with other sums expended each half-year up to the time the rate appealed against was made, and the sum of 302*l.*, for which the rate was made, consisted of the half-yearly balances, and this sum of 280*l.* 2*s.* 5*d.* It is quite true that the balance was carried forward on the half-yearly audit, but, notwithstanding that, the rate is really made for the purpose of obtaining a contribution to a balance which existed in 1879; and the objection raised against it is, that it is not legal to make such a rate, because it is in respect of work done twelve years ago. It has been argued that we cannot go behind the audit; but I think that we are bound to go back to the time at, and the purposes for which, the money was expended. For two reasons, therefore, I am of opinion, in the first place, for the reason which has been fully explained by my brother Denman, which I will not go through again; and, secondly, for the reason that, looking at the origin of the balance in respect of which the rate is made, I fail to see that it is in respect of special expenses within the meaning of the 230th section of the Act of 1875. There is one other point I may mention. If it is proposed to treat this balance as a debt due from the rural sanitary authority to the treasurer, the case then comes within the authority of the case of *R.* v. *Wavell and others* (1 Doug. 116), in which it was held that a rate cannot be made for the express purpose of reimbursing an overseer for money advanced by him even within his year. The judgment of the court must be for the appellants, with costs.

Judgment for the appellants.

Solicitors for the appellants, *Ullithorne, Currey,* and *Villiers,* for *S.* and *S. G. Saul,* Carlisle.

Solicitor for the respondents, *A. Toovey,* for *R. Benson,* Wigton.

Saturday, March 19, 1887.

(Before DAY and WILLS, JJ.)

PURSER (app.) *v.* THE LOCAL BOARD OF HEALTH FOR WORTHING (resps.). (*a*)

Poor law—Rating—Greenhouses—"Market gardens or nursery grounds"—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *s.* 211, *sub-sect.* 1 (*b.*).

By 38 *&* 39 *Vict. c.* 55, *s.* 211, *sub-sect.* 1 (*b.*), "*The occupier of any land used as . . . . . market gardens or nursery grounds . . . . . shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof.*"

The owner and occupier of a piece of land upon which were erected greenhouses of various sizes, which substantially covered the whole of the said piece of land, and which were used by the owner for the purpose of growing therein grapes and other fruit, vegetables, and flowers, in the course of his business of market gardener and nurseryman, had been rated in respect of such greenhouses at their net annual value.

Held (*allowing the appeal*), *that the premises in question were "market gardens or nursery grounds" within the meaning of sub-sect.* 1 (*b.*) *of sect.* 211 *of* 38 *&* 39 *Vict. c.* 55, *and that therefore the owner was liable to be assessed to the poor rate in respect of one-fourth part only of their net annual value.*

THIS was a special case stated for the opinion of the Queen's Bench Division of the High Court of Justice pursuant to the provisions of sect. 11 of 12 & 13 Vict. c. 45.

1. The appellant was a grower of fruit, vegetables, and flowers, carrying on business at Worthing, in the county of Sussex, and for the purposes of such business described himself as and was commonly known as a "market gardener and nurseryman."

2. The appellant was the owner and occupier of a certain piece or parcel of land of the extent of about 1 acre 1 rood, within the district of the Worthing Local Board, and upon the said piece of land sixteen glasshouses or greenhouses of various sizes had been and still were erected, and such glasshouses or greenhouses, as shown on the plan to this special case annexed, covered nearly the whole of the said piece of land.

3. The said glasshouses or greenhouses were used by the appellant for the purpose of growing therein tomatoes, cucumbers, and grapes, and to a smaller extent other vegetables and flowers in the course of his said business. The said plants and crops therein were watered and heated by artificial means, and grown upon soil placed upon prepared beds inside the said houses, and such plants and crops matured much earlier than in the open ground. In the case of the vines, the roots of the plants were in prepared beds outside the glasshouses or greenhouses, and the stems were carried through apertures to the inside. Eight of the said glasshouses or greenhouses were thus used for growing vines.

4. The appellant had been rated to a general district rate by the said local board of health by a rate made by the local board under the provisions of the Public Health Act 1875 on the 6th April 1886, the general district rate in respect of the said premises showing a rateable value as

(*a*) Reported by F. A. CRAILSHEIM, Esq., Barrister-at-Law.

stated in the poor rate of 74*l.* 10*s.*, and a full rateable value of 74*l.* 10*s.*

5. An extract from the valuation list for the parish of Broadwater, within which the district of Worthing is situate, in the county of Sussex, so far as the said valuation list related to the premises of the appellant, described his property as 27,700 superficial feet of glass at 5*l.* per 100 = 1385*l.*, and 1026 yards of pipe at 2*s.* 9*d.* = 141*l.*, making a total of 1526*l.*, the gross estimated rental of which was stated to be 114*l.* 10*s.*, and the rateable value 74*l.* 10*s.*

6. The appellant contended that he was liable to be rated to the said general district rate in respect of the said property in the proportion of one-fourth part only of its net annual value of 74*l.* 10*s.*, on the ground that the said land, with the said glasshouses and buildings, constituted a market garden or nursery ground within the meaning of sect. 211, sub-sect. 1 (*b.*) of the Public Health Act 1875 (38 & 39 Vict. c. 55). The said local board contended the appellant was liable to be rated to the said general district rate in respect of the said glasshouses or greenhouses on their full net annual value of 74*l.* 10*s.*

7. If the court should be of opinion that the appellant was right in his contention as contained in the 6th paragraph of this case, then the appellant was to be entitled to succeed, and the said rate was to be quashed so far as related to his said premises. But if the court should be of opinion in accordance with the contention of the said local board as contained in the 6th paragraph of this case, then the said local board of health was to be entitled to succeed upon the case, and the said rate was to be confirmed.

By 38 & 39 Vict. c. 55, s. 211, sub-sect. 1 (*b.*), it is enacted that:

> With respect to the assessment and levying of general district rates under this Act, the following provisions shall have effect, namely: (1) General district rates shall be made and levied on the occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor, and shall be assessed on the full net annual value of such property, ascertained by the valuation list for the time being in force, or, if there is none, by the rate for the relief of the poor made next before the making of the assessment under this Act, subject to the following exceptions, regulations, and conditions, namely: (*b*) The owner of any tithes, or of any tithe commutation rentcharge, or the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, market gardens, or nursery grounds . . . . shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof.

Arthur Charles, Q.C. (*Forest Fulton* and *A. Glen* with him) for the appellant.—The premises in question constitute a market garden or nursery grounds within the meaning of sect. 211, sub-sect. 1 (*b.*) of the Public Health Act 1875, and therefore the appellant is liable to be rated to one-fourth part only of their net annual value. The appellant does not receive the benefits of a dwelling-house, such as gas, water, &c., and the rate should be proportionate to the benefit. [He was stopped by the Court.]

Lumley Smith, Q.C. (*English Harrison* and *B. Dennies* with him) was called upon.—This is a piece of land covered entirely with glass and used for forcing purposes, and it is in no sense a market garden or nursery ground within the meaning of the sub-section. The appellant is rated, not in respect of a market garden, but in respect of greenhouses. The following cases were cited:

The South Wales Railway Company v. *The Local Board of Health for Swansea*, 4 E. & Bl. 198;
The Newport Dock Company v. *The Local Board of Health for Newport*, 2 Best & Smith, 708;
Reg. v. *The Midland Railway Company*, 32 L. T. Rep. N. S. 753; L. Rep. 10 Q. B. 389;
Peto v. *Overseers of West Ham*, 2 E. & E. 144; 28 L. J. 240, M. C.

Charles, Q.C. was not called upon in reply.

DAY, J.—In this case I am clearly of opinion that the piece of land in question is within the exemption to which sub-sect. 1 (*b.*) of sect. 211 of the Public Health Act 1875 refers, and therefore properly rated at one-fourth part only of the net annual value. The exemption is in respect of market gardens, and, in my opinion, this being a place used for the purposes of gardening and for the production and growth of flowers and vegetable produce, is a market garden within the meaning of the section. Such cultivation is distinguished from agriculture only in the scale upon which it is carried on. The distinction is difficult to define; but this ground is certainly not a farm, but a place used for the production of vegetables, fruit, and flowers, and it is therefore properly called a garden, and, these articles being grown for purposes of sale, this place is the very thing ordinarily spoken of as a market garden. It is certainly not a farm. It is said that it is not a garden because the bulk of the produce is grown under glass, but I fail to see that that fact makes any difference in this respect. I do not think that the mere fact that, for protection from the weather, it is partially covered by glass, and for protection from wind it is surrounded by walls, makes the place any the less a garden. The ground, whether it be covered by glass or not, is used, not for pleasure, but for raising market produce, and, under such circumstances, it does not seem to me to matter how many greenhouses there may be, or what part of the ground may be covered with glass. To my mind, this is a place used for raising produce for market, and a market garden within the meaning of sect. 211, sub-sect. 1 (*b.*) of the Public Health Act 1875. The appellant is therefore entitled to claim the benefit of the exemption, and is liable to be rated to one-fourth part only of the net annual value of the garden in question. This appeal must therefore be allowed.

WILLS, J.—I am of the same opinion. To understand the intention of the Act, we must consider the state of things in existence at the time when it was passed. At that time the majority of so-called market gardens were occupied to a very large extent by glass and greenhouses, in which gardening operations were carried on by persons employed in these gardens. The operation of growing and maintaining greenhouse plants under such covering was no less an essential part of market gardening than the cultivation of plants in the open air. It is difficult to see what difference there can be if a portion of the land so cultivated happens to be covered over with glass. Gardening under such covered portion must be carried on in the same way as gardening in the open air. Glasshouses of this kind are a necessary part of a garden, and still more so of a market garden, and I therefore think that the ground in question falls legiti-

mately under the title of market garden or nursery ground. The circumstances of modern life may cause an increasing relative proportion of glass to be maintained, but I see no reason why ground occupied as that which is here in question, in which the ordinary trade of market gardening is carried on, should be less a market garden or nursery grounds within the meaning of the exemption than open ground used for like purposes. The appellant is therefore entitled to succeed in this appeal.

Appeal allowed.

Solicitors for appellant, *Wolferstan* and *Avery*.
Solicitor for respondents, *W. Fred. Verrall*, Worthing.

Feb. 22, 23, *and March* 8, 1887.

(Before DENMAN and MATHEW, JJ.)

ESDAILE *v.* THE ASSESSMENT COMMITTEE OF THE CITY OF LONDON UNION. (*a*)

Poor rate—Tithes—Statutory payment in lieu of tithes in the city of London—Non-rateability of —37 Hen. 8, *c.* 12—43 *Eliz. c.* 2—44 *&* 45 *Vict. c. cxcvii., ss.* 3, 8, 10.

Under the Act. 37 *Hen.* 8, *c.* 12, *which recited that contention, &c., had risen within the city of London between the parsons, &c., of the said city and the citizens and inhabitants of the same for and concerning the payment of tithes, oblations, and other duties within the said city, it was decreed that the citizens and inhabitants should yearly pay their tithes to the parsons, &c., after a fixed yearly rate in respect of their houses, &c.*

And under 44 *&* 45 *Vict. c. cxcvii., which recited that there were disputes as to the payments to be made in respect of tithes in the parish of St. Botolph Without, Aldgate, and it would be beneficial to the inhabitants and owner of the tithes of the parish that all such disputes should be settled, and that there should be paid to the owner a fixed annual sum in lieu and full satisfaction of all tithes and payments within the parish, it was enacted by sect.* 3 *that "all tithes and sums of money in lieu of tithes whatsoever arising or growing due in the said parish . . . shall cease and be extinguished, and the tithe-owner shall . . . accept and receive in lieu and satisfaction of the tithe and sums of money in lieu of tithes so ceasing and extinguished, and to which he would have been entitled if this Act had not been passed, the annual sum of* 6500*l.*, *which shall be levied and collected by the churchwardens on and from the persons by law rateable to poor rates in the said parish in respect of the houses by law rateable to poor rates . . . and shall be assessed on the annual rateable value of those houses as ascertained by the valuation or assessment for the poor rates for the time being in force, and the said sum of* 6500*l. shall be paid by the churchwardens to the tithe-owner in each and every year."*

Held, that the tithes, oblations, and other duties within the city of London paid according to the rate fixed by 37 *Hen.* 8, *c.* 12, *and in respect of which the sum of* 6500*l. was a statutory commutation payable by the above parish under* 44 *&* 45 *Vict. c. cxcvii., were not tithes within the meaning of* 43 *Eliz. c.* 2, *and accordingly the said sum of* 6500*l. was not rateable to the relief of the poor of the said parish.*

CASE stated under 32 & 33 Vict. c. 67.

The present respondents appealed against an assessment in a valuation list for the parish of St. Botolph Without, Aldgate, in the city of London, to the general assessment sessions of the metropolis, and the court allowed the appeal and struck out the said assessment from the said valuation list subject to the following case :—

The appellants (the now respondents), William Clement Drake Esdaile and Henry Jeffries Badcock, were trustees under the will of Edward Jeffries Esdaile, deceased, and in such capacity were possessed of all his interest as owner of certain tithes or sums of money arising in the said parish, and payable by virtue of the statute 37 Hen. 8, c. 12, and of the annual sum of 6500*l.* in lieu and satisfaction of part thereof payable by virtue of the statute 44 & 45 Vict. c. cxcvii.

By the statute 37 Hen. 8, c. 12, entitled "An Act for tithes in London" (which was to be taken as incorporated in this case), it was recited as follows :

Whereas of late time, contention, strife, and variance hath arisen and grown within the city of London and the liberties of the same, between the parsons, vicars, and curates of the said city, and the citizens and inhabitants of the same, for and concerning the payment of tithes, oblations, and other duties within the said city and liberties.

The said Act then provided that certain commissioners therein named should make a decree for appeasing the same, which decree should stand, remain, and be as an Act of Parliament, and should bind as well all citizens and inhabitants of the said city and liberties for the time being as the said parsons, vicars, and curates, and their successors for ever.

The decree commenced as follows :

As touching the payment of tithes in the city of London and the liberties of the same, it is fully ordered and decreed by Thomas, Archbishop of Canterbury (here followed the names of the other commissioners), that the citizens and inhabitants of the said city of London and liberties of the same for the time being shall yearly without fraud or covin for ever pay their tithes to the parsons, vicars, and curates of the said city, and their successors for the time being, after the rate hereafter following, that is, to wit, of every Xs. rent by the year of all and every house and houses, shops, warehouses, cellars, stables, and every of them within the said city and liberty of the same XVId. ob. (*a*), and of every XXs. rent by the year of all and every such house and houses, shops, warehouses, cellars, and stables, and every of them within the said city and liberties, IIs. and IXd. and so above the rent of XXs. by the year so ascending from Xs. to Xs. according to the rate aforesaid.

The said Edward Jeffries Esdaile, deceased, was, at the time of his death on the 14th Feb. 1881, owner of the said tithes or sums of money arising in the said parish and payable under the said statute of 37 Hen. 8, c. 12.

The London (City) Tithes Act 1879 (42 & 43 Vict. c. clxxvi.), which was entitled "An Act for the commutation of tithes in the city of London and for other purposes," provided in the 16th section as follows :

Nothing in this Act contained shall apply to or in anywise affect the parish of St. Botolph Without, Aldgate, or any rights of Edward Jeffries Esdaile or his successors

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

(*a*) Sixteen pence halfpenny.

in title to tithes or payments instead of tithes arising or growing due within the said parish.

By the London (City) Tithes (St. Botolph Without, Aldgate) Act 1881 (44 & 45 Vict. c. cxcvii.), entitled "An Act to commute the tithes in the parish of St. Botolph Without, Aldgate, in the city of London, and for other purposes," it was recited as follows:

Whereas by the Act of 1879 (sect. 16) it was enacted that nothing therein contained should apply to or in anywise affect the parish of St. Botolph Without, Aldgate, or any rights of Edward Jeffries Esdaile or his successors in title to tithes or payments instead of tithes arising or growing due within the said parish, and whereas there are disputes as to the payments to be made in respect of tithes in the said parish of St. Botolph Without, Aldgate, and it is expedient for the settlement of the same, and it will be beneficial to the inhabitants of the said parish and the owner of the tithes of the said parish, that all such disputes should be settled, and that there should be paid to each owner a fixed annual sum in lieu and in full satisfaction of all tithes or payments in lieu of tithes within the said parish in manner hereinafter mentioned.

By sect. 2 of the said Act the term "tithe-owner" was defined to mean "the person or persons for the time being who, but for this Act, would have been entitled to the tithes or sums of money in lieu of tithes arising or growing due in the said parish."

It was then enacted in sect. 3 as follows:

All tithes and sums of money in lieu of tithes whatsoever arising or growing due in the said parish, except upon the properties referred to in sect. 14 of this Act, shall, as and from the 29th day of Sept. 1881, cease and be extinguished, and the tithe-owner shall as and from that day, accept and receive in lieu and satisfaction of the tithes and sums of money in lieu of tithes so ceasing and extinguished, and to which he would have been entitled if this Act had not been passed, the annual sum of 6500*l*., which shall be levied and collected by the churchwardens on and from the persons by law rateable to poor rates in the said parish in respect of the houses by law rateable to poor rates (except the said properties in the said 14th section referred to), and shall be assessed on the annual rateable value of those houses as ascertained by the valuation or assessment for the poor rates for the time being in force, and the said sum of 6500*l*. shall be paid by the churchwardens to the tithe-owner in each and every year after the said 29th Sept. 1881, by two half-yearly payments, and the first of such half-yearly payments shall be made on the 25th day of March 1882.

The valuation list in respect of which the appeal arises was duly made on or about the 26th day of June 1885, and was subsequently approved by the assessment committee of the City of London Union (the now appellants), and the said tithes or sums of money, or the annual sum in lieu and satisfaction of part thereof, were or was described as follows:

No.	Name of Occupier.	Name of Owner.	Description of Property.	Gross Value as finally determined by Assessment Committee.	Rateable Values as finally determined by Assessment Committee.
890	Esdaile Trustees.	Lay Impropriator.	Tithe.	£6500.	£6500.

It was admitted on the hearing of the said appeal that the said tithes or sums of money, or the annual sum in lieu and satisfaction of part thereof, had never been assessed for the relief of the poor, nor had any person been rated in respect thereof.

By the Valuation (Metropolis) Act 1869, sect. 51, it was provided that the overseers should include in every valuation list "tithes and payments in lieu of tithes, and every hereditament in their parish, and shall enter every hereditament in the valuation list in accordance with the classes mentioned in the 3rd schedule of the Act."

It was contended on behalf of the appellants that the said sum of 6500*l*. ought not to have been inserted in the said valuation list or assessed to the relief of the poor on the grounds that the said payments under the said Act 37 Hen. 8, c. 12, were not rateable, as they were not tithes within the meaning of the statute 43 Eliz. c. 2, and that the said annual sum payable in lieu and satisfaction of part thereof under the statute 44 & 45 Vict. c. cxcvii., was not rateable, as it was not a money payment in lieu of tithes within the meaning of the said statute 43 Eliz. c. 2, and that neither the said payments under the said Act 37 Hen. 8, c. 12, nor the said sum of 6500*l*., had ever been assessed or rated.

It was contended by the respondents that the said sum of 6500*l*. was tithes within the meaning of the said statute 43 Eliz. c. 2, or a payment in lieu of such tithes, and that it was therefore properly inserted in the said valuation list. The Court of General Assessment Sessions held that the said payment of 6500*l*. was not tithes within the meaning of the said statute nor payment in lieu of tithes, and ordered that the said valuation list be altered by striking out the entry therein contained relating to the hereditaments the subject of this appeal.

The question for the opinion of the court was, whether the said sum of 6500*l*. payable to the appellants was liable to be inserted in the said valuation list.

If the court were of opinion that it was, then the order aforesaid of the Court of General Assessment Sessions should be quashed and the said assessment stand.

If the court were of a contrary opinion, then the order aforesaid was to stand confirmed.

By 6 & 7 Will. 4, c. 71 (Act for the Commutation of Tithes), sect. 90:

Nothing in this Act contained, unless by special provision to be inserted in some parochial agreement and specially approved by the commissioners, in which case the same shall be valid, shall extend to any Easter offerings, mortuaries, or surplice fees, or to the tithes of fish or of fishing, or to any personal tithe other than the tithes of mills, or any mineral tithes, or to any payment instead of tithes arising or growing due within the city of London, or to any permanent rentcharge or other rent or payment in lieu of tithes, calculated according to any rate or proportion in the pound on the rent or value of any houses or lands in any city or town under any custom or private Act of Parliament.

By 44 & 45 Vict. c. cxcvii., sect. 8:

For the purpose of levying and collecting the said tithe rates the churchwardens shall be entitled to proceed in the same manner and shall have the same powers, remedies, and privileges as the churchwardens adopt and have in the making, collecting, and levying of poor rates.

By sect. 10:

For the purpose of providing for the redemption of

the said tithes as commuted by this Act, be it enacted that any owner or occupier of any house assessed to the tithe rate shall be at liberty to redeem the tithe rate payable in respect of the said house as if the same were rentcharge under the Tithes Acts referred to in the Act of 1879, and the consideration to be paid for the same shall be such sum as will, after payment of the costs of investment, produce an annual amount if invested in the Three per Cent. Consolidated Bank Annuities equal as near as may be to the last annual amount assessed upon such house for the tithe rate, and the consideration shall be paid to the persons and applied in the manner prescribed by the Tithe Acts referred to in the Act of 1879 with respect to the payment and application of the consideration for rentcharges.

Sir *E. Clarke* (S.-G.) (*Poland* with him) for the appellant.—It is submitted that the parishioners are liable to pay tithe under 37 Hen. 8, c. 12, which Act refers to tithes, and the other class of payments called "oblations" are dealt with by the Act as distinct from tithes. Under this statute the parishioners were liable to pay "tithes" down to the time of the great fire, after which event sums of money in lieu of tithes were paid under 22 & 23 Car. c. 15, by the various city parishes injured by the fire; but that Act did not apply to the present parish of St. Botolph Without, Aldgate. The Act for the commutation of tithes in the city of London and other purposes (42 & 43 Vict. c. clxxvi.) excepted this parish out of its provisions, and the Act of 1881 (44 & 45 Vict. c. cxcvii.) fixed the amount at which the tithe of this parish was to be commuted. Now, the Act of 43 Eliz. c. 2, renders the occupiers of tithes liable to pay poor rates; this payment is a tithe and is rateable. The two cases of *Esdaile* v. *Payne* (52 L. T. Rep. N. S. 530, and 54 L. T. Rep. N. S. 705) are not against my argument that the sum in dispute is a tithe or a payment in lieu of a tithe. [Mathew, J.—The latter case decided that the law of tithes was inapplicable to this kind of payment in an important particular.] The cases did not decide that the payment was not a tithe, but that it was not a tithe within 2 & 3 Will. 4, c. 100. Again, sects. 51 and 54 of the Valuation of Property (Metropolis) Act 1869 (32 & 33 Vict. c. 67) render tithes or payments in lieu of tithes rateable, for such are to be included in the valuation lists. Tithe in the ordinary sense arises from lands, but there are customary tithes. The payments that have been settled by private Acts of Parliament in consequence of disputes between the claims of the clergy and the lay impropriators in the city of London parishes to tithes are in the nature of customary tithes: (2 Eagle on Tithes, 464.) Such payments are rateable. [Mathew, J.—Could the Valuation (Metropolis) Act 1869 operate upon anything except payments of the kind therein mentioned?] Yes, upon such a payment as in the present case. The statute of Elizabeth mentions tithes in terms, and must be construed to be intended to include whatever was called tithe in the Act of Hen. 8. It must be borne in mind that the Valuation Act 1869, which provides for the rating of tithes, applies to an area which is principally covered with houses, though land covered with houses is not properly titheable.

Sir *R. Webster*, Q.C. (A.-G.) (*S. Woolf* with him).—The payment here is in the nature of an oblation, but is called a tithe by the Legislature for the sake of convenience, and the incidents of tithe do not attach to it. The Metropolis Valuation Act of 1869 was not a charging Act at all, but only one for creating uniformity of valuation throughout the metropolis. The sum paid by St. Botolph parish to the respondents under the Act of 1881 is not a tithe upon which that Act could operate, and that Act has nothing to do with the rateability of this payment to the poor. As a matter of fact these so-called "tithes" have never been rated. The original oblation on which this payment is based did not resemble tithes, but were voluntary offerings on Sundays and saints' days. There was no remedy by distress in respect of them, and the payment was not one-tenth of anything. The distinction between tithes and personal payments has always been maintained:

Calthrop's Reports, 92 *et seq.*;
2 Eagle on Tithes, 442 *et seq.*

Tithes in the proper sense of the word were a constructive occupation of the land itself; and what was meant to be chargeable under 43 Eliz. c. 2, were tithes arising from the land, and therefore to be deducted by the tenant or occupier from the value of his occupation; that is, one-tenth of the beneficial occupation of the land was in the parson. The Valuation (Metropolis) Act 1869 did not create any fresh or additional liability to pay rates. He cited

Rex v. *Toms*, 1 Doug. 401;
Reg. v. *Christopherson*, 53 L. T. Rep. N. S. 804; 16 Q. B. Div. 7.

In the latter case the Master of the Rolls throws great doubt on a dictum of Lord Kenyon in *Rex* v. *Carlyon* (3 T. R. 385). [Denman, J. referred to *Reg.* v. *Shaw*, 12 Q. B. 419; 17 L. J. 130, M. C.] That decision turned on the special terms of the particular commuting Act. *Esdaile* v. *Payne* (52 L. T. Rep. N. S. 530) is a direct authority in favour of the contention of the present respondents.

Sir *E. Clarke*, Q.C. in reply.—The case of *Reg.* v. *Christopherson* (*ubi sup.*) is distinguishable, because in that case there was no statute creating a tithe as in the present case. This payment is treated of as a tithe as far back as the Act of 37 Hen. 8. Tithes can by custom be upon houses, as is apparent from 2 & 3 Edw. 6, c. 13, s. 12. He also cited

Rex v. *Boldero*, 4 B. & C. 467;
Lowndes v. *Hone*, 2 Wm. Bl. 1252.

Cur. adv. vult.

March 8.—Mathew, J. delivered the judgment of the Court.—This case was argued before my brother Denman and myself, and I have now to deliver the judgment of the court. It is an appeal against a decision of the General Assessment Sessions held under the Valuation Act of 1869, striking out of the valuation list of the parish of St. Botolph Without, Aldgate, the sum of 6500*l.* at which the respondents had been assessed as the lay impropriators of the tithes valued at that amount. The respondents were admitted to be the owners of the tithes and the sums of money payable in the parish by the Act of 37 Hen. 8, c. 12, and of the annual amount of 6500*l.* in lieu and satisfaction of part thereof payable by the Act of 44 & 45 Vict. c. cxcvii. The question raised for our decision was, whether the respondents ought to be assessed under the 43 Eliz. in the sum of 6500*l.* as being payable in respect of tithes or payment in lieu

of tithes. It was pointed out in the course of the arguments for the appellants that the payments referred to in the Act of Hen. 8 had been described in a long series of statutes down to the Commutation Act for this parish passed in the year 1881 as "tithes or payments in lieu of tithes;" and it was argued that they were payments intended to form part of the income of the parson or vicar, and therefore assessable to the relief of the poor at the time of the passing of the 43 Eliz. This assessable character, it was said, was transferred to the amount of 6500*l.* at which these payments had been commuted. On the other hand, it was contended for the respondents that the payments mentioned in the Act of Hen. 8 were not tithes in the legal sense, because lands covered with houses were not titheable. It was said that the "tithes, oblations, and other duties," with which the statute dealt, were all personal payments of the same character, namely, contributions from the citizens of London towards the maintenance of the clergy which had become, to some extent, obligatory by custom or otherwise. The history of these payments will be found in 2 Eagle on Tithes, 443 and following pages, and the learned author's view that they were not tithes or payments in lieu of tithes received the sanction of the Court of Appeal in *Esdaile* v. *Payne* (52 L. T. Rep. N. S. 530; 54 L. T. Rep. N. S. 705). The object of the Act of Hen. 8 would seem to have been to render these payments certain and tangible, and, as appears from the preamble to the statute, to terminate "the contention, strife, and variances" which had arisen on the subject "between the parsons, vicars, and curates, and the citizens." By the Act it was proposed to substitute for these payments a rate calculated upon the rents of the houses then built and to be thereafter erected within the city and liberties. The many decisions upon the statute with respect to these payments, which will be found in the text-books on the subject of tithes in London, show that they never became certain, and that disputes with respect to them continued until recent times. The differences in the parish of St. Botolph would seem to have lasted down to the passing of the Commutation Act of 1881. That such charges are not assessable under the statute of Elizabeth appears to be settled by the judgment of this division in the case of *Reg.* v. *Christopherson*, which was affirmed by the Court of Appeal (16 Q. B. Div. 7); but even if there were not this authority on the subject there would be great difficulty in adopting the contention of the appellants. It is a significant fact that no assessment upon these payments has ever been made in this parish, and that there would seem to be no decision to the effect that similar payments have been rateable in the other parishes of the city of London. It is further to be observed that, while the Tithes Commutation Act (6 & 7 Will. 4, c. 71), s. 69, expressly provides that rentcharges in lieu of tithes shall be liable to such rates, charges, and assessments as tithes have theretofore been subject to, there is no recognition or imposition of any such liability in the general Act for the commutation of tithes in the city of London of 1879. But that the payment of 6500*l.* is not intended to be assessable appears to be clearly indicated by the Act for the commutation of tithes in this parish passed in 1881 (44 & 45 Vict. c. cxcvii.). The statute confirms a compromise and settlement entered into between the parish and the tithe-owners. For the purpose of carrying out this compromise, the parish is to raise annually 6500*l.* by a tithe rate, which is in effect an addition to the poor rate (sect. 8). This sum of 6500*l.* is to be paid to the tithe-owners by equal half-yearly payments (sect. 3). Now, if the appellants be right the parish is not made liable to pay to the tithe-owners the amount of the commutation, but that sum reduced by an uncertain rebate on repayment of the rates for the poor, and as it would seem other parochial charges. It is extremely improbable that any such bargain would be made by the tithe-owners. That it was not meant seems clear from sect. 10, which provides for the redemption of the tithe rates. Under that section, if the parish desires to get rid of the rates, the ratepayers would practically be bound to find a sum which after payment of the cost of investment would produce an annual amount of 6500*l.* if invested in Three per Cent. Consolidated Bank Annuities. This annual amount the tithe owners would receive without deduction of any kind for parochial purposes. There seems to be no reason why they should be worse off while the rates remain unredeemed. We are of opinion that the statute means what it says, that the tithe-owners were to have 6500*l.* a year in lieu of the previous charges, and therefore that the parish is not enlitled to reduce the amount as contended upon this appeal. Our judgment is therefore for the respondents with costs.

Judgment for respondents.

Solicitors for the appellants, *Baylis* and *Pearce*.
Solicitors for the respondents, *Winter* and *Co.*

Monday, March 14, 1887.

(Before HUDDLESTON, B. and SMITH, J.)

BONELLA (app.) *v.* THE TWICKENHAM LOCAL BOARD OF HEALTH (resps.); HOLMES (app.) *v.* THE SAME. (*a*)

Public Health Act 1875—*Sewers—Vesting in local authority—Sewers sufficient at time of vesting—Compulsory alteration of drainage within area of local authority—Works executed by local authority—Liability of frontagers—Summary proceedings — Delay between complaint and summons*—38 *&* 39 *Vict. c.* 55. *ss.* 13, 15, 18, 21, 150, 207—11 *&* 12 *Vict. c.* 43, *s.* 11.

Where a street has a sewer amply sufficient and adequate at the time of its vesting in the local authority for the purpose for which it was made, and which was to the satisfaction of the local authority, and it subsequently becomes necessary to alter the existing system of drainage in the district at large in which the street is situated, the expenses incurred in altering the sewer in the street are not to be thrown on the frontagers, but charged on the general or district rate.

Where a demand for the payment of money under the Public Health Act 1875 *has been made, and the demand refused, and a summons has been taken out in respect of such non-compliance within the six months limited by* 11 *&* 12 *Vict. c.* 43, *s.* 11, *but not served until after the expira-*

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

tion of such period, the proceedings on the summons are not irregular as being out of time.

This was a case stated by two justices for the county of Middlesex under 42 & 43 Vict. c. 49, s. 33.

The respondents were the urban sanitary authority for the district of Twickenham, in the county of Middlesex.

The appellant was owner of a piece of land fronting, adjoining, and abutting upon a road or street called The Avenue, St. Margaret's, Twickenham, within the said district.

The respondents, as such urban sanitary authority as aforesaid, by notice under the hand of their surveyor, dated the 10th July 1884, after reciting that the said street was not sewered, levelled, paved, metalled, flagged, channelled, and made good to the satisfaction of the respondents, and that the appellant's premises adjoined or abutted upon certain parts of the said street, gave notice to the appellant (in pursuance of sect. 150 of the Public Health Act 1875) to sewer, &c., and make good the same within the space of twenty-one days from the date thereof in the manner in the said notice set forth.

The appellant refused to comply with the said notice within the time thereby limited. Thereupon the respondents, as such urban authority, entered into a contract for the execution of all the works referred to in the said notice by a contractor at a price which included all the works referred to in the notice, and the whole of the works were accordingly executed. The respondents' surveyor, by writing under his hand, dated the 7th July 1885, apportioned the sum of 86*l.* 9*s.* 2*d.* as the proportion of the said expenses payable by the appellant as owner of the said premises so fronting, adjoining, or abutting upon the said street.

The respondents, by notice under the hand of their clerk, dated the 14th Oct. 1885, demanded from the appellant payment of the said sum of 86*l.* 9*s.* 2*d.*

The appellant, having refused to pay the said amount, was by summons required to appear before the said justices on the 7th June 1886 to answer the complaint made by the respondents in respect of the matters hereinbefore mentioned. Such summons bore date the 25th March 1886, but it was contended before the justices on behalf of the appellant as hereinafter set forth that it was not issued until after that date. The said summons was heard on the 28th June and the 12th July last, when the following facts were proved in evidence:

The said street and the land of the appellant respectively were situate in, and formed part of, a piece of land formerly belonging to the Conservative Land Society called St. Margaret's Estate, situate in the parishes of Twickenham and Isleworth, in the county of Middlesex. The said Conservative Land Society some years prior to the year 1868, in which year the respondents' board was formed, laid out the said estate for building purposes, and certain roads, amongst others The Avenue, the street in question in this case (and it was believed another road called Heathcote-road), was laid out and sewered or drained. The sewer or drain in The Avenue which formerly carried off the sewage from several houses consisted of a 12in. pipe, which was laid all along that street until it approached the river Thames, into which it discharged, the outfall being in the parish of Isleworth, which was not under the jurisdiction of the respondents. The Avenue was situate partly in the parish of Isleworth and partly in the parish of Twickenham. The said sewer or drain, at the time when the notice in the third paragraph mentioned was given, was sufficient for the drainage of the houses and premises fronting, adjoining, or abutting upon The Avenue, assuming that draining into the Thames could be continued.

The respondents' board came into existence in the year 1868, some years after the making of the said roads and sewer or drain therein, and the appellant contended that so much of the said sewer under The Avenue (including that opposite the appellant's premises) as was in the parish of Twickenham vested in the respondents under the Public Health Act 1848, or the Public Health Act 1875.

The respondents were under notice of the Thames Conservators to discontinue, and cause to be discontinued, the flow or passage of any sewage or other offensive or injurious matter into the Thames within their district. The new sewer or drain constructed under the notice of the 10th July 1884 before referred to was to be, and then was, a tributary to the respondents' general system of sewerage, and was to be and then consisted of a 12in. pipe, and was in an exactly opposite gradient to the old sewer or drain, falling as it did towards certain outfall works of the respondents in the centre of the parish. The gradient of the old sewer or drain was left undisturbed, but the sewer or drain itself, as far as it lay in the parish of Twickenham, was to cease, and had ceased, to carry sewage, and was to be, and was then, used for the purpose of carrying off the surface water only. It was believed that the portion of the old sewer which was in the parish of Isleworth, and the sewer under the Heathcote-road, still continued to carry and discharge sewage into the Thames.

It was contended on behalf of the appellant that the respondents were not entitled by the notice of the 10th July 1884 to call upon him to make the new sewer therein described, inasmuch as the street in question was then already sufficiently sewered; that the work amounted to an alteration in the course of the sewer or drain, which, under sect. 18 of the Public Health Act 1875, ought to have been done by the respondents, and paid for by them out of the general rates of the parish, and not by imposition upon the appellant and the other adjoining owners; that the work which by the said notice the appellant was required to do to the existing sewer or drain was work which, as the appellant contended that the sewer was vested in the respondents, it would have been unlawful for him to do, and was in the nature of repairs to a sewer or drain belonging to the respondents, which, under sect. 15 of the Public Health Act 1875, the respondents were themselves bound to do, and which they were entitled to pay for out of the general rates, and was work which they, the respondents, could only lawfully have done. It was also contended on behalf of the appellant that proceedings before the justices were not commenced within six months after the demand, as required by the statute. The justices found that the summons was dated the 25th March 1886, and the only evidence given on the subject was a letter from the clerk of the

respondents to the solicitors of the appellant, of which the following was a copy:

193 and 194, High-street, Brentford, Middlesex, 22nd April 1886.—Dear Sir,—The Avenue, St. Margaret's.—Bonella.—I have received instructions from the Twickenham Local Board to proceed to recover the amount due from your client for making up, &c., this highway. I have some time since laid the necessary information, and the process will be served in due course. I think, however, after again looking into your correspondence on the matter, that an interview with you may probably place a different construction upon the matter, and lead you to a different conclusion, as you appear to be without several important facts, and hence you have based your objections to the demand. I can see you here on an appointment.—Yours faithfully (signed) WILLIAM RUSTON, Clerk.—A. C. Spaull, Esq., solicitor, 4, Verulam-buildings, Gray's-inn, W.C.

The justices, being of opinion that the appellant was liable, determined against him, and ordered and adjudged that he should pay to the respondents the amount claimed, 86*l.* 9*s.* 2*d.* and 5*l.* 5*s.* costs, but offered to state a case for the opinion of the court.

The question for the opinion of the court was whether the said justices were right in their determination and in making the said order.

The case of *Holmes* v. *The Twickenham Local Board* was identical, save and except as to the amount claimed—the amount claimed being 94*l.* 2*s.*—and the letter from the board's solicitor to the solicitors of the respondents, which was as follows:

22nd April 1886.—Dear Sirs,—The Avenue, St. Margaret's.—Holmes.—I have received instructions from the Twickenham Local Board to proceed to recover the amount due from your client for making up, &c., this highway. I have some time since laid the necessary information, and the process will be issued shortly.—Yours faithfully (signed) WILLIAM RUSTON, Clerk.—Messrs. Miller, Smith, and Bell.

Bosanquet, Q.C. (*Edwyn Jones* with him) for the appellant Bonella.—The appeal ought to be allowed. The principal question is, whether a frontager is liable for the expenses of laying down a new sewer, which is part of a general re-arrangement of sewering, he being sufficiently sewered under the old system. The appellant contends that the inhabitants of the district under the jurisdiction of the board, and not the frontagers, should bear the cost of the new system. Notice was given under sect. 150 to execute the necessary alterations, but the appellant refused to carry them out, and the board has executed them, and their surveyor has apportioned his share of the expenses. A "street not sewered to the satisfaction of the urban authority" in that section may mean a roadway or street which is not sufficiently sewered, or a street of houses which is not sufficiently sewered; it may mean both. But when a frontager has got a sufficient sewer for his street, and a cause arises outside of his street for altering the sewer, he is not bound to contribute to the cost of alteration, except under sect. 207, which provides for the defraying of such expenses out of the district fund and general district rate. This case is within the principle laid down in *The Board of Works for the Fulham District* v. *Goodwin* (35 L. T. Rep. N. S. 907; 1 Ex Div. 400). Sect. 150 only applies to the making of sewers to the satisfaction of the board for the first time; after that the expenses of repairs, or of change of system and the like, must be borne by the general rate, otherwise there would be no limit to the frontagers' liability:

Cary v. *The Local Board of Health of the Borough of Kingston-upon-Hull*, 34 L. J. 7, M. C.;
The Vestry of the Parish of St. Marylebone v. *Viret*, 12 L. T. Rep. N. S. 673; 34 L. J. 214, M. C.

A. J. Powell for the appellant Holmes.—The application to the justices in this case was out of time. The time allowed for taking proceedings is, under Jervis' Act (11 & 12 Vict. c. 43), s. 11, six months from the date when the matter of complaint arose. Here the date of demand of the amount was the 14th Oct. 1885, and the summons to appear before the magistrates was issued on the 7th June 1886, over the six months.

J. P. Grain for the respondents.—There is nothing in the technical point. The letters of the board's clerk show that the summonses were issued some time before the date of his letter to the appellants, and the justices have found that the summonses were dated the 25th March 1886, which is within the six months. Delay in issuing the summonses is no bar to recovery on them. This point is concluded by *Simcox* v. *The Local Board for Handsworth* (8 Q. B. Div. 39). Sect. 150 of the Public Health Act 1875 does apply to this case, for the Legislature intended when enacting it that all matters connected with the sewering, &c. of a street should be done to the satisfaction of the local authority. As to the main point, it is admitted by the board that, where there is a general scheme of drainage in existence, any main works in any portion of the district of the urban authority must be paid for by a general rate, and not by any particular class of persons. The remarks of Grove, J. in *The Board of Works for the Fulham District* v. *Goodwin* (*ubi sup.*), that the policy of the enactments was to throw, in the first instance, the cost of constructing sewers in a new street upon the neigbouring owners, but when the street had once been sufficiently sewered to impose upon the vestry or district board the duty of maintaining and replacing the original sewers out of the funds at their disposal, are really in favour of the contention of the board when the facts of this case are distinguished from those of the Fulham case. When the board executed these works, The Avenue road was a new street. Before 1868 the land was laid out for building purposes by a commercial company, the Conservative Land Society, and this body made sewers for the houses in The Avenue road for the profit of the shareholders; so that this sewer never vested in the local board when constituted in 1868, by virtue of the exception in sect. 13. At that time we took over only the main drains—that is, such as were common to the whole public. This particular drain, which we did not take over for many years, communicates with the river Thames, and the board is under injunction to prevent foul matter from flowing into the stream from our district system. When we gave notice, we had no right to touch the sewer; we could only act under the statute of notice. [SMITH, J.—How can you touch a sewer or drain unless vested in you?] For the purpose of altering any defect in it, the board have general jurisdiction over the drains in the district, but were obliged to give notice under sect. 150. Having done the work, the board apportioned the expenses. Unless this construction is put upon

sect. 150, it would become inoperative. In short, in 1884, the street was a private road, and the drain or sewer in it was not to the board's satisfaction, who were compelled to send the frontagers a proper notice requiring them to execute the necessary works, and on their default the works had to be executed by the board.

HUDDLESTON, B.—This is, in substance, an appeal in the shape of two cases stated against two orders made by justices, the first requiring Mr. Bonella to pay 86*l.* 9*s.* 2*d.* and 5*l.* 5*s.* costs, and the second requiring Mr. Holmes to pay 94*l.* 2*s.* and 10*l.* 10*s.* costs. We are to decide whether the orders are good. It is just as well that we should clearly understand the facts. It seems that this property belonged to a Conservative Land Society, and, according to paragraph 10 of the cases, that society, some years prior to 1868, laid out the St. Margaret's Estate for building purposes, and made certain roads, among which was The Avenue road, the street in question, and, I think, the Heathcote-road. The sewer or drain in The Avenue road, which formerly carried off the sewage from several houses, consisted of a 12in. pipe, which was laid all along that street until it approached the river Thames, into which it discharged, the outfall being in the parish of Isleworth, which is not under the jurisdiction of the respondents. That sewer which was made in The Avenue road, is found in paragraph 12 of the cases to have been sufficient when the notice mentioned in the third paragraph was given for the drainage of the houses and premises fronting, adjoining, or abutting upon The Avenue road, assuming that the drainage into the Thames could be continued. Therefore, this estate being laid out prior to 1868, the sewer was sufficient for the drainage of the houses and premises, and it might have been made by the Conservative Land Society, or by other proprietors, but that does not appear in the case. That state of things continued for some years before 1868 until 1884. In the meantime the respondents, the Twickenham Local Board, came into existence—that is, some years after the making of the roads and the sewers and drains thereon, and this continued until 1884. I cannot doubt, therefore, that the system of sewerage, as found by the special cases to be sufficient, was approved of and sanctioned, and met with the satisfaction of the Twickenham Local Board, who would be the urban authority. In 1884 pressure was put on the board in consequence of the determination of the Thames Conservators that sewage should not be discharged into the river. It then became necessary to have a different system of drainage, and a different system was adopted, by which the drainage, instead of being discharged into the Thames, was carried in an exactly opposite direction. It is sought, in consequence, to charge the frontagers, among whom were Messrs. Bonella and Holmes, to whom notice was given to execute their share of the necessary works; but they declined to execute it, and the work was done by the urban authority, and the surveyors apportioned the expenses mentioned against the appellants. The question arises whether these expenses are to be borne by the frontagers or the general rate. To decide this we must look at the powers possessed by the urban authority. According to sect. 150 of the Public Health Act 1875, "where any street within any urban district is not sewered . . . to the satisfaction of the urban authority," then the urban authority may require the work to be done by the owners or occupiers of the premises fronting, adjoining, or abutting on such parts as may require to be sewered, &c., and if they do not do the work, the urban authority may do the work and recover the expenses from the owners in default." I cannot help thinking that the meaning of that section is that, when land is laid out, there shall be power in the urban authority, if the land is not properly sewered, to require the frontagers to do it, and if the sewering is found sufficient, then it is done once and for all, but that it has no application to a case like the present. Mr. Grain contended that these sewers never belonged to the urban authority until they took proceedings under sect. 150. I do not agree with that contention. I think that, if sect. 13 is looked at, it is clear that all existing sewers vest in the local authority. The words are somewhat remarkable; they are not only all the "existing" sewers, but all "existing and future" sewers within the district of a local authority shall vest in and be under the control of, the local authority. He also contended that there were certain exceptions in the section which take this sewer out of the section. It came, he said, within the first exception, viz., "sewers made by a person for his own profit, or by a company for the profit of the shareholders." This sewer, it was said, was made either by the owner of the land for his own profit, or by the Conservative Land Society for the profit of its shareholders, and that therefore the sewer was not vested in the local authority. I did not at first understand the meaning of the words a sewer made for a person's or a company's profit. The section does not say "for his own use," but "for his own profit, or by any company for the profit of the shareholders." An illustration occurred to me of its meaning, viz., that the words might have reference to a case where an individual was utilising his sewage by running it on to his land and selling it, or to a company manufacturing it into manure. It is likely that that may be so, for, on looking at the other exceptions in sect. 13, it will be seen that the second applies to "sewers made and used for the purpose of draining, preserving, or improving land under any local or private Act of Parliament, or for the purpose of irrigating land," and the third to "sewers under the authority of any commissioners of sewers appointed by the Crown." These, to a certain extent, throw light on the meaning of the word "profit," and show that it does not mean "use." If Mr. Grain be right, hardly any sewers in England could be vested in the local authority, because if "profit" meant "use," then every sewer which is made for the use and advantage of a house would not be vested in the local authority, who would not, therefore, have any jurisdiction over it at all. But there is no need to speculate on this point; there is judicial authority applicable to this case—viz., the case of *The Acton Local Board* v. *Batten* (52 L. T. Rep. N. S. 17; 28 Ch. Div. 283)—which is conclusive. Kay, J. says: "That being the state of the case, of course the only question between the local board and Mr. Batten is, was this a sewer which was vested in them? Sect. 13 of the Public Health Act 1875 provides that "all existing and future sewers within the district of

a local authority, together with all buildings, works, materials, and things belonging thereto except" as therein mentioned, 'shall vest in and be under the control of' the local authority. The only exception which could possibly apply to this case is 'sewers made by any person for his own profit.' Now, I have not the least doubt that this does not come within that exception, because Mr. Carr swears that he did not make this sewer for his own profit at all." In the present case, Mr. Grain says that the distinction between the cited case and the one under discussion is that there is nothing to show that the sewer was not made for the appellant's profit. But I apprehend the onus would lie on the local board to show that the sewer was made for profit. Kay, J. continues: "He made it for the purpose of draining all the houses in this street, many of which do not belong to him." We may take it that the sewer now in question was made for the purpose of draining the appellant's and other houses. The judgment in the Acton case continues: "But if a sewer so made for draining a street of houses would be considered a sewer made for the profit of the person who made it, because he connects some of his houses, all I can say is, that almost every sewer in every suburb of every town in England might be considered a sewer made for the profit of the person who constructed it. It is quite clear that is not the meaning of the Act." That case is clearly a strong authority in favour of the view that this sewer is not taken out of sect. 13. If then, it is not taken out of sect. 13, or brought within the exception in that section, it is a sewer that is vested in the urban authority. If so, how can the urban authority deal with it? They have got a sewer which was sufficient up to a certain point and date, and, I should think, good to the satisfaction of the urban authority up to 1884. Pressure was then brought to bear upon them by the Thames Conservators, and they were obliged to alter their general system of sewerage; and they proceed to carry out certain works which under sects. 15 and 18 they had ample power to do. Having done those works under the said sections, they have power under sect. 207 to charge the expenses on the general district rate. It is perfectly clear that these sewers were from the first vested in the local board, and that when they come to deal with them in consequence of the alterations of the scheme of sewage, they must deal with it under their general powers and not under sect. 150, which only gives power to deal with them in the first instance. For the appellants it was argued that the notice was not given in time, more than six months having elapsed from the date of the complaint. But, on looking at the words of the case, we find that the demand for payment was made on the 14th Oct. 1885, and it is equally clear that the summons was dated the 25th March 1886, and that date would be in time, and Mr. Powell's argument that no proceedings were taken till after six months fails. I am clearly of opinion that the justices had no power to make these two orders upon the frontagers, and that the appeal must be allowed.

Smith, J.—I am also of opinion that the appeal should be allowed. As to the technical point that the information was not laid in time, on the facts as stated in the case I am of opinion it was laid in time. The other point is no doubt important, and is one which is now mooted for the first time. The question is practically whether, where a street has a sewer adequate and sufficient for the street, the frontagers in that street can be compelled by means of sect. 150 of the Public Health Act 1875 to pay for a new sewer, because the existing system of drainage in the district and outside the street makes it necessary that the system should be altered, and a new sewer constructed in the street. In deciding this point, it is necessary to look at two sections before coming to sect. 150. First, as to sect. 13, which is the vesting section. I have no doubt that in 1868, when the urban authority was formed, this sewer became vested in them. [His Lordship here read sect. 13.] That seems to mean that when the local authority is formed for the area for which it is formed, all existing and future sewers are vested in them with three exceptions, of which I will only deal with one, viz., "sewers made by any person for his own profit." I am of opinion that a man making a sewer in a road for houses upon his own land, does not make a sewer for his own profit within the meaning of the exception. I agree with Huddleston, B. and Kay, J. that the exception does not apply to this class of sewers. If we were to hold that if a sewer made for the purpose of draining a man's own house, and perhaps other houses, was within the exception, more than half the sewers in the kingdom would be excluded from the control of the local authority when formed; whereas the section says that all existing and future sewers within the district of a local authority shall vest in the local authority. I think, therefore, that the sewer in question did vest in 1868 in the respondent board. From 1868 to 1884 that sewer was amply sufficient for the accommodation of the street. It became insufficient by reason of the drainage of the area being prohibited from going into the Thames. Now, we must see what powers the urban authority have for repairing or making sewers. Under sect. 15, "every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act." In my opinion, the respondents were bound to keep this sewer in repair; and, therefore, were bound to do so from 1868. By sect. 18 it is provided that "any local authority may from time to time enlarge, lessen, alter the course of, cover in, or otherwise improve any sewers belonging to them, and may discontinue, close up, or destroy any such sewer that has in their opinion become unnecessary, on condition of providing a sewer as effectual for the use of any person who may be deprived in pursuance of this section of the lawful use of any sewer." Here the local authority are altering the course of a sewer. This last section provides that when once a local authority is in possession of a sewer and wants to improve it by altering its course, or enlarging, or lessening it, it can only do so by providing a sewer as effectual as the one so dealt with, and that alteration must not be at the cost of the person draining into it, but at their own cost, which must be met by imposing a district or general rate. Now we come to sect. 150, which, in my judgment, applies to streets which, when taken over by the sanitary authority by virtue of the Act, or at any time afterwards, are not "sewered, levelled, paved,

metalled, flagged, channelled and made good, or are not lighted to the satisfaction of the urban authority." This section applies to the doing of the work for the first time only. The frontager has to pay for the first cost because he has the benefit of getting a better street or road. Thus, if a mere lane is turned into a good street, that is more for the benefit of the frontager than of the public at large. But if, when the work is once done, the urban authority want to enlarge, alter, or repair, they must do so under the other sections, and bear the costs themselves. I am, therefore, of opinion that the appeal must be allowed.

Appeal allowed.

Solicitors for the appellants, *Spaull*, for Bonella; *Miller, Smith*, and *Bell*, for Holmes.

Solicitors for the respondents, *Ruston, Clark*, and *Ruston*.

Friday, March 4, 1887.

(Before DAY and WILLS, JJ.)

REG. *v.* SANDOVAL. (*a*)

Foreign Enlistment Act 1870—*Expedition against friendly State—Fitting out and preparation of, within Queen's dominions*—33 *&* 34 *Vict. c.* 90, *ss.* 8, 11.

The offence of fitting out and preparing an expedition within the Queen's dominions against a friendly State, under sect. 11 *of the Foreign Enlistment Act* 1870, *is sufficiently constituted by the purchase of guns and ammunition in this country, and their shipment for the purpose of being put on board a ship in a foreign port, with a knowledge of the purchaser and shipper that they are to be used in a hostile demonstration against such State, though the shipper takes no part in any overt act of war, and the ship is not fully equipped for the expedition within any port belonging to the Queen's dominions.*

THIS was an application for a rule for a new trial in criminal proceedings taken by the Crown against the defendant, on the ground of misdirection of the learned judge at the trial, and that the verdict was against the weight of evidence.

The defendant Sandoval, a foreigner, but resident in this country, was indicted at the Central Criminal Court, together with two others, Sir William Call and Baird, for (*inter alia*) within the limits of Her Majesty's dominions, equipping and despatching a vessel with intent or knowledge, or having reasonable cause to believe, that it would be employed in the military or naval service of any foreign State at war with a friendly State, and for preparing and fitting out a naval expedition to proceed against the dominions of a friendly State.

During the course of the case the Crown withdrew the prosecution against Baird. In the end the jury disagreed in regard to Sir W. Call, but convicted the defendant.

The facts on which the conviction was based were as follows:—

Colonel Sandoval bought two Krupp guns at Sheffield, and a quantity of ammunition at Birmingham; the guns he sent to Woolwich to be fitted with carriages suitable for use at sea.

The defendant then shipped in a general ship the guns and ammunition (20,000 rounds of ball cartridge and shells) to Antwerp, where there arrived at the same time a ship called the *Justitia*, purchased by the said Call in the name of his valet, one Philips.

He then embarked on board the *Justitia*, and soon after she left Antwerp; he assumed the general command of those on board, among whom were three generals.

The ship was supposed to be cleared for Trinidad in the West Indies, and her papers were regular; she carried no cargo except a large quantity of bunker coal and the warlike stores.

On the arrival of the ship off Grenada, it was discovered that she would not be allowed to put into Trinidad because she was carrying arms on board.

When off Trinidad the ship was transferred from Philips, Call's valet, to General Pulgar, one of the officers on board, her name was altered, and the English flag hauled down and a foreign one was run up in its place. The defendant, however, left the ship and landed at Trinidad.

The ship then made for a place called Carwpano, on the mainland of Venezuela, where a British consul was said to be, but one could not be found. She there took in tow a flotilla of boats, filled with armed men, and, after harmlessly shelling a custom-house, engaged with a Venezuelan man-of-war, and was worsted, one of the generals on board being killed, and retired to San Domingo, whence the crew was sent back to England.

On his return to England the defendant was put on his trial with the other two, for violation of the Foreign Enlistment Act 1870.

By 33 & 34 Vict. 90, s. 8:

If any person within Her Majesty's dominions, without the licence of Her Majesty, does any of the following acts, that is to say:

(3) Equips any ship with intent or knowledge, or having reasonable cause to believe, that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State; or

(4) Despatches, or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe, that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State;

Such person shall be deemed to have committed an offence against this Act; and the following consequences shall ensue:

(1) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour;

(2) The ship in respect of which any such offence is committed, and her equipment, shall be forfeited to Her Majesty.

By sect. 11:

If any person within the limits of Her Majesty's dominions, and without licence of Her Majesty,

Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State, the following consequences shall ensue:

(1) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

(2) All ships and their equipments, and all arms and

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

munitions of war, used in or forming part of such expedition, shall be forfeited to Her Majesty.

J. P. Grain for the defendant Sandoval.—There ought to be a new trial in these proceedings, on the ground both of misdirection and the absence of evidence to show that the defendant had fitted out within the Queen's dominions a naval or military expedition against a friendly State. The learned judge, it is submitted, was wrong in his construction of the Act in telling the jury there was evidence of an expedition having been fitted out by the defendant in this country. There was no evidence of a naval expedition, for that would require the proper equipment of a vessel capable of being used as a warship; and the ship in question was an ordinary merchant trader. There was no evidence of a military expedition, for that requires the enlistment of men as soldiers, and it is not suggested that any such enlistment took place in the present case. The next point is, whether the defendant prepared or fitted out an expedition against the friendly State of Venezuela, within the Queen's dominions or adjacent territorial waters. The defendant had nothing to do with sending the steamer *Justitia* to Antwerp; and even when she started from Antwerp it was on a commercial venture, for, according to the evidence, the defendant did not know of a proclamation at Trinidad forbidding the importation of arms. No act of war, naval or military, was done by this ship until after the defendant had surrendered all control over her movements. Assuming that overt acts of war were done by those on board of her off the coast of Venezuela, they were done after the British flag was hauled down and a foreign one hoisted, and the courts of this country have no jurisdiction over them. Lastly, according to the true construction of the Act, the expedition must be completely prepared or fitted out in this country to render it a criminal offence. The ship when setting out from English waters must have on board something more than a few arms; and when the *Justitia* left this country she did not carry even a cargo of arms.

DAY, J.—The meaning of sect. 11 is clear; and, as it is of great importance that it should not be supposed that there is any doubt as to the meaning of the Act (and we entertain no doubt upon it), we give our judgment at once. The question is whether there was evidence at the trial that the defendant had within the Queen's dominions prepared or fitted out a naval or military expedition against a friendly State. The only other question that presents itself to us is, supposing there was such evidence, were the jury right in acting upon it? The real question is the first one. The facts were shortly these: Colonel Sandoval, a foreigner, but residing in this country and enjoying its hospitality, and so owing a temporary allegiance and bound to obey its laws, buys two Krupp guns at Sheffield; he also buys at Birmingham a quantity of ammunition such as might be used for purposes of warfare. He sends the guns to Woolwich to be fitted up as cheaply as possible; and as a matter of fact they are fitted up on carriages so as to be capable of being used on board ship. That is all that the defendant was shown to have done in this country; and if he had done nothing else in the matter, I should agree with Mr. Grain that he had not fitted out any naval or military expedition in this country. But evidence was admitted to show what was subsequently done with these guns and ammunition. Colonel Sandoval caused the guns and ammunition to be shipped on board a general trading ship to Antwerp, where they arrive, and at the same time a vessel called the *Justitia* arrives at Antwerp, which had been purchased by Sir William Call in the name of his valet, one Philips. Up to that time there was no evidence of direct connection between the defendant and the *Justitia*, but now we find that the guns and ammunition so shipped by the defendant are put on board the *Justitia*. No sale of the guns and ammunition appears to have been effected, but the defendant himself embarked on board the *Justitia*, and shortly after leaving Antwerp, asserted himself to be the leader of the enterprise. Other ammunition was put on board in considerable quantities, though as regards the ship's carrying capacity, in trifling quantities; and with the exception of these guns and ammunition she carried no cargo. The ship sailed nominally for Trinidad with her papers, as might be expected, in excellent order, and on board of her, besides Colonel Sandoval, were a number of generals and the ordinary crew, mainly Englishmen, and Philips, the valet, who was the nominee of the purchaser, his master. The defendant asserted himself to be the leader of the enterpise and captain, and the captain was the mere navigator. The ship arrived off Grenada, and, on communicating with the shore, those on board learnt that a proclamation had been issued at Trinidad preventing ships with arms on board from putting in at that island. She then sailed towards Trinidad; and, when off that island, Philips, the valet, transfers the ship (without any consideration, as far as we know) to one of the generals, and her name was altered, and the English flag hauled down and some foreign flag was run up in its place. The defendant, however, leaves the ship, and lands in Trinidad. [His Lordship then stated in detail the naval and military operations off the coast of Venezuela.] Now, it is said that this expedition represented a *bonâ fide* commercial transaction; that the ship's papers were thoroughly regular (which one might expect in a transaction which was not *bonâ fide*); and that there was nothing inconsistent with a mercantile adventure; but that was for the jury to judge of. Again, it was said that there was no evidence that the defendant did "prepare or fit out" an expedition within the Queen's dominions. But I am clearly of opinion (if we are to make use of our common sense) that there was abundant evidence of a preparation and fitting out of an expedition. Mr. Grain has urged that there is no offence unless there has been a complete fitting out and equipment; that the ship must take her last biscuit on board. But the Act was passed to prevent such mischiefs as the present, and I am of opinion that the moment any overt act of preparation is done the statutory offence is committed, so that such attempts may be defeated, and the mischievous consequences likely to ensue to this country may be prevented. The defendant bought the guns and the ammunition which were eventually used on board. In my judgment, there was a substan-

tial preparation made in this country. These guns and ammunition were bought over here and then shipped to Antwerp. For what? For that which amounted to both a naval and military expedition. A number of persons were collected together on board this ship, the *Justitia*, and proceeded together for the unmistakable purpose of levying war or creating a disturbance within the territory of a friendly State. The defendant, then, did make preparation in this country for such an expedition. We entertain no doubt that there was abundant evidnece of preparation in this country to be left to the jury, and to support their very proper verdict.

WILLS, J.—I am of the same opinion. The rule for a new trial is based on two grounds. The first is misdirection on the part of the learned judge at the trial, who should have told the jury that, unless a naval or military expedition was completely fitted out in this country, no offence had been committed under sect. 11. In my judgment, it would be very mischievous to grant a rule in order to have a contention of this sort discussed. The section in question, when looked at, will not bear this most unreasonable construction. Any act of preparation in this country is a preparation within the Act, and consequently within the jurisdiction of this court. The second ground was, that the verdict was against the weight of evidence. In my judgment, it was not against the weight of evidence; and I think the jury would have shown themselves devoid of ordinary common sense if on this evidence they had come to any other conclusion than that at which they arrived. This resolves itself into two considerations: first, was this a naval expedition fitted out against the territory of a friendly State; secondly, how far the defendant Sandoval was involved in it. The Crown suggests that it was an expedition to proceed against the State of Venezuela. It is in evidence that it was of a contemptible character, but not the less an expedition. On the facts I think there is no doubt that the ship was intended to be so used. She carried Krupp guns specially fitted on gun carriages for use at sea. According to Colonel Sandoval they were to be used for "moral effect;" but we well understand what is the meaning of that expression under such circumstances—it means coercion of those to whom it is applied. I think an expedition which sets out from this country to use such moral effect upon a friendly State is within the Act, and does not become less a warlike act because it is to have a moral effect. The ship ultimately arrives in waters contiguous to the coast of Venezuela, and receives on board a contingent of men who were not wanted as sailors, and immediately afterwards she becomes engaged with a Venezuelan war vessel, who fires upon her. The Krupp guns and ammunition were made use of in this engagement, and on the following day for the purpose of bombarding, at long range, one or two houses; but the jury were asked to believe that the shots were fired with the object of finding the range. Thus part of the territories of a friendly State were subjected to the fire of this vessel. To my mind, there is abundant evidence, looking at the history of this ship, that ultimately (whatever had been done or left undone) she became an expedition against the dominions of a friendly State. She left Antwerp with a larger quantity of bunker coal than she wanted to take her to Trinidad; she carried on board no cargo except these munitions of war. At Grenada she finds a proclamation that she cannot put into Trinidad because she is carrying arms; and off the latter island the transfer of the vessel takes place. So far, it was said, this ship had not been engaged in anything beyond a mere mercantile venture, and that Colonel Sandoval had left before that which afterwards happened, which was a mere accident that supervened upon the original design of the voyage. I think it would have required an extravagant stretch of human credulity for the jury to entertain the smallest doubt that what happened off the coast of Venezuela was not the actual object of the fitting out of the ship. The next point is, whether the defendant helped to prepare and fit out this expedition. Of course, if he did not, he is not guilty of any offence. But what he did was to buy guns and ammunition over here and ship them to Antwerp. He then superintended their re-embarkation on board the *Justitia*, and soon after she had left that port he declared himself to be the leader of the enterprise, and acted as such—at any rate, as far as Trinidad. It is impossible that he could have assumed that character without a knowledge of the actual destination of the ship. His landing at Trinidad is perfectly immaterial (for that may have been done to secure his personal safety or evade criminal proceedings), if he were connected with the sending out of the vessel to that island, and knew the purpose for which she went there. He made no apparent effort to control the destination of the warlike merchandise after he left her at Trinidad. Again, it happened that this vessel arrived off the coast of Venezuela just at the opportune moment when a revolution broke out; that coincidence could not have been accidental, and Colonel Sandoval must have been aware that there was a strong probability that such revolution would break out. Indeed, that so-called accidental coincidence has much influence on my mind as to the defendant's motives for fitting out this ship. The double coincidence of the defendant arriving at Antwerp just when the *Justitia* was starting and of her arriving off Venezuela, as I have before described, belongs to the marvellous, if not the result of the designs of the defendant. These being the facts, we should be wrong if we were to grant a rule for the further discussion of the question; and in a case of this kind we should be firm and act up to our convictions. Nothing can be more mischievous than that persons who acted as the present defendant had done, may suppose that they can escape the responsibility for acts done in violation of the municipal law passed to maintain the requirements of international comity—acts which might be followed by consequences most mischievous, and which under certain circumstances it might be impossible to exaggerate. The present expedition was contemptible and not of a character seriously to affect our relations with a foreign Power but the law was the same as to a small expedition and a formidable one, as to an expedition against a small State and a great State, and those who took part in it were criminally liable. The preparation of an expedition of such a character is clearly an offence

within the Act. We have no doubt on this point, and the rule must be refused.

Rule nisi refused. (a)

Solicitor for the defendant, *Clift.*

Tuesday, March 28, 1887.

(Before SMITH and GRANTHAM, JJ.)

DUNKLEY AND ANOTHER *v.* HARRISON. (b)

Friendly society — Sickness — Old age — Natural decay.

The respondent, over eighty years of age, belonged to a friendly society, one of the rules of which provided that every member, after paying a certain amount of contributions, falling sick, lame, or blind, or otherwise disabled from work, should be entitled to receive a certain weekly amount from the funds of the society for sixteen weeks, if his illness continued so long, and half pay for the remainder; and another provided that where a member falls sick, lame, or blind, he is to give notice to the stewards, with a certificate from the surgeon of the society, stating the cause of his indisposition. The surgeon of the society certified to the appellants (stewards of the society) that the respondent "continued unable to work by reason of natural decay." The respondent drew sick pay for some weeks; then the appellants refused to allow him any more, holding that the certificate did not entitle him to receive it.

Held, that incapacity to work arising from natural decay, as the result of old age, did not entitle the respondent to sick pay under the society's rules.

THIS was a case stated by justices under 20 & 21 Vict. c. 43, and 38 & 39 Vict. c. 60, sub-sect. (*e*).

At a petty sessions holden at the Town Hall, in Lutterworth, on the 12th Oct. 1886, the information and complaint of Thomas Harrison (the respondent), complaining that he was a member of the "Ullesthorpe Friendly Society," and, being disabled from work, was, in accordance with the rules of such society, entitled to 3*s.* 6*d.* per week sick pay, and that James Dunkley and Thomas Liggins, both of Ullesthorpe, the stewards of such friendly society (the appellants), refused to pay such sick pay, and that there was due to the respondent up to the 13th Sept. then instant the sum of 1*l.* 11*s.* 6*d.*, was heard and determined by the justices, and the court adjudged that the appellants, as stewards of the Ullesthorpe Friendly Society, should pay to the respondent the sum of 1*l.* 11*s.* 6*d.* for sick pay claimed by the respondent under the rules of the said society, subject to the following case:

Upon the hearing of the said information and complaint it was proved as follows: (1) The respondent was, and had been since the formation of the society, a member of the Ullesthorpe Friendly Society (a registered society), and was of the age of eighty years and upwards, and blind of one eye.

Rule 1 of the society provided:

Name, place of business, and objects of society.—This society shall be called the Ullesthorpe Friendly Society, the business thereof shall be carried on at the house of George Rowley, or any other house the majority may think proper, and the objects thereof shall be to raise a fund by subscriptions and donations for the relief and benefit of members in time of sickness, to obtain the attendance of a surgeon and medicine, and to secure a certain sum upon the death of any member or a member's wife.

Rule 19 of the said society provided:

Members falling sick, &c.—When a member falls sick, lame, or blind, he shall give notice to the stewards, with a certificate from the surgeon of the society stating the cause of his indisposition. The steward shall pay his regular money at the end of seven days from the time of his declaring himself on the box, and the stewards shall regularly visit every sick member once a week, or for every default forfeit sixpence if he lives within two miles from the clubhouse, and if a member lives at a distance of more than two miles from the clubhouse, he must send a certificate signed by the minister or churchwardens of the parish where he resides, in a letter directed to the clerks of the society, post paid, or the postage will be stopped out of his pay, and his certificate to be renewed once a month, and a written notice will be required on his declaring off the box.

Rule 12 provided:

Member indisposed by his own imprudence.—If any member become sick, lame, or blind, or otherwise disabled from working, by immorality, drunkenness, or quarrelling, he shall derive no benefit from the box during that illness or indisposition.

Rule 10 provided:

Receipts by sick member.—Every member, after he has paid eighteen months' contribution, falling sick, lame, or blind, or being otherwise disabled from work, shall be entitled to receive, if the funds of the society exceed 50*l.*, at the rate of 7*s.* per week from the funds of the society for and during sixteen weeks, if his illness continues so long, and half pay of 3*s.* 6*d.* per week for the remainder, but no member to be allowed more than sixteen weeks' full pay in one year.

The funds of the society exceeded 50*l.*, and the respondent had obtained in the year 1882 a certificate of illness, and commenced to receive full pay of 7*s.* per week on the 13th Feb. 1882; he then received it for seven weeks, and then ceased to receive this for three weeks. He began again to receive full pay on the 23rd April 1882, and continued to receive it until the 19th June 1882. He began to receive half pay on the 26th June 1882, and continued this until the 12th July 1886, but had not been paid since that date.

The respondent had been refused his half pay—namely, 3*s.* 6*d.* per week—since the 12th July 1886, and the reason alleged was that the last certificate rendered was not in accordance with the rules, being in the words and figures following:

This is to certify that Thomas Harrison continues unable to work by reason of natural decay.—J. HUTCHINSON. June, 1886.

It was contended on behalf of the appellants that the Ullesthorpe Friendly Society was not established for granting pensions in old age, but for providing for periods of sickness, and that, the last certificate not being for sickness, the respondent was not entitled under the rules to receive sick pay from the 12th July 1886 to the 13th Sept. 1886 as claimed. They relied upon rule 1 as showing the objects, and on rule 19 as showing the mode of procedure. They contended that the expression "being otherwise disabled from work" meant an active disability from some external cause or from sickness, and did not mean merely

(a) The defendant was subsequently sentenced by Smith, J. to one month's imprisonment, and to pay a fine of 500*l.* and the costs of the prosecution. In passing sentence, the learned judge remarked that the sentence was lenient, as this was the first case under the Act, but that conviction in any future case would be followed by much more severe punishment.

(b) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

decay of nature from old age. The appellants relied for their interpretation of their expression "disabled from working" upon the reference thereto in rule 12.

On behalf of the respondent it was contended that, by the operation of rule 10, he was entitled to receive sick pay if he was sick, lame, or blind, "or being otherwise disabled from work," and that his last certificate proving his disability to work, and therefore his right to receive sick pay, was a compliance with such rule.

The justices present were of opinion that the words "or being otherwise disabled from work" in rule 10 were applicable to this case, and made an order upon the appellants to pay to the respondent the sum of 1*l.* 11*s.* 6*d.* claimed by him.

The question of law for the opinion of the court was, whether the respondent, being disabled from work, was, under rule 10 and the other rules referred to of the said society, entitled to sick pay.

If the court was of opinion that the respondent was so entitled, then their decision was to stand; but if the court was of opinion otherwise, then their decision was to be reversed.

By 18 & 19 Vict. c. 63, s. 9:

It shall be lawful for any number of persons to form and establish a friendly society under the provisions of this Act, for the purpose of raising by voluntary subscriptions of the members thereof, with or without the aid of donations, a fund for any of the following objects (that is to say),

(2) For the relief or maintenance of the members, their husbands, wives, children, brothers or sisters, nephews or nieces, in old age, sickness, or widowhood.

Toller for the appellants.—The decision of the justices in this case was wrong. The certificate of the medical man, that the respondent was unable to work by reason of natural decay, does not bring him within the words "being otherwise disabled from work" within rule 10 of this society's rules. It is not as though the respondent had become blind through old age. This is no case of ill-health, but only of decay of vitality through old age, and that is not a matter which under these rules entitles a member to sick pay. Johnson defines "sickness" to be a "state of disease." Disablement from working must arise from sickness or disease, and not from mere decay of vitality, to entitle a member to relief. He cited

Burton v. *Eyden*, 28 L. T. Rep. N. S. 408; L. Rep. 8 Q. B. 295.

No counsel appeared for the respondent.

SMITH, J.—The question raised in this case is not on the terms of the doctor's certificate whether the member is entitled to be paid when unable to work by reason of mere old age. In my judgment, the rules of this society do not provide for the incapacity of mere old age. Sect. 2 of 13 & 14 Vict. c. 115 (the Friendly Societies Act 1850), in describing the objects for which friendly societies may be established, mentions the relief, maintenance, or endowment of the members . . . in old age, sickness, or any other natural state of which the probability may be calculated by way of average, which was practically re-enacted by 18 & 19 Vict. c. 63, s. 9. Now, rule 1 of this society states that it was established "to raise a fund by subscriptions and donations for the relief and benefit of members in time of sickness, to obtain the attendance of a surgeon and medicine, and to secure a certain sum upon the death of any member or a member's wife." Nothing is here said as to "old age." The defendant society was formed for the benefit of members in sickness, and not during old age. If the matter stopped there, the argument for the defendants would be well founded; but it is carried further, when we look at rule 10, which provides that a member, after paying eighteen months' contribution, falling sick, lame, or blind, or being otherwise disabled from work, shall be entitled to receive relief for and during sixteen weeks, if his illness continues so long. That is a rule for sickness and illness; and a member only if he is sick and ill comes within it, but if incapacitated by old age, does not come within it. Rules 12 and 19 of this society support this view. In the present case the respondent was not suffering from any indisposition. A mere certificate of old age does not entitle a member to relief under these rules. I think the justices were wrong.

GRANTHAM, J.—I am of the same opinion, and think, on the whole, the justices were wrong. It seems that by these rules the funds of this society are limited to the relief of members who are sick and ill, and consequently, unless the respondent can show that the words in the rules apply to mere old age, he is not entitled to relief. If physical sickness was produced by old age, the case might be different; but if a member is not suffering from any disease, or functional or organic derangement, but only from an incapacity to work arising from old age, he cannot under these rules obtain pecuniary relief. This certificate was given erroneously, and the decision of the justices must be annulled.

Judgment for appellants.

Solicitors for appellants, *Wright* and *Williams*, Leicester.

CROWN CASES RESERVED.

Saturday, April 30, 1887.

(Before Lord COLERIDGE, C.J., GROVE, CAVE, BUTT, and SMITH, JJ.)

REG. *v.* PIERCE. (*a*)

Criminal law—Debtors Act 1869—*Obtaining credit by false pretences—Sufficiency of indictment—Offence stated in words of statute—Incurring of a debt or liability—Renewal of bill of exchange* —32 *&* 33 *Vict. c.* 62, *ss.* 13 (2) *and* 19.

In an indictment for incurring a debt or liability whereby credit was obtained under false pretences or by means of fraud under sect. 13, *sub-sect.* 1, *of the Debtors Act* 1869, *it is unnecessary to specify the false pretences or fraud under or by means of which the credit was obtained, sect.* 19 *of the Act rendering it sufficient to state the substance of the offence in the words of the Act, or as near thereto as circumstances admit.*

The renewal of a bill of exchange obtained under false pretences or by means of fraud is an incurring a debt or liability whereby credit is obtained within the meaning of sub-sect. 1 *of sect.* 13 *of the Debtors Act* 1869.

CASE reserved for the opinion of the court by the Recorder of the borough of Birkenhead as follows:—

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law

John Pierce was indicted at the Birkenhead Borough Sessions, held on the 10th Jan. 1887, for various offences alleged to have been committed against the Debtors Act 1869. The indictment, which contained twelve counts, was as follows:

No. 7, January Sessions, 1887.

Borough of Birkenhead in the County of Chester to wit.

1. The jurors for our Lady the Queen upon their oath present that John Pierce, on the 25th day of August 1886, unlawfully, in incurring a certain debt and liability to one Robert Fairclough, did obtain credit from the said Robert Fairclough by means of fraud other than by false pretences; that is to say, by then and there fraudulently representing to the said Robert Fairclough that a certain bill of exchange which he then produced and delivered, and which said bill of exchange as to the face thereof was in the words and figures following:

"Due 23rd October, 1886.

"£29 0s. 0d. "Birkenhead, 20th August, 1886.

"Two months after date pay to my order in London the sum of twenty-nine pounds value received.

"ROBERT FAIRCLOUGH.

"To Mr. John Pierce, 16, Lowwood-grove, Birkenhead.

"Accepted payable at Messrs. Glynn, Mills, and Co., bankers, London.—JOHN PIERCE."

And as to the back thereof was in the words following:

"JOHN OWEN,"

was a good and genuine bill of exchange indorsed by one John Owen, a brother-in-law of the said John Pierce, whereas the said bill of exchange was not a good and genuine bill of exchange indorsed by the said John Owen against the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

2. And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Pierce, on the day and year aforesaid, unlawfully, in incurring a certain debt and liability to the said Robert Fairclough, did obtain credit from the said Robert Fairclough under false pretences, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity. (a)

The form of the remaining counts marked with the odd numbers was similar to that of the first count, the persons from whom credit was obtained, the dates and the bills of exchange set out, only being different. Each bill of exchange bore the words "John Owen" on the back.

And the form of the remaining counts marked with even numbers was similar to that of the second count.

It was proved that at various periods in the years 1884 and 1885 the prisoner, who was a builder, had obtained timber and other building materials from Fairclough and the other persons named in the indictment in the ordinary way of his trade on credit, for the price whereof he had given bills of exchange. In the spring of 1886 the said persons were pressing him for payment of the said bills, and on their refusing to renew the said bills or to give him further credit without security, he offered to get them bills indorsed by his brother-in-law John Owen. Having made inquiries as to John Owen's position, which proved to be satisfactory, the said persons agreed to take such bills, and they were received from the prisoner with the name of John Owen indorsed upon them.

The bills so given by way of renewal were the bills set out in the indictment, and were as follows: (1) Two bills for 29*l.* each, drawn on the 20th Aug. 1886, by Robert Fairclough and accepted by the prisoner, falling due the 23rd Oct. 1886. (2) Bill for 39*l.* 8*s.*, drawn on the 16th June 1886 by the same Robert Fairclough and accepted by the prisoner, falling due the 19th Aug. 1886. (3) Bill for 58*l.* drawn on the 23rd March 1886 by John Elias Williams and accepted by the prisoner, falling due the 26th May 1886. (4) Bill for 30*l.* 6*s.* 4*d.* drawn on the 27th Feb. 1886 by John Williams and accepted by the prisoner, falling due the 30th April 1886. (5) Bill for 37*l.* 14*s.* 6*d.* drawn on the 17th May 1886 by the same John Williams and accepted by the prisoner, falling due 20th July 1886.

The two bills of 29*l.* each drawn by Robert Fairclough were renewals of the bill for 39*l.* 8*s.*, set out in the indictment, and of a bill for 17*l.* due in July, also drawn by Robert Fairclough and accepted by the prisoner. The date when this bill was drawn was not proved.

The bill for 58*l.* set out in the indictment was a renewal of a bill accepted by the prisoner in 1885 for a smaller amount, but the precise amount did not appear.

The other bills set out in the indictment were renewals, but sufficient evidence was not given at the trial to identify with certainty the bills of which they were the renewals.

The said bills were not in fact indorsed by John Owen, but by his son, a boy thirteen years of age, under the direction of John Owen's wife and without John Owen's knowledge. The bills were dishonoured at maturity, and the prisoner afterwards became bankrupt.

Before the prisoner pleaded it was objected on his behalf that the second and other counts in the indictment having even numbers were bad by reason that the false pretences charged were not specifically set out therein, and that the first and other counts having odd numbers were also bad for uncertainty in not setting forth specially the debt and liability in incurring which credit was in each case alleged to have been obtained.

I overruled both objections, subject to the statement of this case.

At the close of the case for the prosecution, it was objected for the prisoner that there was no evidence to go to the jury that, if any credit had been obtained by false pretences or other fraud, the same had been obtained "in incurring a debt or liability" within the meaning of the Debtors Act 1869. I overruled the objection subject to the statement of this case.

No witnesses were called for the prisoner, and the jury found him guilty generally, and not upon any particular count or counts. Sentence was deferred until this case should have been decided.

The questions for the consideration of the court were: 1. Whether under the circumstances hereinbefore stated the objections to the indictment were good. 2. Whether the objection as to the credit having been obtained by the defendant in incurring a debt or liability under the said statute was good.

(a) This count was framed under sub-sect. 1 of sect. 13 of the Debtors Act 1869 (32 & 33 Vict. c. 62). That section enacts as follows: "Any person shall, in each of the cases following, be deemed guilty of a misdemeanour, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year, with or without hard labour; that is to say: (1) If in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud."

J. Marshall, on behalf of the prisoner, submitted that the second count in the indictment was bad, on the ground that it did not sufficiently state the false pretences with which the prisoner was charged. He admitted that, had the objection been taken in arrest of judgment, *Reg.* v. *Watkinson* (26 L. T. Rep. N. S. 853; 12 Cox C. C. 271) would have been conclusive against him, on the ground that the insufficiency of the indictment would have been cured by verdict. Here, however, the objection was taken before plea, and the indictment, if bad, was not cured by verdict. He understood that a question would be raised as to the jurisdiction of the court to entertain an objection taken before plea.

J. E. Bankes, for the prosecution, stated that he should take the point, and that the grounds upon which he should do so were, shortly, that the jurisdiction of the court was confined by 11 & 12 Vict. c. 78, s. 1, to questions of law arising on a trial, and that here there was no trial at the time the objection was raised, for he had authority to the effect that the trial did not commence until the prisoner had been given in charge to the jury.

Marshall contended that this was really a question of law which arose during the trial. In *Reg.* v. *Watkinson* a doubt was suggested as to the jurisdiction of the court; but the court chose to take the motion in that case as a motion in arrest of judgment. [Lord COLERIDGE, C.J.—We none of us think you need go further into that question at present.] With regard to the question as to the sufficiency of the indictment, the rule was that, unless the prosecution could point to some statutory provision by reason of which the setting out of the false pretence was rendered unnecessary, or unless the insufficient statement was cured by verdict, the indictment must be bad. The statutory provision relied on here was no doubt sect. 19 of the Debtors Act 1869 (*a*), but the aim of that section was to dispense with the necessity for setting out the bankruptcy proceedings. The substance of the offence must still be set out, and the use of the words "as near thereto" showed that the false pretence must still be set out, otherwise the section need only have required the offence to be set out in the words of the Act; they showed that something more was required. Had the charge in the present case been under the latter part of the section, there would have been authority directly in point in *Reg.* v. *Bell* (12 Cox C. C. 37), for there Smith, J. held that a count which merely alleged that the defendant had obtained credit "by means of a fraud other than by false pretences" without setting out the means, was too general. If a prisoner were charged with removing property under sect. 13, the property would have to be set out, otherwise he would not know what charge he had to meet. [CAVE, J.—He can hardly be said not to know that, because the indictment would be subject to the Vexatious Indictments Act.] He would at any rate not be able to plead the previous proceedings in any subsequent proceedings. The indictment ought to show clearly what the offence is with which the prisoner is charged. [Lord COLERIDGE, C.J.—At present, upon looking at the words of sect. 13, I have a strong opinion that the Legislature intended to make a distinction between the obtaining a thing by false pretences and the obtaining it under false pretences, and therefore used the word "under" instead of "by" in sect. 13.] False pretences would in either case be the necessary ingredient of the offence. The general principle as to indictments for false pretences is stated in *Reg.* v. *Aspinall* (36 L. T. Rep. N. S. 300; 13 Cox C. C. 563; 2 Q. B. Div. 56). With regard to the objection to the first count, there, too, the debt, by incurring which the prisoner is alleged to have obtained credit improperly, should have been set out; and further, there was no evidence that any debt or liability had been incurred, for it was proved that the whole of the goods in respect of which the bills of exchange had been given were obtained in 1884 and 1885 in the regular way of business, and that such bills were merely renewed when they became due. No such fresh debt was, therefore, incurred, for when the bills were given originally the debt had been incurred once for all.

J. E. Bankes and *E. W. Edwards*, on behalf of the prosecution, were not called upon.

Lord COLERIDGE, C.J.—This conviction must be affirmed upon both the grounds upon which it is objected to. As to the last, that there was no evidence to go to the jury of an incurring a debt within the meaning of the Debtors Act 1869, because the bills of exchange in respect of which the charges were made were given in renewal of other bills of exchange given previously, the moment sect. 13 is looked at it is perfectly clear to my mind that, upon the renewal of those bills, the prisoner incurred a liability, and the words of the section are, "if in incurring any debt or liability he has obtained credit under false pretences." As to the first point taken, that the indictment was insufficient by reason that the false pretences charged in it were not specifically set out, it being merely in the words of the statute, the prisoner here was indicted under sect. 13, sub-sect. 1, of 32 & 33 Vict. c. 62, which states that, "if in incurring any debt or liability a person has obtained credit under false pretences, or by means of any other fraud, he shall be deemed guilty of a misdemeanour." Now, that is the section under which the prisoner was indicted, and it may be stated broadly and simply that the words of the Act are followed, and the charge is that, in incurring a certain debt or liability, he did obtain credit under false pretences against the form of the statute. Now, it is said that this is to be regarded as if it were an old common law indictment for obtaining money by means of false pretences, and that as in such an indictment it would be necessary to state the false pretence at length, it must also be stated at length here. In the first place, I should certainly require some time to consider whether the word "under" was not intentionally used instead of the word "by," where the section speaks of obtaining credit "under false pretences;" and it would not be easy to satisfy me that, in an Act of Parliament drawn by a person who knew what the law was, the word "under" was substituted uninten-

(*a*) Sect. 19 is as follows: "In an indictment for an offence under this Act it shall be sufficient to set forth the substance of the offence charged, in the words of the Act specifying the offence, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant, or document of any court acting under the Bankruptcy Act 1869."

tionally for the word "by." Because, in sub-sect. 13 of sect. 11, where the Act deals with the offence of obtaining property on credit by fraud within four months after the bankruptcy, the word "by" is used. I may not, however, be expressing the opinion of my learned brothers if I place any stress upon the use of the word "under;" and I do not consider it necessary for the purposes of this case to do so. I base my decision on sect. 19, which provides that "in any indictment for an offence under this Act, it shall be sufficient to set forth the substance of the offence charged in the words of this Act." That has been done here, and the question is, whether that is sufficient. Now, this court, in *Reg.* v. *Watkinson* (12 Cox C. C. 271), has expressly held that, in an indictment under sub-sect. 13 of sect. 11 of the Debtors Act 1869, it is enough to allege that credit was obtained by certain false pretences without setting out the particular false pretences. That is a decision of a court of great authority; and it is admitted on behalf of the prisoner that the case is undistinguishable from the case we are now considering. It is true that in an earlier case there is what is perhaps only an *obiter dictum* on the part of the learned judge, which is inconsistent with that case. The learned judge there said, without having had his attention drawn to sect. 19 of the Act, for, had it been, there would clearly have been some mention of it in the report —he there said that a similar indictment was too indefinite. On the other hand, if his attention was drawn to sect. 19, all I can say is, that I disagree with him. If, however, the report of the case is looked at, it will be seen that the point was really not present to the mind of the learned judge at all, and that he decided the point upon the general principle, which, without the section, would have been right enough. As to the second point, it is clear to my mind that, by the renewal of the bills of exchange, there was an incurring of liability whereby credit was obtained within the meaning of sect. 13 of the Debtors Act 1869. What I have said applies to all the counts of the indictment; they are all the same, and, the objections being the same, the judgment is the same. I am not sure that I have accurately ascertained the point that was suggested as to the jurisdiction of this court. But it seems to me that the answer to it is, that in *Reg.* v. *Watkinson* the court had the same point before them, and that, if there was any difficulty as to it, they there held that the case could be heard as if the objections were taken on motion in arrest of judgment. On all the points raised by the case, I am of opinion that the objections to the indictment fail, and that the conviction must therefore be affirmed.

GROVE, J.—I am of the same opinion. I think that the case of *Reg.* v. *Watkinson* is a binding authority on us; and the only observation I have to make is, that in that case it is stated that the prisoner did obtain credit "by" false pretences, and the report sets out the indictment, and there the word "by" does occur again; and therefore the present is the stronger case of the two.

CAVE, J.—I am of the same opinion. I do not desire to express any opinion as to the jurisdiction of this court to hear a motion to quash an indictment. But whether the court have or have not such power it is not necessary to decide, because I am of opinion that, whether the objections could or could not be entertained, they should not succeed; and that the indictment was a good one.

BUTT, J.—I am of the same opinion.

SMITH, J.—I think that this indictment is a good one, by reason of sect. 19 of the Debtors Act 1869.

Conviction affirmed.

Solicitors for the prosecution, *Broadbridge* and *Nield*.

Solicitors for the prisoner, *Thompson* and *Hughes*, Birkenhead.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

March 10 *and* 19, 1887.

(Present: The Right Hons. Lords WATSON and FITZGERALD and Sir BARNES PEACOCK.)

Re DILLET. (*a*)

ON APPEAL FROM THE SUPREME COURT OF BRITISH HONDURAS.

Appeal in criminal case—Conviction improperly obtained—Perjury—Misdirection.

Although the Judicial Committee will not review or interfere with the course of criminal proceedings in the court of a colony, as a general rule, yet where a legal practitioner was ordered to be struck off the rolls of the court upon a conviction for perjury after a charge by the presiding judge to the jury which in the opinion of their Lordships was "grievously unjust to the defendant, and in many instances outraged the proprieties of judicial procedure," the verdict and conviction were set aside.

Judgment of the court below reversed.

THIS was an appeal by Mr. A. M. Dillet, of the Inner Temple, barrister-at-law, against a conviction for perjury in the Supreme Court of British Honduras, and also to annul an order of the court striking him off the rolls of the court.

The appellant had obtained special leave to appeal in March 1886.

The facts of the case appear sufficiently from the judgment of their Lordships.

Lane (*Willis*, Q.C. with him) appeared for the appellant.

At the conclusion of the arguments their Lordships took time to consider their judgment.

March 19.—Their Lordships' judgment was delivered by

Lord WATSON.—This appeal is brought by Abraham Mallory Dillet, of the Inner Temple, barrister-at-law, against a verdict returned by a jury, on the 6th Sept. 1884, finding him guilty of the crime of perjury before William Anthony Musgrave Sheriff, who was at that time Chief Justice of the Supreme Court of British Honduras; and also against a consequential order of the Chief Justice, dated the 27th March 1885, directing the appellant to be struck off the list of practitioners of that court. Such appeals are of rare occurrence; because the rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings,

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law

unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done. Along with his petition for leave to appeal, the appellant produced a printed report of the charge of the presiding judge, and (*inter alia*) alleged (reason 13) that the judge had made statements to the jury with reference to his conduct on other occasions, of which no evidence had been given at the trial; and he referred in particular to three extracts from the charge, marked respectively A, B, and C, as calculated to prejudice unduly the minds of the jury against him. By Order in Council of the 12th Aug. 1885 Her Majesty directed the petition and these extracts to be referred to the Chief Justice, in order that he might make such observations thereon as he might think fit, and further ordered that he should be at liberty to appear and show cause against the prayer of the petitioner. His Honour did not avail himself of the leave thus given him, but forwarded his observations to the registrar of the Privy Council. These observations were submitted to this board; and upon their report Her Majesty, by Order in Council of the 3rd April 1886, allowed the appellant to enter and prosecute his appeal upon the ground stated in the thirteenth reason of his petition, namely, that the conviction was obtained in a manner so unsatisfactory that the conviction alone ought not to be conclusive as a ground for striking him off the roll. The Chief Justice was dnly served with the appeal, but has not made appearance. The prosecution of the appellant for perjury had its origin in these circumstances. The Chief Justice received a communication from Mr. Goodman, the Attorney-General of Honduras, bringing under his notice the conduct of the appellant in the inferior court at two sittings of the court held upon the 17th June 1884, and in the presence of the acting magistrate. His Honour thereupon directed the affidavits of three persons who were present on these occasions to be prepared and submitted to him for his approval, and these were subsequently sworn to by the deponents. Two of them (the Attorney-General and the acting magistrate) stated that the appellant "appeared to be under the influence of drink;" the third (Cato, the court crier), "I saw that he was intoxicated." The Chief Justice appointed the appellant to answer these affidavits, and he accordingly made an affidavit, in which he stated that he was not "under the influence of drink," and denied Cato's statement that he was intoxicated. Upon consideration of these statements in his affidavit, the Chief Justice, acting under the authority of 14 & 15 Vict. c. 100, which has been extended to Honduras, directed the Attorney-General to prosecute the appellant for perjury; and a criminal information was filed by that officer on the 15th Aug. 1884, containing two counts, one founded upon the appellant's contradiction of himself and the magistrate, and the other upon his contradiction of Cato's statement. The trial commenced upon the 27th Aug. 1884, and after occupying eight days, terminated in a verdict of guilty by a majority of five to two, accompanied by a recommendation to the sympathy of the court. It is very unfortunate that, owing to the fact of there being but one member of the Supreme Court of British Honduras, the trial took place before the same judge who had directed the affidavits to be prepared and submitted to him, had appointed the appellant to answer them, and, upon the affidavit and answer being made, had directed the prosecution. These circumstances may in some measure account for, although they cannot, in the opinion of their Lordships, justify, many of the observations which were addressed by him to the jury. The issue which the jury had to try was a very simple one. They had to consider, in the first place, whether the accused was under the influence of liquor on the occasions libelled; and, in the second place, whether he knew and believed that he was so at the time when he made affidavit to the contrary. Unless they were satisfied on both these points, the jury had no right to find the appellant guilty. A man labouring under excitement may appear to others to be under the influence of drink when he is not; and, although he is actually under that influence, he may be unconscious of the fact. The only question submitted to the jury was, whether the appellant's behaviour in court on the 17th June 1884 was due to drink. A misdirection of that kind would not necessarily afford a ground for setting aside a conviction in a criminal case. But, in the extract C, which the Chief Justice in his observations states to be "substantially correct," he thus put the case against the accused: "Pause for a second and reflect what the result would be of a verdict in favour of Mr. Dillet. It would be to brand the Attorney-General of the colony, a magistrate, and others as perjurers; and are you going to brand all the members of my Bar as alike perjurers and conspirators? If the jury think so, let them do their duty regardless of consequences." Comment upon that language is needless. It grossly misrepresented the real issue, and was most unfair to the accused, whose acquittal by the jury would have cast no imputation of perjury, or even of untruthfulness, either upon the officials alluded to, or upon the members of the Honduras Bar. The Chief Justice does not in his observations impeach the substantial accuracy of the extract A, which is sufficiently vouched by the affidavits produced, but he vindicates the remarks contained in that extract by pointing out that the records in the four cases therein referred to were put in evidence by the prosecutor before the case was closed, and that the appellant was the first to refer to these cases of contempt. Apparently, the Chief Justice has failed to appreciate the gravamen of the objections which the appellant takes to the remarks in question, which are, in their Lordships' opinion, well founded. The judge not only uses these records in a manner altogether unwarrantable, but he converts himself into a witness, and without being sworn makes statements to the jury regarding a visit of the accused to his (the Chief Justice's) private house, and other matters, which are neither to be found in these records nor in the evidence. The remarks contained in extract B are a little, but not much, less objectionable. Their Lordships have not, in estimating their character, taken into account a reference which is therein made to a certain "tragical or dark transaction." The Chief Justice, in his observations, states that he has no recollection of making, and is under the impression that he did not make such a reference, and their

Lordships have assumed, for the purposes of this appeal, that he did not do so; although there are affidavits produced by persons who heard the words, including one reverend gentleman who took them down in shorthand at the time they were uttered to the jury. It would neither be pleasant nor profitable to criticise more minutely the directions of the Chief Justice to the jury, so far as contained in these extracts. Their Lordships are of opinion that these directions were grievously unjust to the appellant, and in many instances outraged the proprieties of judicial procedure. A conviction obtained by such unworthy means cannot be permitted to stand; and their Lordships will humbly advise Her Majesty to set aside the verdict and conviction appealed from. Seeing that the appellant has already undergone the sentence which followed upon the verdict, it is unnecessary to order a new trial. Their Lordships will also humbly advise Her Majesty to reverse the order of 27th March 1885, removing the appellant from the roll of practitioners of the Supreme Court of British Honduras. Their Lordships will direct a copy of their judgment in this case to be communicated to one of Her Majesty's Secretaries of State.

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 23, 24, 25, 26, *and* 28, 1887.

(Before Lord ESHER, M.R., BOWEN and FRY, L.JJ.)

GOVERNORS, &C., OF THE POOR OF BRISTOL (respts.) *v.* BRISTOL URBAN SANITARY AUTHORITY (apps.) (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Poor rate—Land liable to assessment, taken for improvements—Deficiency in assessments—Completion of works—Lands Clauses Consolidation Act 1845 (8 *Vict. c.* 18), *ss.* 2, 133.

The Lands Clauses Consolidation Act 1845, *s.* 133, *provides that the promoters of undertakings who become possessed, by virtue of that Act or of the special Act, of lands liable to be assessed to the poor rate, shall from time to time, until the works shall be completed and assessed to such poor rate, be liable to make good the deficiency in the assessment for poor rate by reason of such lands having been taken or used for the purposes of the works, and such deficiency shall be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the special Act.*

The defendants became possessed, under statutory authority, of lands liable to be assessed to the poor rate for the purposes of improvements by the construction of new streets in the ancient city of Bristol. In some cases all the land taken was used in the construction of the roadway and footway of the new streets; but in other cases more land was taken than was required for that purpose, so that the defendants were possessed of surplus land which was vacant, unoccupied, and unassessed. Such land was to be disposed of by the defendants by sale in fee simple or at fee farm rents within a specified time, which had not expired when the plaintiffs, the rating authority, brought an action to recover the amount of the deficiency in the assessment to the poor rate caused by the lands having been taken.

Held, that the works would be completed within the meaning of sect. 133 *of the Lands Clauses Consolidation Act* 1845, *and that the liability of the defendants to make good any deficiency would determine, when the roadways and footways were fully constructed and the whole of the lands taken, which could become liable to assessment, had become assessable.*

Held, also, that the deficiency must be computed from time to time by comparing the assessed value, at the time of the passing of the special Act, of the lands taken, with the assessed value at the time of computation of such of the lands taken as might have again become assessable, and that if the latter amount was not less than the former there would be no deficiency.

The power to take lands under the Lands Clauses Consolidation Acts was conferred upon the defendants by a provisional Order in Council, confirmed by a special Act, which described in one schedule, but under separately numbered headings, the several improvement schemes promoted by the defendants.

Held, that each improvement scheme separately described in the schedule constituted a separate undertaking, and that the deficiency in the assessment to the poor rate ought to be computed upon each separate improvement scheme.

THIS was a special case stated for the opinion of the court pursuant to two orders of a master.

The special case, so far as is here material, was as follows:—

1. This action is brought to recover alleged deficiencies in poor rates in respect of several assessments of properties taken for street improvements in certain parishes within the limits of the ancient city of Bristol.

2. The plaintiffs were incorporated with perpetual succession by the local Act 3 Geo. 4, c. xxiv., and were thereby appointed to be the guardians of the poor of the city of Bristol, and were by the said Act invested with and required to exercise all and every the powers and authorities with which churchwardens and overseers of the poor then were, or thereafter should be, invested by any laws made or to be made concerning the maintenance and relief of the poor.

9. The defendants in this action are the urban sanitary authority for the city and county of Bristol under the provisions of the Public Health Act 1875.

10. By the Public Health Act 1875, s. 154, any urban sanitary authority may purchase any premises for the purpose of widening, opening, enlarging, or otherwise improving any street, or (with the sanction of the Local Government Board), for the purpose of making any new street.

11. By the 176th section (sub-sect. 1) of the said Act the Lands Clauses Consolidation Acts 1845, 1860, and 1869 are incorporated with the said Act, with certain exceptions therein appearing.

12. By the 297th section of the said Act, the Local Government Board is authorised, under the

(*a*) Reported by J. SMITH and A. H. BITTLESTON, Esqrs., Barristers-at-Law.

regulations therein contained, to make provisional orders empowering local sanitary authorities to put in force the powers of the Lands Clauses Consolidation Acts 1845, 1860, and 1869, with respect to the purchase and taking of lands otherwise than by agreement, subject to any such provisional order being confirmed by Act of Parliament.

13. By sect. 316 of the said Public Health Act 1875 it is enacted that in the construction of the provisions of any Act incorporated with this Act the term "the special Act" includes this Act, and (in the case of the Lands Clauses Consolidation Acts 1845, 1860, and 1869) any order confirmed by Parliament and authorising the purchase of lands otherwise than by agreement under this Act, and the urban or rural authority shall be deemed to be the promoters of the undertaking, "the commissioners," or "the undertakers," as the case may be.

14. By the 133rd section of the Lands Clauses Consolidation Act 1845 it is enacted as follows:

If the promoters of the undertaking become possessed by virtue of this or the special Act, or any Act incorporated therewith, of any lands charged with the land tax, or liable to be assessed to the poor's rate, they shall from time to time until the works shall be completed and assessed to such land tax or poor rate, be liable to make good the deficiency in the several assessments for land tax and poor's rate by reason of such lands having been taken or used for the purposes of the works, and such deficiency shall be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the special Act, and on demand of such deficiency the promoters of the undertaking, or their treasurer, shall pay all such deficiencies to the collector of the said assessments respectively.

15. By the 2nd section of the said Lands Clauses Consolidation Act 1845 the expression "the works," or "the undertaking," is defined to mean "the works or undertaking, of whatever nature, which shall by the special Act be authorised to be executed."

16. By the Local Government Board's Provisional Orders Confirmation (Bristol, &c.) Act 1876 a provisional order of the Local Government Board, made under the provisions of the Public Health Act 1875, and relating to the city of Bristol, was confirmed, and by the said provisional order the Local Government Board empowered the defendants, as the urban sanitary authority of the said city, to put in force, with reference to the lands and premises described in the schedule thereto, and for the purpose of widening and otherwise improving certain streets and roads, the powers of the Lands Clauses Consolidation Acts 1845, 1860, and 1869, with respect to the purchase and taking of lands otherwise than by agreement.

17. The said provisional order relates to fourteen different undertakings, with respect to each of which the defendants are thereby empowered to take lands for street improvements; but the four undertakings numbered in the said schedule III., XI., XII., and XIV. respectively, are alone material to this case.

18—25. These paragraphs described the four material undertakings and their condition at the time when this action was commenced. In some cases all the land taken by the defendants was used in the construction of the roadway and footway of the new street. In other cases more land had been taken than was required for the roadway, which land would be an improvement to the neighbourhood as a site for new buildings. The roadways and footways had been thrown open to the public at the time this action was commenced, and some of the surplus lands had been sold and had been reassessed, but some was still undisposed of, vacant, and unassessed. In the case of those lands which had been reassessed the value upon which they were assessed was greater than the value upon which they had been assessed at the time they were taken by the defendants.

26. The plaintiffs contend that the defendants are liable to pay to them the deficiency (if any) in respect of each property which had been separately assessed, irrespective of any increase in value arising upon other properties which had been taken and subsequently reassessed.

27. The plaintiffs also contend that the liability of the defendants to make good the deficiency in the several assessments respectively continues in each case until the new or improved streets are completed in the sense that buildings in contiguity, or approximate contiguity, have been erected on the adjoining land and assessed to the poor rate, or (in the alternative) until each separate item of the former assessments is reassessed to the poor rate, or at the least until the lands not dedicated to public traffic by virtue of the scheme are disposed of by the defendants, and are reassessed.

28. The defendants contend that the correct way of ascertaining the deficiency for which they are liable is to add up the total rateable values of the properties taken from the time the defendants obtained possession thereof respectively, and to deduct all the values of the properties reassessed as and when they become reassessable, and for any deficiencies thus appearing from time to time they admit liability. But in all cases they contend that when the streets and improvements authorised to be executed by them are completed their liability absolutely ceases, and that such completion is effected when the new and widened roadways or footways are formed and opened for public use. Further, that holding vacant lands as surplus property not required to be thrown into the road or footways of the widened and improved streets or roadways does not prevent the "works" authorised being completed within the meaning of sect. 133 of the Lands Clauses Consolidation Act 1845 as applied to the present case. They further contend that in cases where the whole of a rateable property is devoted to the site of the road or footways of a street their liability ceases as to that property on the opening of the street to the public as a highway. They also contend that they are entitled to the benefit of all reassessments to be taken into account against the deficiency.

It was admitted during the argument that the defendants were empowered by several local Acts to sell the surplus lands absolutely, or at fee farm rents, and that they were bound to dispose of the lands within a period which had not expired.

The questions for the opinion of the court are: (1) At what period does the liability of the defendants to make good deficiencies in the rates terminate? (2) Whether the liability must not be considered and dealt with in respect of each undertaking, treating the entire ancient city of Bristol as one area. (3) Whether the mode of calculating the deficiency contended for by the

plaintiffs, or that alleged by the defendants, is correct. (4) Whether the plaintiffs are entitled to recover any and which of the sums claimed by them, or whether the case is to be remitted to apply the decision of the court.

Pitt Lewis, Q.C. and *Wightman Wood* for the plaintiffs. — The 133rd section of the Lands Clauses Act 1845 provides that the defendants shall from time to time, until the works shall be completed and assessed to the poor rate, be liable to make good the deficiency caused by the lands having been taken for the purpose of the works, such deficiency to be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the special Act. Here the works are not "completed" and assessed to the poor rate within the meaning of the section. The works are not "completed" when the new or improved streets are finished and thrown open to the public. Such a construction would render the section nugatory. The clear intention of the Legislature was that there should be no deficiency at any time in the poor rate, but that the promoters should make good all deficiencies until such time as the works executed by them were in a position to contribute to the rate. This intention will be defeated if these works are held to be completed when the street is thrown open, the sites abutting thereon being left vacant, and not in a position to contribute to the rate. This construction also gives no force to the words of the section "and assessed to the poor rate." According to the true construction, the defendants are liable to make good the deficiency until all the surplus lands have been sold by them, or disposed of by the creation of ground rents, and have been rendered capable of being rated. Otherwise the deficiency caused by the destruction of rateable property which it was the intention of the Legislature to guard against by this section is almost certain to occur in the case of every municipal improvement. The learned counsel cited on this point

Galloway v. *The Corporation of London*, 14 L. T. Rep. N. S. 865; L. Rep. 1 H. L. 34;
Quinton v. *The Mayor and Corporation of Bristol*, 30 L. T. Rep. N. S. 112; L. Rep. 17 Eq. 524;
The Mayor and Corporation of London v. *The Churchwardens and Overseers of St. Andrew, Holborn*, 16 L. T. Rep. N. S. 665; L. Rep. 2 C. P. 574.

Further, each undertaking must be considered by itself, and the defendants are not at liberty to set off an increase in the rateable value of the property reassessed in one undertaking against a deficiency caused by property undisposed of in another. Where also the properties dealt with by any undertaking are not all situate in one parish, the properties situate in each parish must be separately dealt with. The learned counsel cited

The East London Railway Company v. *Whitechurch*, L. Rep. 7 H. L. 81.

Philbrick, Q.C. and *Wall* for the defendants.—The whole of the improvement schemes authorised by the provisional order and the confirming Act must be taken as one undertaking for the purposes of the Lands Clauses Act, and the defendants are at liberty to set off a loss in one case against a gain in another. As to the proposal to divide the different schemes into portions, and to deal separately with every portion of a scheme situate in a separate parish, that course would obviously be very unfair. The whole of the property, for instance, destroyed for a time as a rateable subject might be situate in one parish, while in another parish the same scheme might cause an immediate large increase in the rateable value. Generally the defendants are only directed by the 133rd section of the Lands Clauses Act to make good the deficiency until the works are completed and assessed. It is submitted that "the works are completed," in the case of municipal improvements, when the streets are finished and thrown open to the public. The words are incapable of any other construction, since nothing remains to be done by the promoters. As to the words "and assessed," they are clearly inapplicable in such a case, and are meant to apply only to cases in which the works themselves when completed are capable of being rated. Here they are not so. It is clear that in the case of properties thrown wholly into a new street, the words "and assessed" can never be applicable, and it was not intended that the promoters of a municipal improvement should incur a perpetual liability as to them. Being therefore confessedly inapplicable in certain cases, there is no reason why they should be applied in cases where the property is not wholly dedicated to the public, and why the liability of the promoters should be made to depend on the uncertain contingency of a suitable purchaser being found for a parcel of surplus land. They cited

Stratton v. *The Metropolitan Board of Works*, 31 L. T. Rep. N. S. 689; L. Rep. 10 C. P. 76;
Wheeler v. *The Metropolitan Board of Works*, 20 L. T. Rep. N. S. 88; L. Rep. 4 Ex. 303.

Pitt Lewis, Q.C. in reply.

Cur. adv. vult.

Dec. 21.—Wills, J.—This is a special case which has raised an important question with reference to the method in which the rates are to be levied in the city of Bristol, and as to the extent in point of time to which the urban sanitary authority are liable to make good a deficiency which has been caused in the poor rate by reason of certain lands having been taken for the purpose of street improvements. The first question which has been raised is as to the period at which the liability of the urban sanitary authority under the 133rd section of the Lands Clauses Act 1845 came to an end. The difficulty arises from an attempt on the part of the Legislature to save the necessity of new and lengthy enactments by adapting to fresh sets of circumstances provisions which were admirably adapted to the matter to which they were originally applied, but not equally so to a state of things not then contemplated. The 133rd section of the Lands Clauses Act 1845 provides that if the promoters of an undertaking become possessed by virtue of that Act, or their special Act, or any Act incorporated therewith, of any lands liable to be assessed to the poor's rate, they shall from time to time, until the works shall be completed and assessed to such poor's rates, be liable to make good the deficiency in the several assessments for poor's rate by reason of such lands having been taken or used for the purposes of the works. Now, what has happened at Bristol is that two classes of statutory undertakings have been entered into. One class, in which land has been bought for a

street improvement, and, no more being taken than was wanted for the improvement, the whole has been thrown into the street; and a second class, in which more has been bought than was wanted; and virtually a land speculation has been entered into by the urban sanitary authority acting under the authority of the Legislature. Two cases bearing upon this point have been very fully discussed in the course of argument. I allude to the case of *Galloway* v. *The Corporation of London* (14 L. T. Rep. N. S. 865; L. Rep. 1 H. of L. 34), and that of *Quinton* v. *The Mayor and Corporation of Bristol* (30 L. T. Rep. N. S. 112; L. Rep. 17 Eq. 524). These cases, I think, make it abundantly clear, and, but for the question having been raised, I should have thought that the point was beyond dispute—that in construing an Act of Parliament of this kind it is impossible to treat the power of buying lands as ancillary only to the execution of the works, as in the case of a railway company, but that such power must be treated as a part of the undertaking. A railway company is limited to buying only so much land as is necessary for the actual purpose of constructing their works, but the authority of the defendants was not confined within these limits. They were authorised by the Legislature, not merely to purchase sufficient land for the improvement of the street, but also to speculate in land. If this view is correct, all those incidents which are indispensably connected with speculation in land are just as much within the scope of the undertaking as the reconstruction and improvement of the street. This is, I think, an important consideration when we approach the question of the time at which the works must be considered as having been completed. The expression "the works" has received statutory interpretation. In the 2nd section of the Lands Clauses Act it is provided that the expression "the works" or "the undertaking" shall mean the works or undertaking which shall by the special Act be authorised to be executed. It seems to me that the carrying out of a scheme of purchasing land beyond what was required, and reselling it, is just as much comprehended within the undertaking authorised by the special Act in this case as the construction of the street itself. When, then, is the undertaking completed? In ordinary cases in which, under circumstances like this, surplus land has to be resold, the undertaking is completed when the last piece of surplus land comprehended in it has been sold. Here, however, the matter is slightly complicated because of certain provisions contained in the local Acts. Into the details of these I do not propose to go. I will merely say that it was thoroughly traced out in the argument, and admitted by both sides, that these Acts contain provisions applicable to the circumstances of these undertakings which empower the urban sanitary authority, instead of selling the land in fee simple, to create ground rents and sell them. For the purpose, however, of such a section as this I think it is proper to treat the creation of these ground rents as equivalent to a sale, the creation of the ground rents being merely a piece of machinery for disposing of the property. It would, moreover, be unreasonable to treat the period elapsing between the creation of the ground rents by the authority and their sale as a period elapsing before the completion of the works. In the first place, then, I think that the creation of a ground rent upon a piece of surplus land is equivalent to a sale, and that the works are not completed in such a case until the last piece of land to be treated by sale or the creation of a ground rent has passed out of the control of the authority. Then come the following words of the 133rd section, "and assessed to the poor's rate." The period fixed by the Legislature is not merely when the works are completed, but when they are completed and assessed to the poor rate. Now, in neither of the classes of undertakings which I have mentioned are the promoters liable to be rated to the relief of the poor in respect of the lands taken. In those cases in which the lands taken were wholly thrown into the reconstructed street they are clearly not liable. In these cases, in which more land was taken than was wanted, the case of the *Mayor, &c., of London* v. *The Churchwardens and Overseers of St. Andrew, Holborn* (16 L. T. Rep. N. S. 665; L. Rep. 2 C. P. 574), establishes that it was never intended that such land, while in the hands of a corporation, should be assessed to the poor rate, but only that the corporation should be liable to make up the deficiency. It seems to me, therefore, that the expression "until the works shall be . . . assessed to such poor's rate" must be rejected in dealing with the present case because it is not applicable to the circumstances of it. It is impossible to retain them, because it is not possible that they could ever be satisfied by any extension of time. Precisely the same view is I think taken in the case of *Stratton* v. *The Metropolitan Board of Works* (31 L. T. Rep. N. S. 689; L. Rep. 10 C. P. 76). In that case the remarks of Bramwell, B. in *Wheeler* v. *The Metropolitan Board of Works* (20 L. T. Rep. N. S. 88; L. Rep. 4 Ex. 303), doubting whether the section was meant to apply unless the lands taken could, when the works were completed, be capable of a beneficial occupation, were pressed upon the court, and the court declared them in terms to be extra-judicial, observing that they had fully considered the language of the clause, and were satisfied that such was not its meaning. The time, therefore, up to which the liability of the defendants runs is, in my opinion, the completion of the street, where the construction of the street is the only object of the undertaking, and the sale of the last piece of land or the creation of the last ground rent, or the completion of the street, whichever happens last, in all other cases. The next question is important from a financial point of view. It is whether on the proper construction of the Act of 1876, confirming the provisional order of the Local Government Board, the whole of the fourteen schemes which the defendants were thereby empowered to carry out are to be considered as one undertaking within the meaning of the Lands Clauses Act, or as fourteen separate undertakings. The enactment itself is perfectly general in terms, empowering the urban sanitary authority to put in force the powers of the Lands Clauses Acts with reference to the lands and premises described in the schedule; but in the schedule we find that the solemn word "undertaking"—always used in all Acts of Parliament relating to schemes to which the Lands Clauses Acts apply—is used separately with respect to each of these fourteen schemes, and I do not doubt that that

word is used for the special purpose of separating each scheme from the others, and preventing them from being merged in one general scheme. On the true construction of the Act I think that they are all separate undertakings, and I believe that that was the object of drawing up this schedule in this very unusual way. The third question which I have to answer is as to the meaning of the clause of the section "shall be liable to make good the deficiency in the several assessments for poor's rate." Does that clause mean "the deficiency in the several assessments, taking the rating area as a whole," or "the deficiency of the individual assessments in respect of each separate property?" I have no doubt that it means the deficiency in the assessment as a whole within each rating area. A line of railway, which is one of the undertakings with which the enactment was primarily intended to deal, passes through hundreds of parishes, and no one, I think, can have any doubt that, in the case of a railway, the "several assessments" must mean the several assessments of each separate rating area through which the works pass taken by itself. The fourth and last question is one of great importance to the city of Bristol. Since the argument I have read carefully the whole of the two local Acts (3 Geo. 4, c. xxiv. and 1 Vict. c. lxxxvi.), on the provisions of which the question whether the whole of the city of Bristol is to be considered as one rating area, or whether each of the nineteen parishes of which it is composed is a rating area in itself, must turn. The Act of 1822 contains many provisions, especially the 41st section, which strongly favours the view that the whole city constitutes one rating area only; but, on the other hand, there are also many expressions which are in favour of each parish constituting a separate area, and indeed it seems to me that some of the sections are incapable of explanation on any other theory. Now, it appears that before the Acts each parish had the right of making a separate rate; and it seems to me that, if so important a change had been contemplated by the Legislature as the consolidation of nineteen parishes into one rating area, that change would have been made by the use of plain words. Instead of that, the language of the Legislature is, if anything, more consistent with the continuance of the old state of things. I think, therefore, that each of the nineteen parishes constitutes a distinct rating area.

Grantham, J.—I quite agree with my brother in the result at which he has arrived, but I do not agree with the last portion of his judgment; and I feel bound to express my opinion that the rate is not a parochial rate, but one for the whole of the city. This, however, does not affect the result, because it is impossible to arrive at the deficiency without taking each separate undertaking by itself. I cannot find anything in the local Act of 1822 justifying the view that there is to be a separate parochial rate for each parish; and, as to the Act of 1837, I am unable to see how, when one assessment only is constantly spoken of all through the Act, the rating can be parochial. With this exception, I entirely concur with my brother Wills.

Wills, J.—The answer of the court to the first question will therefore be, that the liability of the defendants to make good deficiencies in the rates terminates on the completion of the streets or the sale of the last piece of land in fee simple, or the creation of the last ground rent, whichever shall last happen, treating each undertaking as a separate undertaking. To the other questions we give no answer, as they are compound and involve the question whether the entire ancient city of Bristol is to be treated as one area, on which point we differ.

The defendants appealed.

Philbrick, Q.C. and *Wall* for the defendants.—The liability of the defendants ceases when the works—that is, the roadways—are completed. The whole of the improvements which they are authorised by the Order in Council to make form one undertaking, and any increase of rateable value caused by the completion or part completion of one portion will reduce the deficiency upon the whole of the lands taken. When the rateable value of the whole of the lands which have become reassessed is equal to the rateable value of the whole of the lands taken at the time of the passing of the special Act, then the defendants' liability ceases, even though some of the improvements are not completed. They cited

Mayor of London v. *St. Andrew, Holborn*, 16 L. T. Rep. N. S. 665; L. Rep. 2 C. P. 574;
Wheeler v. *Metropolitan Board of Works*, 20 L. T. Rep. N. S. 984; L. Rep. 4 Ex. 303.

Pitt Lewis, Q.C. and *Wightman Wood* for the plaintiffs.—The expressions "works" and "undertaking," in sect. 2 of the statute, are equivalent terms, and the "undertaking" is the entirety of that which the promoters are required to do under their special Act. When they have finished all that which they have been empowered to do, and when such parts of their undertaking as are capable of assessment have been reassessed, their liability ceases. They cited

Bushell v. *Buckett*, 2 C. B. 110;
R. v. *St. Michael's, Norwich*, 6 T. R. 536;
R. v. *Wallingford Union*, 10 A. & E. 259;
East London Railway v. *Whitechurch*, 30 L. T. Rep. N. S. 412; L. Rep. 7 H. L. 81;
Galloway v. *Mayor, &c., of London*, 14 L. T. Rep. N. S. 865; L. Rep. 1 H. L. 34;
Stratton v. *Metropolitan Board of Works*, 31 L. T. Rep. N. S. 673; L. Rep. 10 C. P. 76.

Philbrick, Q.C. in reply.

Lord Esher, M.R. (after deciding that the whole of the ancient city of Bristol was to be considered as one rating area).—The next point which we have to decide is, whether this is to be taken as one undertaking, or as several separate undertakings. This is a question of fact, and cannot be answered by looking at the words of the Public Health Act; the things which are undertaken must themselves be looked at. If they are in their nature distinct undertakings, they are not made one undertaking by being put in the same petition or Order in Council. In my opinion, they are in their nature distinct, and have been treated in the Order in Council as distinct and separate undertakings. Therefore credit cannot be given to any one undertaking for an increase in rateable value arising from another and separate undertaking. Now comes the question as to the period of time at which the deficiency, if there be any, is no longer to be made good by the defendants. This depends upon the true construction of sect. 133 of the Lands Clauses Consolidation Act 1845, as incorporated

into the local Act. I adopt the reasoning in *Stratton* v. *Metropolitan Board of Works*, that sect. 133 must not be read by itself, but must be considered in each case as and when it is introduced into a local Act. The undertakings which were contemplated by the Legislature at the time the Act was passed, and with reference to which this section was drawn, were such as always afterwards acquired a large rateable value, as railways and canals. New circumstances have arisen since that time, and undertakings of a different nature, which frequently when finished have no rateable value, are promoted. In Acts for the purposes of undertakings of such a nature, this section of the old Act is always deliberately incorporated. It is incorporated in the Act now before us, and we must apply it, where a large portion of the land taken for the undertaking passes into new streets and the like, and can never become again a rateable property. Under these circumstances the words of the section must not be too strictly construed, but must be somewhat stretched, and I think that the expression "the works" must be read as meaning not merely the structural works, but all that which the promoters have proposed to do as part of their undertaking. Here the promoters have undertaken more than the duty of making new streets, for they have taken more land than is necessary for that purpose. They have undertaken to dispose of such surplus lands, and I consider that the disposal of such surplus lands is part of the "works," using this term in its enlarged sense, which they have undertaken. A great part of their works—for instance, the roadways—can never be assessed, and therefore, in accordance with *Stratton* v. *Metropolitan Board of Works*, the section must be read "until the works are completed, and such part of them as can become assessable are assessed." The section is intended to ascertain a limit of time to the liability of promoters to make good a deficiency, which, in many cases, it would not do unless it is thus construed. Construing it thus in the present case, the limit of time will be when the structural works are finished, and when the surplus land is all disposed of, and has become assessable. I think that each part of the land which is disposed of and becomes assessable, will from time to time lessen the deficiency in respect of each separate undertaking. As soon as the whole deficiency arising from the taking of land for an undertaking is made up by the rateable value of such part of the surplus land of such undertaking as has been disposed of, the liability will cease, though there may be still some surplus land undisposed of. The liability also ceases for the deficiency arising from an undertaking as soon as that undertaking is finished by the completion of the structural works, and the disposal of, and reassessment of, all the surplus land, although a deficiency still exists upon that undertaking. Now, what is the result with regard to this appeal? A course was taken with regard to the drawing up of this judgment which I think is new, and which is undesirable. The two judges in the Divisional Court have differed in opinion upon a point, and one of them has not withdrawn his judgment, so that the judgment of the court is not drawn up either way. As no judgment was drawn up, both sides were obliged to come here to get a judgment on the point, and, as we are neither affirming nor overruling a judgment of a divisional court, there will be no costs of this appeal. My brother Bowen agrees in the results at which I have arrived as to each point.

Fry, L.J. (after deciding that there was but one rating area).—The next question is, whether all these streets are to be considered as one undertaking, or whether there are several separate undertakings. I confess that I have had some difficulty in arriving at the true answer to that inquiry, but I think that the scope and intent of the provisional order, and of the Legislature in confirming that provisional order, were to treat each of these several streets, or works, or undertakings, which is defined as an undertaking in the schedule to the provisional order, as a separate and distinct undertaking. I think that convenience manifestly dictates this view, and that it would be highly inconvenient to consider the whole of these several streets, in different parts of the city of Bristol, which may have no connection one with another, as parts of one common undertaking. I agree therefore with the opinion which the Master of the Rolls has expressed upon this point. The next question is, when does the liability to pay any deficiency determine? This question is embarrassed by the fact that the Legislature has been pleased to introduce into the statute regulating these undertakings a section which was drawn with reference to undertakings of a different character. The primary object of undertakings, to which the Legislature intended to apply sect. 133 of the Lands Clauses Consolidation Act, was to create a certain physical structure which would be in its nature liable to assessment—such as a railway, works of a railway, terminus of, or approaches to, a railway. In the present case that section has been applied to an undertaking which was not intended to result in any structure which would become assessable to the rates. Therefore there arises a difficulty in applying language which is only applicable to one case to the other. In the present case the works are primarily the widening and making of the roadway and footway. The erection of buildings at the side of the street is not part of the works which the undertakers are to do, although they are empowered to sell the land upon which they may be erected. It is said, therefore, that the works to be completed are the mere construction of the roadway and footway. It appears to me that this is primarily what one would expect to be the meaning of the word "works;" but then we find that the Legislature, in contemplating "works," are contemplating something assessable. Such works as these are never assessable. If, therefore, we put the narrow and primary construction upon the word "works," the result is that, in a case like the present one, the terminus of liability fixed by the Legislature is removed to an indefinite distance, and that, in effect, the liability would never cease, although the Legislature is intending to fix the time at which it shall cease. We are therefore driven, it seems to me, by the very exigency of the statute, to put some secondary meaning upon the word "works." The best secondary meaning we can put upon that expression "works," in a case like the present one, is that the completion of the works means the doing of the structural works which the promoters are bound to do, and the selling of the surplus lands which they have taken,

so as to make them again become assessable. I come to the conclusion, therefore, that this is the true terminus of the liability. Now there remains the question, which, again, is certainly not an easy one, in what mode is the deficiency to be calculated? It is said, on the one hand, that every single tenement or item on the rate-book must be taken separately, and that, so long as any deficiency remains in respect of that item, there is a deficiency for which the promoters remain liable. It is said that, although they may have taken one hundred items, and ninety-nine of those may have again become assessable, so that the aggregate rateable value has been largely increased upon the whole hundred, if there is a deficiency on the one item they are liable to make that good. I am bound to say that this does not appear to me to be the meaning of the statute. As I have already said, I think the deficiency is the amount by which the common fund is less than it otherwise would have been. In my opinion, the true view is this, that, so long as the liability to make good a deficiency continues, you are to inquire whether any deficiency exists, because there may be the liability to make good a deficiency continuing, although the deficiency itself does not exist. That must be determined from half-year to half-year, or whatever may be the period of the rate. To calculate the deficiency, you must take, on the one side, the assessed value, at the time of the passing of the special Act, of the lands which have been taken, and, on the other hand, you must take the assessed value, at the time of calculation, of the lands which have been taken and brought back again into assessment. Those are the two sums you have to take. If the former of those is larger than the latter, then there is a deficiency, which is the amount of the difference between the two sums. If the two sums are equal, or if the latter is greater than the former, then there is no deficiency. That, in my judgment, is the meaning of the words "such deficiency shall be computed according to the rental at which such lands, with any building thereon, were valued at the time of the passing of the special Act." Applying those conclusions to this case, the answers will be as follows: 1. The liability of the defendants to make good the deficiency in the rates terminates when the road and footway have been fully made, and the whole of the lands which have been taken and which may be liable to assessment have become assessable. 2. The liability must be considered and dealt with separately in respect of each undertaking as mentioned in the schedule to the provisional order, and the entire ancient city of Bristol is to be treated as one area. 3. The deficiency is to be computed from time to time until the liability ceases, by comparing, on the one hand, the assessed value, at the time of the passing of the Act sanctioning the provisional order, of the lands taken, and, on the other hand, the assessed value, at the time of such computation, of such of the lands taken as may have again become assessable, and the excess, if any, of the former value over the latter is the deficiency.

Judgment accordingly.

Solicitors for the plaintiffs, *Meredith* and *Co.*, *Osborne, Ward, Vassall*, and *Co.*, Bristol.

Solicitors for defendants, *Robins, Burges*, and *Co.*, for *Heaven*, Bristol.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Tuesday, April 19, 1887.

(Before SMITH and WILLS, JJ.)

ADDY (app.) *v.* BLAKE (resp.). (*a*)

Licensing Act 1872 (35 *&* 36 *Vict. c.* 94), *s.* 8—*Intoxicating liquor sold by retail—"Selling" in properly marked measure.*

By sect. 8 *of the Licensing Act* 1872, "*Every person shall sell all intoxicating liquor which is sold by retail and not in cask or bottle, and is not sold in a quantity less than half a pint, in measures marked according to the imperial standard.*"

A publican drew a pint of beer for a customer in a properly stamped measure, and then poured it into an unstamped jug, in which he handed it to the customer. From the position of the customer it was impossible for him to see the bar where the beer was drawn, and he was not aware that any measure had been used in drawing it.

Held (*upholding a conviction by the justices*), *that the beer had not been sold in a measure marked according to the imperial standard within the meaning of sect.* 8 *of the Licensing Act* 1872.

THIS was a special case stated under 20 & 21 Vict. c. 43, for the opinion of the Queen's Bench Division of the High Court of Justice, by the justices of the peace acting in and for the Lower Strafforth and Tickhill Division of the West Riding of the county of York.

1. An information was preferred by the respondent, a superintendent of police and inspector of weights and measures, against the appellant, an innkeeper, for that the appellant on the 30th Sept. 1886, at the parish of Conisborough, in the said riding, unlawfully did sell by retail and not in cask or bottle certain intoxicating liquor, to wit, beer, in a quantity not less than half a pint, which said beer was not sold by the appellant in a measure marked according to the imperial standards, contrary to the provisions of the 8th section of the Licensing Act 1872.

2. The information came on for hearing before a court of summary jurisdiction for the Lower Strafforth and Tickhill Division of the West Riding, held at Doncaster in the said riding, on the 9th Oct. 1886, when the facts hereinafter stated were proved.

3. The appellant was the licensed occupier of an inn at Conisborough, known as the Eagle and Child, which was visited by the respondent on the date mentioned in the information. The respondent having seated himself in the parlour of the inn, ordered the appellant to serve him with a pint of beer, and the appellant thereupon left the room for the purpose of executing such order. Shortly afterwards the appellant returned with an earthenware jug filled with beer, which he handed to the respondent, who then paid to the appellant the price of the liquor. The jug in which the beer was so supplied to the respondent was not in any way stamped or marked as a measure.

4. It was further proved by witnesses called on behalf of the appellant that, on leaving the parlour to fetch the beer, he (the appellant)

(*a*) Reported by F. A. CRAILSHEIM, Esq., Barrister-at-Law.

entered the bar (an adjoining room) and there drew the beer into a properly stamped pint measure, being one of a set of stamped measures which were kept by the appellant in the bar for the purpose of measuring liquor. The appellant then proceeded to pour the contents of the measure into the jug, which, together with an unstamped glass tumbler, he subsequently carried into the parlour and handed to the respondent. From the position in which the respondent was seated in the parlour, it was impossible for him to see the appellant draw the beer or pour it into the jug, and the respondent was not in fact aware that any measure had been used by the appellant.

5. It was contended on behalf of the appellant that he had not, under the circumstances proved, contravened the provisions of the 8th section of the Licensing Act 1872, inasmuch as that section requires that the liquor should be "sold" in a measure marked according to the imperial standard, and not that the liquor should be delivered to the customer in such a measure, and that the sale was complete immediately upon the beer being placed in the measure and appropriated to the customer.

6. The justices, however, thought that the appellant had been guilty of the offence charged in the information, on the ground that the liquor had not been placed in a duly stamped measure in the presence or to the knowledge of the customer, and on the further ground that the sale was, under the circumstances, incomplete until the liquor had been handed to the customer and paid for by him.

7. The justices accordingly convicted the appellant, and inflicted a fine of 2*s.* 6*d.* and costs.

8. The appellant being dissatisfied with their determination, as being erroneous in point of law, applied for a case to be stated for the opinion of the Queen's Bench Division.

The question for the opinion of the court was whether, upon the facts as stated, the appellant was rightly convicted.

By sect. 8 of the Licensing Act 1872 (35 & 36 Vict. c. 94) it is enacted that:

> Every person shall sell all intoxicating liquor which is sold by retail and not in cask or bottle, and is not sold in a quantity less than half a pint, in measures marked according to the imperial standards.
>
> Every person who acts or suffers any person under his control or in his employment to act in contravention of this section, shall be liable to a penalty.

Lockwood, Q.C. (*Newson* with him) for the appellant.—There is nothing in sect. 8 of the Licensing Act 1872 which compels the drawing or measurement of the beer in the presence of the customer. The beer in the present case was drawn in a properly stamped measure, and it is submitted that that is sufficient to satisfy the requirements of the Act. Although the presence of the customer is not material at the time of drawing the beer, he may require it to be measured in his presence. That this is so is clear from the repealed Act, 3 Geo. 4, c. 77, s. 20, which enacted that, "All persons keeping common inns, alehouses, or victualling houses, and retailing ale and beer, shall sell the same in and from their houses by a full ale quart, pint, or half pint, made of pewter, sized to the standard, and stamped or marked, to be of full size according to the standard . . . and shall not retail any ale or beer in any other vessels than such stamped pewter ale quarts, pints, or half pints, unless such ale or beer shall have been first measured in and by such stamped pewter ale quart, pint, or half pint, in the presence of the guest or customer purchasing the same. . . ." It is therefore submitted that the conviction ought to be quashed.

Forbes, Q.C. (*C. M. Atkinson* with him) was not called upon.

SMITH, J.—I am of opinion that the justices were right in convicting the appellant of having contravened the provisions of sect. 8 of the Licensing Act 1872. It appears that a customer went to the appellant's public-house and called for a pint of beer. The publican went to the bar in another room, where the customer could not see him, and there drew the beer, which he brought to the customer in an unstamped jug. The customer was not aware that the beer had been drawn in a stamped measure. Upon that, proceedings are taken against the publican under sect. 8 of the Licensing Act 1872, which says that "Every person shall sell all intoxicating liquor which is sold by retail and not in cask or bottle, and is not sold in a quantity less than half a pint, in measures marked according to the imperial standards." That means that the liquor shall be "sold" in a properly marked measure, which was not done in this case. It is true that the appellant appears to have drawn the beer into a stamped measure, but he then turned it into an unstamped jug, in which he sold it. If he had come out of the bar, bringing with him also the stamped measure, and had asked the customer how he would have it, I should be inclined to hold that the beer had been sold properly in the measure, and that the Act had not been evaded. But, upon the facts as they stand, I am of opinion that the conviction was right, and this appeal must therefore be dismissed.

WILLS, J.—I am of the same opinion, and I think that there has obviously been an attempt on the part of the appellant to evade the provisions of the 8th section of the Licensing Act 1872. The purpose of the section was to prevent cheating, and to protect customers. Beer in retail quantities must be sold in a measure marked according to the imperial standard, and it appears to me that, until the beer is on the point of becoming the property of the purchaser, it is not sold. The change of property does not take place until there has been some act of appropriation on the part of the purchaser; the sale takes place when the beer is placed in front of the purchaser for him to take it, but not until then. I agree with my brother Smith, that if the appellant had brought both the jug and the stamped pewter pot into the parlour, and had thus given the customer an opportunity of measuring the beer, the Act would not have been broken, and I think that there would not have been any offence if the customer had asked to have the beer in a jug, and the publican had brought the marked measure into the room too. The conviction must stand.

Conviction upheld.

Solicitors for the appellant, *Edward Doyle and Sons*, for *Binney and Sons*, Sheffield.

Solicitors for the respondent, *Badham and Williams*, for *W. L. Williams*, Wakefield.

Tuesday, April 19, 1887.

(Before SMITH and WILLS, JJ.)

BACK (app.) *v.* HOLMES (resp.).(*a*)

Highway within the metropolitan area—Obstruction—Application of the Highway Act—Power of police to prosecute — Highway Act (5 *&* 6 *Will.* 4, *c.* 50), *s.* 72.

A person, by singing hymns, occasioned a crowd to assemble, and thereby obstructed a certain highway within the metropolitan police district.

An information was accordingly preferred against him by an inspector of police, under sect. 72 *of the Highway Act.*

Held (*reversing the decision of the magistrate, who had dismissed the summons*), *that the provisions of sect.* 72 *of the Highway Act were applicable to highways within the metropolitan area.*

Held also, that a prosecution under sect. 72 *of the Act might be initiated by anyone, and therefore that the proceedings taken by the police were valid.*

THIS was a case stated by one of the magistrates of the police-courts of the metropolis, sitting at the Court of Summary Jurisdiction, at Worship-street, within the Metropolitan Police District, under 20 & 21 Vict. c. 43.

1. Upon the hearing of an information preferred by the appellant, an inspector of police, against the respondent, under sect. 72 of the Highway Act (4 & 5 Will. 4, c. 50), charging "for that the respondent on the 7th Aug. 1886, in a certain highway, to wit, the Roman-road, Bow, within the Metropolitan Police District, did unlawfully and wilfully obstruct the free passage of the said highway, by causing a crowd of persons to assemble there," the magistrate dismissed the said information.

2. The following facts were proved:

3. The respondent, at or about twenty minutes to 9 o'clock p.m., on the last-mentioned day, came, with several women, into the forecourt of Anlita House, which is a private ground, but adjoins the highway. At that time there was no obstruction. Hymns were sung by the women, in which the respondent joined, and he then delivered a religious address. Neither he nor the women left the private ground. These proceedings, however, caused a crowd to assemble and obstruct the highway. The respondent's attention was called to this, but he continued his address until five minutes past 9 p.m., when he retired, and the crowd cleared away. He must be taken to have intended to cause the obstruction from the time that it was brought to his notice till his departure.

4. On the part of the appellant it was contended that the respondent was guilty of an obstruction within the meaning of the words in sect. 72 of the Highway Act, which imposes a penalty on any person who "shall in any way wilfully obstruct the free passage of any such highway."

5. On the part of the respondent it was contended that these words do not warrant a police prosecution for obstructing a highway in the Metropolitan Police District.

6. At the time when the Highway Act was passed the statutory provisions relating to obstructions and nuisances on the metropolitan highways within the bills of mortality, and including the *locus in quo*, were (with certain local exceptions immaterial to this case) contained in 57 Geo. 3, c. 29, commonly called Michael Angelo Taylor's Act, which was afterwards extended to other portions of the metropolis by 25 & 26 Vict. c. 102, s. 73. The Highway Act adopted some of these provisions with or without modifications, and introduced others. To take a well-known instance among the new provisions, the rule of the road was by sect. 78 made enforceable by penalties in the country, but its infringement has never, it appears, been treated as a substantive offence within the above area. The provision relied on by the prosecution was also new in so far as it extended beyond the obstructions specified in Michael Angelo Taylor's Act (sects. 64-78) to all wilful obstructions whatever. Sect. 112 of the Highway Act provides that nothing in the Act "shall be construed to abridge, repeal, alter, amend, or interfere with the powers and provisions in Michael Angelo Taylor's Act." The question then arises, whether Michael Angelo Taylor's Act was meant to operate in the said area exclusively of the Highway Act, or whether the provision relied on by the prosecution may, in its present application, be taken to supplement the powers and provisions in Michael Angelo Taylor's Act without "amending or interfering with" them.

7. Sect. 54 of the Police Act (2 & 3 Vict. c. 47) repeated so many of the provisions relating to obstructions and nuisances on the thoroughfares of the metropolis which were already contained in sects. 64-78 of Michael Angelo Taylor's Act, that the object in view was presumably to supply in the Police Act a complete code on the subject. If therefore the provision relied on by the prosecution applied to the said area, it might have been expected to recur in the Police Act. But the nearest approach to such a provision is found at the conclusion of sect. 54, sub-sect. 6, where the words "wilfully cause any obstruction in any thoroughfare" seem always to have been held to be limited by the previous words "who by means of" to the obstacles thereinafter specified, a limitation which may have prevented this clause from having been depended on for the present prosecution.

8. Sect. 96 of the Metropolis Local Management Act (18 & 19 Vict. c. 120) provides that

> Every vestry and district board shall, within their parish or district (exclusively of any other persons whatsoever), execute the office of, and be surveyors of highways, and have all such powers, authorities, and duties, and be subject to all such liabilities, as any surveyor of highways in England is now, or may hereafter be invested with, or liable to, by virtue of this office.

The cases of *Harvey* v. *The Vestry of Bethnal Green* (38 J. P. 743) and *St. Mary, Newington*, v. *Jacobs* (25 L. T. Rep. N. S. 800; L. Rep. 7 Q. B. 47; 41 L. J. 72, M. C.) fall under this section. If the objections raised in the two last paragraphs are either of them, or taken together, sound, this section would seem to operate as the first extension of the Highway Act to the said area; but, even assuming that it would empower vestry and district boards to enforce the provisions relied on by the prosecution, it gives no such power to the police or private persons.

9. On the above grounds, and being unable to find any authority for a prosecution under the Highway Act by the police or private persons, for causing obstructions in the said area, the

(*a*) Reported by F. A. CRAIGENEM, Esq., Barrister-at-Law.

magistrate was led, with hesitation, to dismiss the summons.

The question submitted for the consideration of the High Court was, whether the magistrate was right in point of law in dismissing the summons. If the court should be of opinion that he was right, his decision was to stand, but if the court should be of the contrary opinion, the case was to be remitted back to him to be dealt with accordingly.

Mead for the appellant.—It is submitted that the Highway Act is applicable to, and can be enforced within the area of the Metropolitan Police District. There is nothing in the Act to limit its application, except sect. 112, which merely provides that "nothing in the Act shall be construed to abridge, repeal, alter, amend, or interfere with the powers and provisions in Michael Angelo Taylor's Act." This point is not touched in the case of *Harvey* v. *The Vestry of Bethnal Green* (38 J. P. 743). The question there was whether certain preliminaries and the obtaining of a certificate of two justices had been properly complied with. The street there was within the metropolis, but the point that the Highway Act did not apply to the metropolis was not taken. In the case of *St. Mary, Newington*, v. *Jacobs* (25 L. T. Rep. N. S. 800; L. Rep. 7 Q. B. 47) it was not suggested that, supposing there had been an obstruction, it would not have been met by the provisions of the Highway Act. That the Highway Act is supplementary to Michael Angelo Taylor's Act is shown by sect. 112 of the former. The remedies for obstructions in the streets of the metropolis are concurrent and cumulative. It is also submitted that it is open to anyone to set the law in motion in a prosecution of this sort, and therefore that the information in this case instituted by the police was good. There is no restriction in the Highway Act as to who may prosecute in such a case.

The respondent was not represented.

SMITH, J.—This is a case stated by the learned magistrate of the Worship-street Police-court, and he says himself, in the case which he has stated for the opinion of this court, that he was led with hesitation to dismiss the summons, and he seems to have been doubtful whether he was right in dismissing it. We have not had the advantage of hearing any argument in support of the learned magistrate's decision, but we have the reasons upon which he acted fully set out by him in the case. Now, the points to be decided are, first, whether the operation of the old Highway Act (5 & 6 Will. 4, c. 50) extends throughout the whole of England, or is limited to such parts as have no special legislation of their own applicable to them. There is nothing in the Highway Act to limit the sections of that Act to any particular locality, and, apart from any special exception, it seems to me that it would apply to the whole country, with the exception of the special turnpike roads and the roads mentioned in sect. 113. Therefore I am of opinion that sect. 72 of the Highway Act applies to the *locus in quo*. It certainly may be, and indeed it seems to be the case, that there is special legislation applicable to the *locus in quo*; but such special legislation is cumulative, and in addition to the provisions of the Highway Act, and does not prevent the application of the provisions of the Highway Act to the road now in question. That answers the first question which is put to us. Then the next question is, whether the initiative can be taken by the police in a prosecution under sect. 72 of the Act. Why not? Anyone can prosecute if an offence has been committed. The learned magistrate thought that the vestry should have taken the initiative, or someone who had the control of the highway, but I do not see any reason for that supposition. It seems to me, therefore, that the learned magistrate might, if he had chosen, have found that the respondent had wilfully obstructed the highway within the meaning of sect. 72 of the Highway Act, and, if he had liked, he might have convicted him upon the evidence before him. The case must, therefore, go back to him with that intimation from this court.

WILLS, J.—I am of the same opinion. I am not able to find anything which limits the generality of the operation of the Highway Act, nor any reason to prevent its applicability to the metropolitan area. If there are any exceptions with reference to the city of London—and I am unable at the moment to ascertain precisely what they are—the legislation which is special to the City is not intended to be interfered with. If that is so, the effect would be to put the City upon the same footing as the rest of the metropolitan area—namely, that wherever there were special provisions which applied to those areas, and also applied to the kingdom in general, those provisions should not be interfered with. But, with the exception perhaps of this legislation, there is nothing to limit the general application of the Highway Act, nor is there anything to limit its application to the parts of London other than the metropolitan area. Then, as to the other point. I see no difficulty whatever as to the initiation of a prosecution under sect. 72 of the Highway Act. The section appears to create an offence, and where an offence is created, with a penalty attached to it, anyone can initiate the prosecution. There is no subsequent legislation interfering with the general right to prosecute under this section. It seems to me, therefore, that the case must go back to be dealt with by the learned magistrate.

Case remitted.

Solicitor for the appellant, *The Solicitor to the Treasury.*

April 1, 2, *and* 22, 1887.

(Before HAWKINS and SMITH, JJ.)

HADDON *v.* HADDON.(*a*)

Husband and wife—Order of separation and maintenance under Matrimonial Causes Act 1878—*Subsequent cohabitation—Effect of subsequent cohabitation on order — Wife's costs — Matrimonial Causes Act* 1878 (41 *&* 42 *Vict. c.* 19), *s.* 4 (*b*).

An order of judicial separation and maintenance made under sect. 4 *of the Matrimonial Causes Act* 1878 *is avoided and absolutely put an end to by a reconciliation and resumed cohabitation of the husband and wife, so that such order*

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

cannot be revived if a second separation takes place.

On the 30th Sept. 1882 a husband was summarily convicted of an aggravated assault upon his wife, and the justices granted to the wife an order, under sect. 4 of the Matrimonial Causes Act 1878, that she should be no longer bound to cohabit with her husband, and also that the husband should pay her the weekly sum of 1l. In November following the wife was reconciled to her husband, and resumed cohabitation with him for about a year, and then she again left him, for what reason did not appear. Some time after her second separation from her husband, she applied to the justices to recover against her husband the sum of 8l., being eight weeks' arrears of her allowance which had accrued due since her second separation, and the justices made an order in the wife's favour for these arrears.

The husband appealed.

Held, that the wife was not entitled to recover these arrears, as the effect of the reconciliation and subsequent cohabitation was to avoid, and absolutely put an end to, the legal existence of the order of judicial separation and maintenance, and to render it no longer operative.

Held also, as to the wife's costs, that the wife was not entitled to her costs in the court below or on appeal, as this was not a suit for judicial separation or for alimony, but an appeal by the husband against an order obtained by the wife to enforce an order the legal effect of which had been exhausted.

CASE stated under 20 & 21 Vict. c. 43, by two justices of the peace for the county of Leicester.

1. Upon the hearing of a certain information and complaint preferred by the respondent against the appellant, under sect. 4 of the Matrimonial Causes Act 1878, that by an order made under the said Matrimonial Causes Act 1878, on the 30th Sept. 1882, it was ordered that the respondent should be no longer bound to cohabit with the appellant, her husband, and that by the said order the appellant was ordered to pay weekly to the respondent the sum of 1l., and that the said appellant had had notice of the said order, and that the payments, directed to be made by the said order, had not been made according thereto by the said appellant, and that there was in arrear for the same the sum of 8l., being the arrears for eight weeks' payments, we, by a warrant under our hands and seals, directed the said sum of 8l., together with the sum of 7s. 6d. for costs, to be recovered by distress and sale of the goods of the said appellant.

2. The following facts were either proved before us, or admitted by both parties.

3. In the month of Nov. 1882 the respondent returned to cohabitation with the appellant, and continued to reside with him until the 16th Nov. 1883, when the respondent ceased to cohabit with the appellant, and has not again lived with him.

4. On the 26th March 1884 the respondent laid an information against the appellant to recover 15l. which were then due under the order of judicial separation. The appellant at that time contended that, in consequence of the respondent having resumed cohabitation with him since the making of the order of judicial separation, he was not liable to pay the sum ordered to be paid by him to the respondent by the said order. The justices who then heard the case ordered him to pay the amount, and he has continued to make the weekly payments up to the time when the amount became due for which the respondent laid the information first before mentioned.

5. On the part of the appellant it was contended, that the fact of the respondent having cohabited with the appellant subsequent to the making of the order of judicial separation, annulled the order of judicial separation, and the cases of *Bateman* v. *Countess of Ross* (1 Dow H. L. 235) and *Nicol* v. *Nicol* (31 Ch. Div. 524) were quoted.

6. It was also submitted that such subsequent cohabitation avoided a wife's right of maintenance under an order of judicial separation, by analogy to the effect of subsequent cohabitation on a separation by deed, and on a married woman's rights by virtue of the Matrimonial Causes Act, ss. 25, 26.

7. On the part of the respondent it was contended, that no case had ever been decided on the question at issue; that the Matrimonial Causes Act 1878 (under which the order of judicial separation was made) provides, under sect. 4, "that any order for payment of money, or for the custody of children, may be discharged by the court or magistrate by whom such order was made, upon proof that the wife has, since the making thereof, been guilty of adultery," and that inasmuch as the Act had provided under what circumstances the order might be discharged, it could not be annulled or discharged for any other cause, and that the said order was not discharged by the cohabitation of the respondent with the appellant.

8. In reply it was pointed out, on behalf of the appellant, that this was an application to the magistrates to annul or discharge the said order of judicial separation under the Matrimonial Causes Act 1878, the contention on his behalf simply being that the said order could not be enforced against him, the same having been already annulled or avoided by the said subsequent cohabitation, and therefore there was no need to apply to the magistrates to discharge the order.

9. We, being of opinion that the said order of judicial separation had not been annulled or discharged by the cohabitation of the respondent with the appellant subsequent to the making of the said order, gave our determination against the appellant in the manner before stated.

10. The question of law upon which this case is stated for the opinion of the court therefore is, whether the said order of judicial separation and payments for maintenance can now be enforced against the appellant, or whether it has been annulled or discharged by cohabitation of the appellant and respondent subsequent to the making of the said order.

Lane for the appellant.—The reconciliation puts an end to the order. Sect. 4 of the statute says that the order shall have the effect of a decree of judicial separation, and the Divorce Act provided that such a decree shall have the effect of a divorce *a mensâ et thoro*. In Pritchard on Divorce it is laid down that a separation operates only so long as the parties live apart, and ceases to operate when they are reconciled. In *Bateman* v. *Countess of Ross* (1 Dow. H. of L. Cas. 235) Lord Eldon held that a reconciliation put an end to an agreement for a separation. [SMITH, J.—

This is a decree, which is different from an agreement.] Yes, but still it is only a decree for a separation, and it only remains in force while they continue to live apart. He also cited

Nicol v. *Nicol*, 54 L. T. Rep. N. S. 470; 31 Ch. Div. 524; 55 L. J. 437, Ch.; 34 W. R. 283.

Sills for the respondent.—The cases cited refer to voluntary agreements, and do not apply to the present case, which is a decree of a court. In *Randle* v. *Gould* (8 E. & B. 457) it was laid down that a separation deed was not necessarily or impliedly avoided by subsequent cohabitation. The magistrates have, under sect. 4 of the Act, power to vary or alter this order from time to time, but an order of this kind is not put an end to merely by the parties trying to live together again. When the separation takes place under the sanction of a court of competent jurisdiction, it can only be put an end to by an order or decision of the court. A decree of judicial separation is in the nature of a judgment *in rem*; it alters the status of the parties, and can only be got rid of by a court of competent jurisdiction By sect. 25 of the Divorce and Matrimonial Causes Act (20 & 21 Vict. c. 85) a decree of judicial separation has the effect of altering the status of the wife, and it requires another decree to get rid of it, and the order of the magistrates here has the same effect as a decree of judicial separation under the former Acts. [SMITH, J.—I do not know that a decree of judicial separation has the effect of a judgment *in rem*; I have the highest authority for saying that the reconciliation of the parties and their subsequent cohabitation puts an end to the decree.] That would be so only while they were living together; if the wife had to leave her husband again she would go to the court for a fresh order for alimony. [HAWKINS, J.—You admit that a new order is necessary.] An order to enforce the old order is necessary, and here the wife has got such an order. While the parties are living together the wife, getting board and lodging with her husband, cannot have her alimony. In this way the operation of the order is temporarily suspended, but it still remains in force and revives when the parties separate again.

Lane in reply.—If the order of judicial separation altered the status of the wife, then the order cannot be suspended. In *Linton* v. *Linton* (52 L. T. Rep. N. S. 782; 15 Q. B. Div. 239; 54 L. J. 529, Q. B.; 33 W. R. 714) Brett, M.R. said that the payments might be stopped at any time if the husband and wife returned to cohabitation.

Cur. adv. vult.

April 22.—HAWKINS, J.—The question in this case is, whether an order made by justices under sect. 4 of the Matrimonial Causes Act 1878 (41 Vict. c. 19), that a wife shall no longer be bound to cohabit with her husband, and that he shall pay to her a weekly sum, is avoided, or merely suspended, upon the parties subsequently resuming cohabitation. By the section above mentioned it is enacted that, "If a husband shall be convicted summarily, or otherwise, of an aggravated assault within the meaning of the statute (24 & 25 Vict. c. 100), s. 43, upon his wife, the court or magistrate before whom he shall be so convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall be no longer bound to cohabit with her husband, and such order shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty; and such order may further provide (*inter alia*) that the husband shall pay to his wife such weekly sum as the court or magistrate may consider to be in accordance with his means." On the 30th Sept. 1882 the appellant, who is the husband of the respondent, was summarily convicted by magistrates of an aggravated assault on the respondent; and such magistrates duly ordered that the respondent should be no longer bound to cohabit with the appellant, and that the appellant should pay to the respondent the weekly sum of 1*l*. In the following month of Nov. 1882 the appellant and the respondent resumed cohabitation, and such resumed cohabitation continued for about a year, that is to say, until Nov. 1883, when it ceased (for what reason or under what circumstances is not stated in the case), and the parties have not since lived together. After this final separation many weekly payments were made under order of the justices enforcing the above-mentioned order and otherwise, but my judgment is not in the least degree affected by that fact; for no submission to an order which has ceased to have legal existence can give it renewed vitality. It is clear that the order for payment of a weekly sum is merely accessory to the order releasing the wife from the obligation to cohabit with her husband, and is intended merely as a mode of compelling him to provide for her a maintenance during the time of her separation from him, under the order which his cruelty has driven her to obtain. It seems to me to follow that, with renewed cohabitation, the obligation to pay such maintenance ceases, at least for so long a time as the reconciliation lasts; that I think may be taken for granted. The question, however, in the present case is, whether the effect of such reconciliation and resumed cohabitation is to terminate absolutely from thenceforth the legal effect of the order, or merely to suspend its operation until some fresh aggravated assault is committed upon the wife which makes it necessary for her again to live apart from her husband, or until she thinks fit again to separate herself from him. In my opinion, the effect is to put an end to the legal existence of the order, and to render it no longer operative. The court or magistrate has only power to make the order for separation, if satisfied that the future safety of the wife is in peril, and when made the only effect of it is to release her from any obligation to cohabit, leaving her at full liberty to do so if she pleases. If before acting upon the order she thinks fit to abandon it, to become reconciled to her husband, and to continue to cohabit with him, she may do so. So also, after separation for a time, she may return to cohabitation; but in either of these events the validity of the order ceases, just as a decree for judicial separation would cease under similar circumstances. It is impossible to suppose that the Legislature, in giving magistrates power to release a wife from the obligation of cohabitation by reason of imminent danger from her husband's violence, intended to confer upon them jurisdiction to make an order which should give a wife liberty to live apart from and resume cohabitation with her husband when and as often as she should

think fit, and compel her husband to maintain her at all times when it pleased her to separate from him, even though her safety no longer required a separation. It was suggested by Mr. Sills that the status of the wife was altered by the order. I do not agree in this; the order does not affect her status as a wife at all, it merely gives her the power, if she pleases, to live separate from her husband, the language of it being "she shall be no longer bound to cohabit." It was further suggested that, even though cohabitation may have been resumed, the order might be revived by a fresh assault. I am not of that opinion. If, after that resumption of cohabitation, fresh assaults of an aggravated character are made by the husband, so as again to imperil her safety, the wife must apply for a new order, and cannot again avail herself of that which, by her own act in returning to cohabitation, she has exhausted. It was further urged that the 4th section of the Matrimonial Causes Act having provided that the court or magistrate may vary orders for payment on proof of the altered means of either husband or wife, and may discharge an order for payment in the event of the wife's adultery, it must be taken that the Legislature did not intend that orders made under that Act should be discharged for any other cause. The answer to this argument seems to me to be, that the section in question only deals with orders for payment where the orders for separation continue in operation, leaving every order of separation made under it to "have the force and effect in all respects of a decree of judicial separation on the ground of cruelty." The orders for separation and payment of maintenance are distinct. It remains only to say one word or two upon the very few authorities bearing upon the subject of judicial separation. In the case of *Bateman* v. *Countess of Ross* (*ubi sup.*) Lord Eldon, speaking of the effect of a reconciliation of married persons after a separation, held "the general doctrine to be clear, that a reconciliation after a separation entirely did away with the effects of it," adding that "this rested upon the grounds of public policy, as it must not be permitted to parties to make agreements for themselves, to hold good whenever they choose to live separate." I am not aware that this general proposition has ever been dissented from. It was indeed suggested that in *Randle* v. *Gould* (*ubi sup.*) the judges of the Queen's Bench did not adopt it. I do not, however, find a single expression at variance with it, for the decision in that case turned upon the language of the particular deed which was then under consideration, and not upon the general doctrine. In *Nicol* v. *Nicol* (*ubi sup.*) the general principle stated by Lord Eldon was expressly recognised by the Court of Appeal. In *Linton* v. *Linton* (*ubi sup.*) the Master of the Rolls (Lord Esher), in speaking of weekly alimony, ordered to be paid to a wife by the Divorce Court, under sect. 1 of the Act 29 & 30 Vict. c. 32, said "they are not payments of a life annuity; they might be stopped at any moment if the husband and wife returned to cohabitation." I am not aware that any authority exists directly bearing upon the question before us, nor have I been able to discover any in the least degree supporting the contention of the appellant. I have therefore come to the conclusion that the existence of the order for separation and maintenance came to an end the moment the appellant and his wife became reconciled and resumed cohabitation. This appeal, therefore, must be allowed, but under the circumstances without costs.

SMITH, J.—I agree in the judgment just delivered by my brother Hawkins, which I have had the advantage of reading, and I only wish to add this: The order made by the justices is to have the force and effect in all respects of a decree of judicial separation on the ground of cruelty; such is the enactment in sect. 4 of 41 Vict. c. 19. (*a*) It it beyond question the law as administered in the Divorce Court, as I have ascertained, that, upon resumption of cohabitation, a decree of judicial separation on the ground of cruelty comes to an end. This, if inquired into, is beyond doubt. The reason is, that the resumption of cohabitation puts an end to the cause for which the judicial separation was granted, and after such resumption of cohabitation, if proceedings are to be taken at all, it must be by a fresh suit. In my judgment the decision of the justices was erroneous.

Sills, for the respondent, submitted that the wife should be allowed the costs in the court below and on appeal, and contended that by the usual practice she was entitled to them:

Flower v. *Flower*, 29 L. T. Rep. N. S. 253; L. Rep. 3 P. & D. 132; 42 L. J. 45, P. & M.; 21 W. R. 776.

In *Robertson* v. *Robertson* (45 L. T. Rep. N. S. 237; 6 P. Div. 119) Jessel, M.R., at p. 122 (6 P. Div.) lays it down that a wife ought to have her costs even of a false defence to a charge of adultery, as well as the costs of a false counter-charge against her husband.

HAWKINS, J.—This is not a suit for a judicial separation or for alimony, but an appeal by the husband against an order, obtained by the wife, to enforce an order or decree the legal effect of which has been exhausted. There is no analogy between the cases cited and the present case which would entitle the wife to her costs.

Appeal allowed without costs.

Solicitors for appellant, *Law* and *Worssam*, for *Buckby* and *Marshall*, Leicester.

Solicitors for respondent, *Longcroft* and *Wade*, for *Fowler*, *Smith*, and *Warwick*, Leicester.

(*a*) Sect. 4 provides as follows: If a husband shall be convicted summarily or otherwise of an aggravated assault within the meaning of the statute 24 & 25 Vict. c. 100, s. 43, upon his wife, the court or magistrate before whom he shall be so convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall be no longer bound to cohabit with her husband; and such order shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty; and such order may further provide, that the husband shall pay to his wife such weekly sum as the court or magistrate may consider to be in accordance with his means, and with any means which the wife may have for her support, and the payment of any sum of money so ordered shall be enforceable and enforced against the husband in the same manner as the payment of money is enforced under an order of affiliation; and the court or magistrate by whom any such order for payment of money shall be made shall have power from time to time to vary the same on the application of either the husband or wife, upon proof that the means of the husband or wife have been altered in amount since the original order or any subsequent order varying it shall have been made.

Wednesday, May 11, 1887.

(Before Lord COLERIDGE, C.J. and SMITH, J.)

DUNCAN (app.) *v.* TOMS (resp.). (*a*)

Practice—Petty sessions—Prosecution by inspector for the Society for the Prevention of Cruelty to Animals—Right of such inspector to conduct case and to examine and cross-examine witnesses—Summary Jurisdiction Act 1848 (11 *&* 12 *Vict. c.* 43), *ss.* 12, 14.

An inspector for the Society for the Prevention of Cruelty to Animals, who has preferred an information and complaint, before a court of summary jurisdiction, against any person for cruelty to animals, has a right to appear on behalf of such society, and to examine and cross-examine witnesses on the hearing of such information.

CASE stated by two justices of the peace for the borough of Tewkesbury.

1. At a court of summary jurisdiction holden at Tewkesbury, in and for the borough of Tewkesbury, on the 29th Oct. 1886, an information and complaint was preferred by Andrew Duncan, of Cheltenham, in the county of Gloucester, inspector to and for the Society for the Prevention of Cruelty to Animals (hereinafter called the appellant) against Robert Toms (hereinafter called the respondent), under the 2nd section of the statute 12 & 13 Vict. c. 92, charging that the respondent did, on the 13th Oct. 1886, at the borough of Tewkesbury aforesaid, unlawfully and cruelly beat and ill-treat a certain animal, to wit, a dog, by then and there kicking the same, contrary to the form of the statute in such case made and provided.

2. Upon the hearing of the said information and complaint, the appellant appeared before us on behalf of the said Society for the Prevention of Cruelty to Animals, and proceeded to examine the owner of the said dog referred to in the said information and complaint, whereupon the solicitor for the respondent objected to the appellant being allowed to examine and cross-examine witnesses, on the ground that he was not a counsel or solicitor, and that the society, who were the real prosecutors in the case, could only appear by counsel or solicitor, in pursuance of sect. 12 of the Summary Jurisdiction Act 1848. The appellant claimed the right to appear before us on behalf of the said society, and to conduct the case, and to examine and cross-examine witnesses.

3. We were of opinion that, bearing in mind the decisions of, and remarks made by the judges in, the following cases—*Reg.* v. *Brice* (2 B. & Ald. 606); *Reg.* v. *Justices of Lancashire* (1 Chit. 602); *Reg.* v. *Stoddart* (Dickenson's Quarter Sessions, 152, 476; and 11 Cox C. C. 422); *Cobbett* v. *Hudson* (1 E. & B. 13); *Reg.* v. *Gurney* (11 Cox C. C. 414)—and that this prosecution was not at the suit of a private individual for private redress, but was a proceeding at the suit of the Crown in the same way as proceedings for an indictable offence, the appellant had no right to conduct the case on behalf of the said society, and to examine and cross-examine witnesses. The Summary Jurisdiction Act of 1848 (11 & 12 Vict. c. 43), s. 12 provides that every complainant or informant shall be at liberty to conduct such complaint or information respectively, and to have the witnesses examined and cross-examined by counsel or attorney on his behalf, which words appear to us to qualify the earlier clause enabling the informant to conduct the information. This is borne out by the marginal note, "Parties allowed to plead by counsel or attorney," and also by the clause immediately preceding the one above quoted, which provides that, "The party against whom such information is laid shall be permitted to make his full answer and defence thereto, and to have the witnesses examined and cross-examined by counsel or attorney on his behalf." We therefore allowed the objection raised by the respondent's solicitor, and offered the appellant an adjournment of the case to enable him to consult the said society, but which he declined and preferred the case proceeding.

4. We accordingly heard the evidence of the owner of the said dog, and the witnesses called by the appellant, and being satisfied that the beating and ill-treating of the said dog was not proved, we dismissed the said information and complaint. No witness was called on behalf of the respondent.

5. The appellant and the said society being dissatisfied with our refusal to allow the appellant to conduct the said case, and to examine and cross-examine witnesses, served us on the 5th Nov. 1886 with the following notice:

In the matter of an information wherein the undersigned Andrew Duncan was the informant and Robert Toms defendant, heard before and determined by you at Tewkesbury, on the 29th day of Oct. 1886, I, being aggrieved by your refusal to allow me to conduct my case, or to cross-examine witnesses at the hearing of the said information, and by the determination of the said information without being allowed to conduct my case or to examine or cross-examine witnesses, hereby give you notice, pursuant to the provisions of the 23rd section of the Summary Jurisdiction Act 1879, that I desire to question the order made on the said information, on the ground that your refusal to allow me to conduct my case or to examine or cross-examine witnesses at the said hearing is erroneous in point of law, and I hereby apply to you to state and sign a special case setting forth the facts of the case, and the grounds on which the proceedings were questioned by me on the hearing of the said information, in order that I may obtain the opinion of the Queen's Bench Division of the High Court of Justice thereon.—Dated this 4th day of Nov. 1886.

ANDREW DUNCAN.

And on the same day the appellant, with his solicitor, appeared before us in support of the said application, whereupon we consented to state and sign a case for the opinion of this honourable court, and the appellant and his surety (the chairman of the said society) entered into a recognisance, as required by the statute in that behalf, and we have therefore stated this case for the opinion of the court thereon.

6. The question for the opinion of this honourable court is, whether the appellant had a right to appear on behalf of the said society, and to examine and cross-examine witnesses on the hearing of the said information and complaint.

Sect. 14 provides that, if the defendant do not admit the truth of such complaint or information, the justices shall proceed to hear the prosecutor or complainant, and such witnesses as he may examine, and such other evidence as he may adduce, &c.

Colam (with *Waddy*, Q.C.) for the appellant.—The whole law on the subject is contained in two sections of the Summary Jurisdiction Act 1848. By sect. 12 the prosecutor can conduct his case by

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

counsel or attorney, if he so chooses; and by sect. 14 the prosecutor, who is the informant here, can conduct his own case. [Stopped.]

Macmorran for the respondent.—In criminal proceedings the prosecutor has no *locus standi*, the suit being that of the Crown. This has been held in many cases of indictable offences, some of which are mentioned in the special case, and the same rule applies to criminal proceedings, as distinguished from civil proceedings, before magistrates, unless the statute alters the law in that respect. Reading sects. 12, 14, and 15 together, the construction which should be placed upon them is, that in criminal proceedings a prosecutor can only be heard as a witness, though he has a right to employ counsel or attorney to conduct the prosecution. In *Webb* v. *Catchlove* (50 J. P. 795) the court strongly condemned the practice of allowing police officers to act as advocates in courts.

Lord Coleridge, C.J.—In the general observations made in *Webb* v. *Catchlove* (50 J. P. 795) I should entirely concur. I agree that it is a bad practice for a policeman, being a general officer of the law, and one who ought to stand indifferent between the parties, to appear and act as an advocate in courts of justice. I entirely agree, and I entirely concur in the observations made in that case against such a practice, but here we have a different case. This is a case stated by justices, under 20 & 21 Vict. c. 43, setting out that, in an information laid against the respondent by the appellant, the justices refused to allow the appellant to examine and cross-examine witnesses, and the question is whether they were right in refusing him leave to examine and cross-examine witnesses in the face of the plain words of the Act of Parliament which says that they "shall" proceed to hear the prosecutor, &c. I think they are entirely wrong. Sect. 12 provides that "every complainant or informant shall be at liberty to conduct such complaint or information respectively, and to have the witnesses examined and cross-examined by counsel or attorney on his behalf." This means that they shall be at liberty, if they think fit, to employ a counsel or solicitor in their behalf; not that they must do so. Then sect. 14 provides that "the justices shall proceed to hear the prosecutor or complainant and such witnesses as he may examine, and such other evidence as he may adduce in support of his information or complaint." This shows that a person who conducts a prosecution may go into the witness-box himself and give evidence. We must answer the question raised in this case in the affirmative, and say that the appellant is entitled to appear and to examine and cross-examine witnesses on the hearing of the information.

Smith, J.—I am of the same opinion.

Judgment for appellant, with costs.

Solicitor for the appellant, *A. Leslie*, for *Ryland* and *Waghorne*, Cheltenham.

Solicitor for the respondent, *Sweeting*.

CROWN CASES RESERVED.

Saturday, June 18, 1887.

(Before Lord Coleridge, C.J., Denman, J., Pollock, B., Hawkins and Stephen, JJ.)

Reg. *v.* Coley. (*a*)

Criminal law—Embezzlement by clerk or servant—Appointment for specific purpose—Assistant overseer not authorised to collect or receive moneys— 59 *Geo.* 3, *c.* 12, *s.* 7—24 *&* 25 *Vict. c.* 95, *s.* 68.

Upon an indictment under 24 *&* 25 *Vict. c.* 95, *s.* 68, *for embezzlement by a clerk or servant, it is necessary to prove that the prisoner was appointed or employed to collect or receive money for his employer.*

C., having been nominated by the inhabitants of a township as an assistant overseer, and the nomination not specifying as one of the duties he was to perform the duty of collecting or receiving money:

Held, that, inasmuch as under 59 *Geo.* 3, *c.* 12, *s.* 7, *an assistant overseer can only be appointed by justices for such purposes as are specified in the nomination, C. could not be convicted of embezzling rates collected by him as a clerk or servant of the inhabitants within the meaning of* 24 *&* 25 *Vict. c.* 95, *s.* 68.

At the Court of Quarter Sessions for the county of Worcester, held at the County-hall, Worcester, on Monday, the 4th April 1887, one Eli Coley was tried for embezzlement. Two indictments were preferred by the prosecution, the first of which charged the defendant in the first count with feloniously embezzling 5*l.* 18*s.* 8*d.* on the 2nd July 1886, the moneys of the inhabitants of the township of Hasbury, the prisoner being then employed as servant to the inhabitants of the township of Hasbury aforesaid; the second count charged a similar offence with respect to the sum of 16*s.* 3*d.* embezzled on the 10th Aug. 1886; and the third count a further similar offence with respect to the sum of 2*l.* 3*s.* 4*d.* embezzled on the 20th Sept. 1886.

The prisoner was the assistant overseer of the township of Hasbury aforesaid, and, in order to prove his appointment as such, a book which purported to be the minute-book of the meetings of the inhabitants of the township of Hasbury was produced. The minutes as to the meeting at which the prisoner was elected assistant overseer were in the prisoner's handwriting. On another leaf was an appointment, which the justices' clerk swore he had written as such, signed by two justices (who had been seen to sign by the clerk), of the prisoner as assistant overseer.

The book was in the prisoner's possession immediately before his arrest, and he handed it to a witness who demanded from him all books belonging to the overseers.

The admission of this being objected to on the prisoner's behalf, the Court held that (1) The book came from the proper custody; and (2) without going into the question as to whether the whole of the contents of the book were admissible as evidence, that that part which related to Coley's appointment was admissible; and that (3) it was a sufficient appointment in law, under the Act of

(*a*) Reported by R. Cunningham Glen, Esq., Barrister-at-Law.

59 Geo. 3, c. 12, s. 7, of the prisoner as assistant overseer.

The appointment was as follows:

In accordance with the foregoing notice a meeting was duly held in the Primitive Methodist Chapel schoolroom, on Thursday evening, the 30th June 1881, when it was proposed and seconded that Mr. Kirton be appointed assistant overseer, and it was proposed and seconded that Mr. Eli Coley be appointed assistant overseer. On the votes being taken the chairman declared Eli Coley was duly elected by a majority of ten votes. Mr. Harris requested a poll, but the chairman decided it was useless, as the number being for Mr. Kirton fifty-four and the number for Mr. Eli Coley sixty-four, the majority was too great.

Also it was proposed and seconded that the salary be ten pounds per annum, commencing at Lady-day, the 25th day of March 1881, as usual carried unanimously. The duties of the assistant overseer: He shall duly correctly prepare, calculate, and complete all rates and assessment for the relief of the poor of the said township of Halsbury which shall be required to be made during the continuance of his office as assistant overseer, and shall correctly prepare, balance, and make up twice in each year, at such times as he may be required in that behalf, all and every the books and accounts of the overseers of the poor to pass and verify their accounts for the said township before the district auditor for the time being to be appointed for that purpose, and prepare all receipts, notices, and other writing as may be required during his said office.

THOMAS MORE, Chairman.

WILLIAM SHUKER, JOHN LANGFORD, } Overseers.

It was contended that under this appointment the prisoner was not a clerk or servant within the statute. (*a*)

The Court held that he was.

With other evidence in proof of the prisoner's duties as assistant overseer as to moneys received by him from the ratepayers, a copy of the Poor Law Board's General Order for Accounts, dated the 14th Jan. 1867, printed by the Queen's printers, was tendered in evidence.

There was no evidence that this order had ever been brought to the prisoner's knowledge.

The copy was the one sent by the Poor Law Board to the Stourbridge Union in which the township of Hasbury is included.

It was not signed by anyone; but, at the end were the lithographed signatures of Gathorne Hardy, President, S. H. Walpole, B. Disraeli, Ralph A. Earle, Secretary.

It was contended that the copy order was not so authenticated as to be admissible in evidence. The Court held it to be admissible.

It was proved that the prisoner received the three sums of 5*l.* 18*s.* 8*d.*, 16*s.* 3*d.*, and 2*l.* 3*s.* 4*d.* from different ratepayers and gave them the proper receipts for the same, and did not include any of the sums in his collecting and deposit book, but returned them to the auditor in his unpaid rates statement.

It was submitted on the prisoner's behalf that this did not amount to embezzlement. The Court held that it did; and left the following questions to the jury: (1) Was the prisoner duly appointed assistant overseer? Answer, Yes. (2) Did he receive the three sums of 5*l.* 18*s.* 8*d.*, 16*s.* 3*d.*, and 2*l.* 3*s.* 4*d.* as such assistant overseer? Answer, Yes. (3) Was it his duty as such assistant overseer to include the said sums in his collecting and deposit book? Answer, Yes. (4) Did he include them in his collecting and deposit book as paid rates? Answer, No. (5) Did he fraudulently include them in his unpaid rates statement? Answer, Yes.

The jury found the prisoner guilty on the first indictment and he was adjudged to be imprisoned with hard labour for twelve calendar months.

No evidence was offered upon the second indictment.

The following were the questions of law reserved for the opinion of the court, namely: (1) Was the evidence adduced on behalf of the prosecution admissible to prove the prisoner's appointment, and was it in law sufficient for the purpose? (2) Was the prisoner, having regard to the terms of his appointment, a clerk or servant within the meaning of the statute? (3) Was the copy of the Poor Law Board's General Order for Accounts admissible in evidence? (4) Did the receipt of the moneys by the prisoner and his failure to enter them in his collecting and deposit book as paid rates, and his entering them in the unpaid rates statement, constitute embezzlement?

If the court should be of opinion that any of the above questions should be answered in the negative, the judgment given on the indictment was to be avoided; if not, it was to be affirmed.

Amphlett, for the prisoner, admitted that the objection to the admissibility in evidence of the Order of the Poor Law Board could not be sustained, inasmuch as it was made admissible under 31 & 32 Vict. c. 37, s. 2 (2), by reason of its purporting to be printed by the Queen's printers. With regard to the question whether the prisoner was a clerk or servant within the meaning of 59 Geo. 3, c. 12, s. 7, he submitted that under that section the justices have only power to appoint an assistant overseer for the purposes for which he is nominated by the inhabitants in vestry; and that here the prisoner had only been nominated for the purposes specified in the nomination set out in the case. The justices could not, therefore, appoint the prisoner to perform any other duties; and it not having been proved that he was appointed for the purpose of collecting or receiving money, he could not be convicted of embezzlement as a clerk or servant of the inhabitants within the meaning of 24 & 25 Vict. c. 95, s. 68.

Cranstoun, on behalf of the prosecution, submitted that the fact of the prisoner having collected the rates was sufficient evidence of his having been duly appointed. That his duty was to correctly make up and balance the books and accounts, and if the fact of his having collected money and failed to enter it in the books was proved, that was sufficient evidence of his being a clerk or servant within the meaning of the Act. The prisoner had represented himself as having authority to receive the money, and had received it as assistant overseer, and whether or not he had authority to receive it was immaterial.

(*a*) *i.e.*, 24 & 25 Vict. c. 95, s. 68, which enacts that: Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed.

Lord COLERIDGE, C.J.—I am of opinion that this conviction must be reversed, on the ground that the second question must be answered in the negative, in which case, according to the reservation of the learned chairman, the judgment given on the indictment is to be avoided.

DENMAN, J.—I am of opinion that the second question asked by the case can only be answered in one way, and that is in the negative. The conviction must therefore be quashed.

POLLOCK, B.—I am of the same opinion; and I think that it is important to notice the mode in which the second question was put to the jury, for it asked them whether, having regard to the terms of the appointment, the prisoner was a clerk or servant within the meaning of the statute, and not merely whether the prisoner was guilty of embezzlement. Obviously, what the learned chairman had in his mind was whether this man had that office cast upon him by reason of the Order of the Poor Law Board. Being of opinion that the terms of the appointment were limited by the terms of the nomination, I am of opinion that the second question must be answered in the negative, and that therefore the conviction must be quashed.

HAWKINS, J.—I am of the same opinion.

STEPHEN, J.—I am of the same opinion, and as there does not seem to be any count in the indictment as to false accounting, that the conviction must be quashed.

Conviction quashed.

Solicitor for the prosecution, *T. Wall*, Stourbridge.

Solicitors for the prisoner, *Stokes* and *Hooper*, Dudley.

Saturday, June 18, 1887.

(Before Lord COLERIDGE, C.J., DENMAN, J., POLLOCK, B., HAWKINS and STEPHEN, JJ.)

REG. *v.* WYNN. (*a*)

Criminal law—Larceny by bailee—Fraudulent conversion—Evidence of intent—Pledging of watches deposited with bailee for repair—24 & 25 Vict. c. 26, s. 3.

Prisoner, a travelling watchmaker, on two separate occasions received from different persons watches which he was to repair. One of the watches was pledged by the prisoner in Nov. 1886, *and the other before Christmas in that year. Upon pledging the first watch the prisoner stated that he only wanted the money for which he pledged it temporarily. And upon pledging the second watch, he requested the person with whom he pledged it not to part with it, as it was not his property. Upon an indictment under* 24 *&* 25 *Vict. c.* 26, *s.* 3 *for the fraudulent conversion of the watches by the prisoner while a bailee thereof:*

Held, that there was some evidence of a fraudulent conversion, i.e., an intention on the part of the prisoner to deprive the prosecutors permanently of their property, there being no evidence that any effort had been made by the prisoner to redeem the watches; and he never having shown any intention beyond the statements referred to, of so doing.

CASE stated by Field, J., at Lewes, as follows:—

At the spring assizes for Assize County No. 10, John Wynn was charged upon an indictment with larceny of a watch of the goods and chattels of Alfred King, and upon a second indictment with larceny of another watch of the goods and chattels of George Jenner. John Wynn was a travelling watchmaker, who periodically but at no fixed time went his rounds, and received into his possession watches of customers for repair and cleaning. In Nov. 1886 the prosecutor Alfred King delivered his watch to prisoner to alter the spring, the prisoner promising that the prosecutor should have it back next time he came that round. The value of the watch is 2*l.* In the same month the prisoner pledged the watch at East Grinstead with Frederic Charles Brown, the landlord of an inn there, for 25*s.*, as he wanted money, telling Brown at the time that he only wanted the money temporarily. In April 1887 the prisoner was arrested. In the other case the prosecutor George Jenner, of Washington in Sussex, in July or August in like manner delivered his watch to be cleaned by the prisoner, who before Christmas pledged it with George Spencer Payne, a commission agent of East Grinstead, asking him not to part with it, as it was not his property. The watch is worth 3*l.* and was afterwards disposed of by Payne.

I asked counsel for the Crown whether he had any evidence to show that the prisoner had at the time he pledged the watch the intention of appropriating it to his own use, but the answer was in the negative. I directed the jury that the prisoner was a bailee of the watch within the meaning of the statute 24 & 25 Vict. c. 96, s. 3, and that the question for them was whether the prisoner had fraudulently taken or converted the watches to his own use within the meaning of the said statute.

The jury found a verdict of guilty upon both indictments. The prisoner was not defended by counsel, but I entertain some doubt whether, inasmuch as the act of conversion merely amounted to a pledge, there was reasonable evidence of a fraudulent conversion, *i.e.*, an intention on the part of the prisoner to deprive the prosecutors permanently of their property, the effect of the pledge being, as I thought, in law to create a special property in the pledgee leaving a general property in the prosecutors. I postponed judgment, and the prisoner remains in prison until this case shall have been heard.

If this honourable court is of opinion that there is such reasonable evidence the conviction is to be affirmed, and judgment to be passed upon the prisoner; if not such evidence, the conviction to be quashed.

No one appeared against or in support of the conviction.

Lord COLERIDGE, C.J.—I am of opinion that in this case the conviction should be affirmed. It is the case of a man who has on two separate occasions within the space of two months had two watches delivered to him under substantially similar circumstances by two different persons. Now, the possession of the watches was no doubt in the first instance obtained in a perfectly legal manner, the watches being in each case delivered to him for the execution of repairs, and the pledging of the watches in neither case taking place immediately. My brother Field told the

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

jury that the prisoner was a bailee of the watches, and the question is, whether the case was within the statute. The jury found that the prisoner had on both occasions fraudulently taken or converted the watches to his own use, and found a verdict of guilty on both charges. A doubt occurred to my learned brother whether there was reasonable evidence that the taking or conversion was fraudulent. Now, if the taking or conversion was fraudulent, the case is clearly within the words of the statute; but, if it was not fraudulent, and the watches were pledged with an honest intention of redeeming them, it would be a different case. That, however, is not this case, for the jury have found that at the time the watches were pledged the prisoner did so with the intention of converting them to his own use; and the only question which we have to decide is, whether there was any evidence to support such finding. It seems to me that the very circumstance of there being two cases, and of the second case being separated from the other by an interval of only two months, was evidence that the man was doing what was fraudulent. There might have been circumstances which would have tended to negative a fraudulent intention, but there was no such evidence; and I am therefore of opinion that there was some evidence of a fraudulent taking or conversion, and that the conviction must, therefore, be affirmed.

DENMAN, J.—The only circumstance that in my mind could have raised any doubt in the mind of the jury was that, at the time the prisoner pledged the first watch, he told the person with whom he pledged it that he only wanted the money temporarily; and that, when he pledged the other watch, he asked the person with whom he pledged it not to part with it, as it was not his property. As against the latter statement, however, which is the stronger statement in favour of the prisoner, is the fact that he never did go near the place again, and that the watch was ultimately disposed of by the person with whom it was pledged. Taking it altogether, therefore, I think that there was evidence of a fraudulent conversion of the watches by the prisoner, and, that being so, I am of opinion that the conviction must be sustained.

POLLOCK, B.—I agree that the point on which my brother Field appears to have had a doubt is one which often arises. The question for us is, whether the jury, having found that there was an intention to deprive the owners of the watches of their property, there was any evidence by which such finding could be established. Now, this is a modern enactment, and it is that, whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, shall be guilty of larceny. The word "convert" is well known to lawyers, and it means that, where any man who is intrusted with goods of another puts them into the hands of a third person contrary to his orders, he converts them. That was decided in *Syeds* v. *Hay* (4 T. R. 260) and *Wilbraham* v. *Snow* (2 Saund. Rep. 102). Of course, that in itself would not be sufficient in this case, because the Legislature have added the word "fraudulently;" and the question is, then, did the prisoner part with the watches intending to take them back again, or did he part with them fraudulently with the intention of getting them out of his hands, and depriving the owners of them altogether? Under the circumstances, the jury having thought that he did fraudulently part with them, I think that the conviction was right.

HAWKINS, J.—I am of the same opinion. There was clearly a conversion, and the question is, was there a fraudulent conversion? I think there was abundant evidence that there was an intention on the part of the prisoner to part with the watches, and to derive the benefit himself of their conversion. The circumstances under which the watches were converted were that, in November, the first watch was intrusted to him, and in the same month he pledged it with Brown for 25*s*., as he wanted money, telling him that he only wanted the money temporarily; but, in contradiction of that assertion of his, he remained until April without doing anything to redeem the watch, or to restore it to its owner. The question is not whether that estopped him from showing that he had no fraudulent intention at the time he pledged it, but whether there was any evidence justifying the jury in finding that there was a fraudulent intention. In my opinion, there was such evidence, and the conviction must therefore be affirmed.

STEPHEN, J.—I am of the same opinion. But for the statute the fact that there was no fraudulent intention on the part of the prisoner when pledging the watches would not have afforded him any protection. Under the statute, however, there must now be a fraudulent intention. Now, fraudulent involves a fraudulent conversion; a conversion, that is, with no claim of right, and a conversion with the intention permanently to deprive the owner of his property. The question is, whether there was here reasonable evidence of such a fraudulent conversion; that is, was the pledging a real *bonâ fide* pledging with the intention of merely obtaining money temporarily, or with the intention of taking the pledge out of the power of the owner? I agree with the observations of my brother Hawkins as to that; and it is therefore unnecessary for me to say more than that the conviction must be affirmed.

Conviction affirmed.

Saturday, June 18, 1887.

(Before Lord COLERIDGE, C.J., DENMAN, J., POLLOCK, B., HAWKINS and STEPHEN, JJ.)

REG. *v.* LLOYD. (*a*)

Criminal law—Perjury—Court of competent authority — Examination in bankruptcy — Witness examined in absence of registrar—46 & 47 Vict. c. 52, *s.* 27 (3).

An examination of a witness under sub-sect. 3 *of sect.* 27 *of the Bankruptcy Act* 1883 *by the court, or by a registrar in pursuance of sect.* 99 *of the Act* (*b*), *cannot be proceeded with in the absence of the judge or the registrar, as the case may be.*

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

(*b*) By sub-sect. 3 of sect. 27 of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52), The court may examine on oath, either by word of mouth or by written interrogatories, any person so brought before it (*i.e.*, by summons

When, therefore, a witness is sworn before the court, but examined in a separate room, it is not a sufficient compliance with sub-sect. 3 *of sect.* 27 *that the judge or registrar may be ready and willing to come into the examination when requested; and false evidence given upon an examination when the authority competent to hold the examination is absent is not perjury.*

CASE stated by Day, J. as follows:—

The prisoner was tried before me at the last Liverpool assizes on the 21st May 1887 upon an indictment charging him with wilful and corrupt perjury alleged to have been committed by him in the course of his examination as a witness in the case of the bankruptcy of one Henry Fleetwood Lloyd, under sect. 27 of the Bankruptcy Act 1883, and a copy of the said indictment is annexed to this case. Upon the said trial evidence was given on the part of the prosecution that the prisoner was duly summoned under sect. 27 of the Bankruptcy Act 1883 for examination at the Court-house, Government-buildings, Victoria-street, in the city of Liverpool, on the 1st April 1887, and in pursuance of such summons he attended before Mr. Registrar Bellringer, one of the registrars of the Liverpool County Court then sitting in the said bankruptcy court, and having jurisdiction in the matter of the said examination, and was duly sworn that the evidence he should give in his examination should be the truth, the whole truth, and nothing but the truth, and at the same time Edwin Dillon James, a duly appointed shorthand writer of the court, made a declaration before the said Mr. Registrar Bellringer that he would duly take and subscribe the evidence of the prisoner. It was also proved that after the prisoner had been so sworn, and the shorthand writer had made such declaration before the registrar, they retired from the court in which the said registrar was sitting to a room at the other end of the passage in Government-buildings, which room is called the witness examination-room, while Mr. Registrar Bellringer remained in the said court transacting other business; but it was also proved that the said Mr. Registrar Bellringer was ready and willing to come into the said witness examination-room when requested so to do. The prisoner was examined by the solicitor to the official receiver in the presence of his own solicitor. The said Mr. Registrar Bellringer was not present in the witnesses examination-room, or within hearing, at the time when the answers were given by the prisoner upon which the perjury was assigned in the said indictment. The file of proceedings which was produced at the trial may be referred to by the court.

Evidence was also given of the materiality and the falsehood of the answers given by the prisoner on his said examination. At the close of the case for the prosecution counsel for the prisoner contended that the case for the prosecution had shown that the answers given by the prisoner on his examination, and upon which perjury was assigned, were given in the absence of the registrar from the room in which the said examination was conducted, and that the alleged perjury was not before a court properly constituted, or of competent jurisdiction.

I directed the jury that the said examination, and the evidence of the prisoner, were taken before a court properly constituted and of competent jurisdiction, but intimated that I would state a case for the opinion of the Court of Crown Cases Reserved.

The jury convicted the prisoner, and he was released on bail pending the decision of the said point reserved.

The question for the said Court of Crown Cases Reserved is: Whether the said indictment is supported by evidence, having regard only to the fact that, although the oath was properly administered before a competent court, the registrar was to the extent and under the circumstances above detailed absent when the particular questions were answered on which answers the perjury is assigned.

Macconnell (with him *F. Smith*) for the prisoner. —Sect. 27 of the Bankruptcy Act 1883 enacts that the court may examine on oath, either by word of mouth or interrogatories, any person brought before it concerning the debtor, his dealings or property. Therefore the functions of the court before whom the prisoner was examined were judicial and not merely ministerial; and the court could not be formed in the absence of the person properly qualified to take evidence on oath. The fact that the examination must be on oath showed that there must be a presiding authority who should decide what questions might be put, and what questions were to be answered. Further, rule 88 of the Bankruptcy Rules of 1886 (*a*) enables the registrar to report a refusal to answer to the judge, in which case the report is to be made in Form No. 35, according to which the registrar is to state that the question was put at an examination "held before me." The examination was therefore required to be held before the registrar; and an examination held in a separate room out of hearing of the registrar is not an examination properly conducted and taken before a properly constituted court. The registrar by rule 88 is to allow questions to be put, and his presence in order to sanction the questions is necessary. [Lord COLERIDGE, C.J.—Does not rule 66 (*b*) show the only way in which an exami-

under sub-sect. 1), concerning the debtor, his dealings or property.

By sect. 99 of the Act: (1) The registrars in bankruptcy of the High Court, and the registrars of a County Court having jurisdiction in bankruptcy, shall have the powers and jurisdiction in this section mentioned, and any order made or act done by such registrar in the exercise of the said powers and jurisdiction, shall be deemed the order or act of the court.

(2) Subject to general rules limiting the powers conferred by this section, a registrar shall have power . . . (*h*) to summon and examine any person known or suspected to have in his possession effects of the debtor, or to be indebted to him, or capable of giving information respecting the debtor, his dealings, or property.

(*a*) Rule 88 of the Bankruptcy Rules of 1886 provides that: (1) If a debtor or witness examined before a registrar refuses to answer to the satisfaction of the registrar any question which he may allow to be put, the registrar shall report such refusal in a summary way to the judge, and, upon such report being made, the debtor or witness in default shall be in the same position and be dealt with in the same manner as if he had made default in answering before the judge.

(*b*) By rule 66, the court may, in any matter where it shall appear necessary for the purposes of justice, make an order for the examination upon oath before the court or any officer of the court, or any other person, and at any place, of any witness or person, and may empower any party to any such matter to give such deposition in evidence therein on such terms, if any, as the court may direct.

nation can be held elsewhere than before the court or the registrar?] Yes; and the shorthand writer is expressly excepted by rule 67 from being appointed to act as a deputy. Here an astute solicitor was examining the witness without the presence of any restraining judicial authority, which might easily lead to his being entrapped into contradicting himself, without his being afforded any opportunity for explanation. [He was here stopped by the Court.]

Mulholland in support of the conviction. The corporal presence of the registrar, and whether he is to give his mind to each question that is asked, is not the question here. The question is whether the prisoner committed perjury or not. [Lord COLERIDGE, C.J.—But whether the prisoner committed perjury depends upon the nature of the proceedings in which the alleged false statement was made. A false oath is not perjury unless it is made before a judicial authority.] The practice adopted here was one which Bacon, V.C., in the case of *Re Sir John Moore Mining Company* (W. N. 1878, p. 87), said was the every-day practice before the registrars in bankruptcy. [STEPHEN, J.—All the length that statement appears to go is, that in such examinations it was an every-day practice for notes to be taken by shorthand writers.] The registrar in taking this examination was not performing a judicial function at all, and therefore the case was analogous to that of the swearing of affidavits in proceedings in the High Court. [POLLOCK, B.—The answer to that is, that the taking of an affidavit is the appointed mode in which evidence which is afterwards to be read in court is to be taken.] The point was discussed in *Caudle* v. *Seymour* (1 Q. B. 889), with regard to informations on oath before justices, and Patteson, J. said: "Depositions of this kind are not like affidavits here, which are made to be used, or not, by a party in a cause as he sees fit." Here the examinations need not be acted on. [Lord COLERIDGE, C.J.—How do you get over rules 66 and 88?] The registrar is invested with power to take the examination by sect. 99, and is not allowed to make an order on it. He is to report to the judge; therefore he is not exercising a judicial function. The allegation in the indictment that the examination was before the registrar may be treated as immaterial, unless the registrar must be corporally present at the examination. In Stephen's Digest of the Criminal Law, p. 82, perjury is defined as "an assertion upon an oath duly administered in a judicial proceeding, before a competent court." [STEPHEN, J.—Yes, but the whole question here is, whether this examination was before and not behind the back of a competent court.]

Lord COLERIDGE, C.J.—It appears to me that this case is clear. It is a case in which perjury is assigned under these circumstances: A man is brought up for examination in certain bankruptcy proceedings in the Liverpool County Court. In such proceedings the registrar has jurisdiction to hear evidence, and to administer the oath upon which the evidence is taken. Now here the oath is admitted to have been taken and administered properly, and thereupon the examination proceeded, but not before the court or the competent authority who administered the oath. The witness is taken away into another room while the registrar goes on with other work, and is examined in the room to which he is taken, and thereupon he makes the statements which it is said were made before the registrar. I am of opinion that the answers were not made before a court of competent jurisdiction, and that the court was elsewhere, and therefore it was not before a court of competent authority that the examination took place, but behind the court of competent authority. The answers which were received in the examination so held are those upon which the perjury is assigned. Now it is most important that any witness who is examined should be examined with the whole sanction of the court before whom he is examined, and the jurisdiction of whom makes that examination receivable in evidence afterwards against him. It is most important that such examinations should be conducted before a competent authority, in order that such authority may see that the examinations are properly conducted. I am of opinion that this conviction cannot possibly be sustained, and that the practice invoked to justify it is one which ought at once to be put a stop to.

DENMAN, J.—I am of the same opinion. The indictment states that the prisoner was summoned and appeared in accordance with the summons at the County Court of Lancashire, holden at Liverpool, to be examined in pursuance of the Bankruptcy Act 1883 "before Mr. Registrar Bellringer, being one of the registrars of the said court, having power and jurisdiction to summon and examine the said Henry Lloyd, and was then duly sworn and took his corporal oath upon the Holy Gospel of God before the said Mr. Registrar Bellringer that the evidence which he should give upon the said examination, that is to say, the examination before Mr. Registrar Bellringer, should be the truth, the whole truth, and nothing but the truth, the said Mr. Registrar Bellringer then and there having sufficient and competent authority to administer the said oath to the said Henry Lloyd, and the said Henry Lloyd was then examined by word of mouth upon his said oath concerning the debtor, his dealings and property, in accordance with the provisions of the said Act." Now, if the indictment had stopped there, I very much doubt whether it would not have been a bad indictment. It may be, however, that after verdict that might have been cured. At any rate the indictment goes on to say "that the said Henry Lloyd being so sworn as aforesaid, not having the fear of God before his eyes, and upon his oath aforesaid, before the said Mr. Registrar Bellringer aforesaid, falsely, corruptly, &c., did depose and swear, &c." How far those subsequent allegations can be said to cure that which makes the indictment otherwise bad is doubtful. It is not necessary, however, to consider whether the indictment is good or bad, for, assuming it to be good, it has to be proved that the perjury alleged to have been committed was committed before Mr. Registrar Bellringer. Now that it was committed before Mr. Registrar Bellringer is absolutely disproved by the evidence. For the facts show that the prisoner was examined before a totally different body of persons, certainly not before Mr. Registrar Bellringer. It is said that the practice of examining witnesses in the way in which the prisoner was examined is a practice generally adopted and of every-day occurrence. I think that it is not only a bad practice, but that

it is an illegal practice. It is of the highest importance that those who come before the Bankruptcy Court should have the full protection of the presence of a judicial person to see that the examination is properly conducted. In my opinion this conviction should be quashed.

POLLOCK, B.—I concur. I have nothing to add.

HAWKINS, J.—I am of the same opinion. I think that my brother Denman has already said that the facts contradict the statement in the indictment that the perjury was committed before Mr. Registrar Bellringer. It is quite true that the oath was taken before the registrar; but it is also perfectly certain that no part of the examination took place before the court, that is, Mr. Registrar Bellringer. It is said that the registrar was in court, and was ready to come to the room where the examination was being held if wanted. But that does not disturb what I have said. He was not there. Mr. Registrar Bellringer swore the witness, but the examination was taken behind his back, and the most that can be said is, that he was in the neighbourhood and would have gone into the room if he had been wanted. A practice has no doubt existed for very many years to hold examinations in bankruptcy in this manner. But it has always struck me as a monstrously unfair practice, and I am glad that the court have at last had the opportunity of expressing their opinion on the matter, and putting an end to the practice.

STEPHEN, J.—I am of the same opinion. And the only additional remark I have to make is, that the fact of the matter having been brought as an appeal *ad misericordiam* to the court, was one of the strongest reasons in favour of the prisoner. The way in which it was put was, that if the registrar is obliged to be present there will have to be additions made to the staff of registrars. If that is so, all I can say is that the staff should be increased. I cannot think of a worse form of economy than that of putting more work on a person than he can efficiently perform, in order to save money at the expense of the proper administration of justice. Evidence taken in the way in which the evidence was taken in this case is not evidence at all; and, therefore, I am of opinion that this conviction should be quashed.

Conviction quashed.

Solicitors for the prosecution, *Yates, Stanaworth*, and *Johnson*, Liverpool.

Solicitor for the prisoner, *H. T. Neal*, Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

Saturday, March 5, 1887.

(Before Lord ESHER, M.R., BOWEN and FRY, L.JJ.)

OSBORNE *v.* MILMAN. (*a*)

Prison—"Criminal prisoner"—Committal of unqualified person acting as solicitor—Solicitors Acts, 6 & 7 Vict. c. 73, ss. 2, 32; 23 & 24 Vict. c. 127, s. 26—Prison Acts, 28 & 29 Vict. c. 126, ss. 4, 67; 40 & 41 Vict. c. 21, s. 41.

A person committed to prison under 6 & 7 Vict. c. 73, s. 32, for acting as a solicitor, though not duly qualified, is a "criminal prisoner" within 28 & 29 Vict. c. 126, s. 4, which enacts that "criminal prisoner" shall mean any person charged with or convicted of a crime. A prisoner so committed is not entitled to be treated as a misdemeanant of the first division by 40 & 41 Vict. c. 21, s. 41.

Judgment of Denman, J. (55 *L. T. Rep. N. S.* 436) *reversed.*

THIS was an appeal from a judgment of Denman, J. (reported 55 L. T. Rep. N. S. 436), in an action tried before him without a jury, in which the plaintiff claimed damages for false imprisonment and trespass.

The plaintiff had been committed to prison for six months by an order of the Queen's Bench Division, under the provisions of 6 & 7 Vict. c. 73, s. 32, for having practised as a solicitor, though not duly qualified. Having been arrested, he was imprisoned in Holloway Gaol, of which the defendant was the governor, under a warrant which recited that he had been so committed. He was placed on the criminal side of the prison, and was treated as a criminal who had been convicted but had not been sentenced to hard labour. He protested against this treatment, and contended that he ought to be treated as a first-class misdemeanant, and brought this action against the defendant. The amount of damages was agreed at 50*l.* if judgment should be given for the plaintiff.

By 6 & 7 Vict. c. 73, s. 2:

No person shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit, or defend any action, suit, or other proceeding in the name of any other person or in his own name in Her Majesty's High Court of Chancery or Courts of Queen's Bench, &c. . . . or act as an attorney or solicitor in any cause, matter, or suit, civil or criminal, to be heard, tried, or determined before any justice of assize, oyer and terminer, or gaol delivery . . . unless such person shall have been, after the passing of this Act, admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor, pursuant to the directions and regulations of this Act, and unless such person shall continue to be so duly qualified and on the roll at the time of his acting in the capacity of an attorney or solicitor as aforesaid.

By sect. 32:

If any attorney or solicitor shall wilfully and knowingly act as agent in any action or suit in any court . . . for any person not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be anyways made use of in any such action, suit, or matter upon the account or for the profit of any unqualified person, or send any process to such unqualified person, or do any other act thereby to enable such unqualified person to appear, act, or practise in any respect as an attorney or solicitor . . . knowing such person not to be duly qualified as aforesaid, and complaint shall be made thereof in a summary way to any of the Superior Courts wherein such attorney or solicitor has been admitted, and proof made thereof upon oath to the satisfaction of the court that such attorney or solicitor hath wilfully and knowingly offended therein as aforesaid, then and in such case every such attorney or solicitor so offending shall and may be struck off the roll, and for ever after disabled from practising as an attorney or solicitor; and in that case, and upon such complaint and proof made as aforesaid, it shall and may be lawful to and for the said court to commit such unqualified person so acting or practising as aforesaid to the prison of the said court, without bail or mainprise, for any term not exceeding one year.

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

By 23 & 24 Vict. c. 127, s. 26:

Every person who acts as an attorney or solicitor contrary to the enactment in sect. 2 of the first hereinbefore mentioned Act . . . without being qualified so to act, shall be deemed guilty of a contempt of the court in which the action . . . in relation to which he so acts is brought . . . and may be punished accordingly.

By 28 & 29 Vict. c. 126, s. 4:

"Criminal prisoner" shall mean any prisoner charged with, or convicted of, a crime.

By sect. 67:

In every prison to which this Act applies, prisoners convicted of misdemeanour and not sentenced to hard labour shall be divided into at least two divisions, one of which shall be called the first division; and whenever any person convicted of misdemeanour is sentenced to imprisonment without hard labour, it shall be lawful for the court or judge before whom such person has been tried, to order, if such court or judge think fit that, such person shall be treated as a misdemeanant of the first division, and a misdemeanant of the first division shall not be deemed to be a criminal prisoner within the meaning of this Act.

By 40 & 41 Vict. c. 21, s. 41:

Any person who shall be imprisoned under any rule, order, or attachment for contempt of any court, shall be in like manner treated as a misdemeanant of the first division within the meaning of the said section of the said Act.

At the trial of the action the learned judge gave judgment in favour of the plaintiff.

The defendant appealed.

Sir *R. E. Webster* (A.-G.) and *Danckwerts* for the defendant.—The question is, whether the plaintiff ought to have been treated as a "criminal prisoner" not sentenced to hard labour, or as a first-class misdemeanant. Sect. 2 of 6 & 7 Vict. c. 73 prohibits an unqualified person acting as a solicitor, and the plaintiff might have been indicted under that section and convicted of a misdemeanour. But the court has acted under the alternative power, given to it under sect. 32, which deals with the case of a solicitor and an unqualified person acting in concert, to order him to be committed to prison. The fact that the court has so acted does not alter the nature of the offence, and it is submitted that the plaintiff is a person convicted of a crime. Sect. 41 of the Prisons Act 1877 does not apply; that section relates only to proceedings for contempt of court, the words "for contempt of court" govern the whole section, and therefore it has no application to this case, which is not a case of contempt of court, but is a statutory misdemeanour:

Reg. v. *Buchanan*, 8 Q. B. 883.

They also cited

Abercrombie v. *Jordan*, 8 Q. B. Div. 187;
Cattell v. *Ireson*, E. B. & E. 91.

Crump, Q.C., *Wildey Wright*, and *Richards* for the plaintiff.—The court has proceeded under 6 & 7 Vict. c. 73, s. 32; the proceeding provided for in that section is in the nature of a proceeding for contempt, and is not in any sense a criminal proceeding. It cannot be that by means of such a proceeding, the plaintiff has been "convicted of a crime." There are none of the necessary elements of a conviction for crime about it—no indictment, no trial, no jury; such evidence as is given is given by affidavit, and the defendant's answer is upon oath and also by affidavit. How can such a proceeding be said to be in the nature of a criminal proceeding, so that the result of it is to convict the defendant of a crime? The order is not a conviction; it is merely made in the exercise of a summary power to punish for contempt. Sect. 41 of 40 & 41 Vict. c. 21, applies; the words "for contempt" refer only to the word "attachment," and the true construction is to read the section: "Any person who shall be imprisoned under any rule, order, or attachment for contempt of any court shall," &c.

No reply was called for.

Lord ESHER, M.R.—In this case the plaintiff has brought an action against the governor of the gaol in which he was imprisoned, for having illegally misused him, and the defence set up is that the governor acted rightly under the warrant which he had. Of course, that defence will be made out if it can be shown that the governor legally obeyed the warrant under which he acted and therefore the question to be decided is, whether the defendant was justified in causing the plaintiff to be treated in the manner complained of by the warrant for his committal. Now, the warrant states that he is to keep James Osborne in prison in execution of an order of the Queen's Bench Division, whereby he was committed to prison for six months pursuant to the statute 6 & 7 Vict. c. 73, s. 32, for having acted or practised as a solicitor without being duly qualified. Therefore, what we have to consider is, whether the proceeding, under sect. 32 of that statute, with regard to an unqualified person acting as a solicitor, is or is not a conviction for a crime. Now, it is no doubt true to say that it is not a conviction after trial by a jury; but is that the only possible method of obtaining a conviction known to the law? Certainly not; there are summary convictions by magistrates, and it cannot be doubted that a person summarily convicted by magistrates under the statutes providing for such conviction is certainly convicted of a crime. It is also true to say that here the conviction has not been by a magistrate: by whom, then, has it been? That brings me to the section in question, which is as follows: [His Lordship read the section.] Now, by the 2nd section of the same Act of Parliament, any person had been in terms prohibited from doing the act for which imprisonment may be awarded under sect. 32; so that it is clear that any person disregarding that prohibition might be indicted for misdemeanour; the offence itself is therefore a crime. Then it seems to me that sect. 32 only gives an additional and summary way of dealing with the crime. But, even assuming that it could be successfully argued that sect. 32 itself created an offence and provided for its punishment, I should still be of opinion that it treated it as a crime. The offence has all the essentials of a crime; the offender coming within sect. 32 is doing a thing which is itself evil, by an arrangement with others, which is in the nature of a conspiracy; and, further, I think that when the Legislature says that a man who does a certain thing may be sent to prison for a year, it is by necessary implication dealing with such an act as a crime. I am therefore of opinion that any person dealt with by a court under the latter part of sect. 32 is a person who has been convicted by the court of a criminal offence. It was then argued that the case came within the 41st section of the Prisons Act 1877, which provides that any

person who shall be imprisoned under any rule, order, or attachment for contempt of any court shall be treated as a misdemeanant of the first division. The learned judge in the court below seems to have been of this opinion, and to have held that the words "for contempt of any court" only applied to the immediately preceding word "attachment." I cannot read the section in that way; the effect of such a reading would be that, wherever under a rule or order of a court imprisonment is inflicted, then the offender shall necessarily be treated as a first-class misdemeanant, quite irrespective of the view taken by the court as to the nature of his offence. I think that the words "contempt of any court" apply to all that goes before, and are the governing words of the section, and therefore that the section does not apply to this case. For these reasons I am not able to agree with the judgment of Denman, J., and I think that this appeal must be allowed.

BOWEN, J.—I agree, and I should add nothing to what has fallen from the Master of the Rolls, were it not that we are differing from the judgment of the learned judge below. Now, the only question which we have to decide is, whether, as between the plaintiff and the defendant, the defendant was justified by the warrant in treating the plaintiff as a convicted criminal. The warrant stated that the plaintiff was committed to prison under 6 & 7 Vict. c. 73, s. 32, for having acted as a solicitor without being duly qualified, and the question for us, therefore, is, whether a person who has been committed to prison under that section is or is not a convicted criminal. Now, I think it is clear that the proceeding under that section against the offending person who has acted as a solicitor without being duly qualified, is a criminal proceeding, for several reasons. First, I think it is clear that sect. 2 prohibits the acts which he has committed, and, although it must always be a question of construction whether an act is prohibited in the sense that it is rendered criminal, or whether the statute merely affixes to it certain consequences more or less unpleasant, yet if the true view is that the statute prohibits the act in the sense that it is rendered criminal, then the doing of that prohibited act may either be made the subject of an indictment for misdemeanour, or the statute may provide for other summary proceedings. It appears to me that sect. 2 prohibits the acts which the plaintiff has committed in the sense that it renders them criminal. Secondly, that conclusion is greatly strengthened by the consideration that they are not merely wrong as being contrary to the provisions of the statute, but are wrong in themselves, and are such as, quite apart from the statute, you might expect to be treated criminally. Lastly, it must be observed that sect. 32 does not appear to treat the act merely as one of contempt, but it gives to any court in which the solicitor, who has acted with the unqualified person, has been admitted, the power of striking the one off the rolls and of committing the other to prison. Therefore, any court in which the solicitor has been admitted has power to punish, and not only the court against which, by reason of the acts complained of, a contempt may have been committed. Therefore, both from other considerations, and from the terms of sect. 32 itself, I come to the conclusion that the act therein rendered punishable by imprisonment is a crime, and if so, then I think that the person punished under that section is a convicted criminal. It was argued that sect. 41 of the Prisons Act 1877 has entitled any person imprisoned under any rule or order of a court to be treated as a first-class misdemeanant; but in my opinion, that section only applies to the case of persons committed for contempt of court. I am therefore of opinion that this appeal must be allowed.

FRY, L.J.—I am of the same opinion. The first inquiry is, whether Osborne was a prisoner convicted of a crime. The statute 6 & 7 Vict. c. 73, regulates the qualification of solicitors, and sect. 2 prohibits a person not duly qualified from acting, and the result is that any person so acting without being duly qualified, is guilty of a misdemeanour. Sect. 32 deals, as it seems to, me with a particular form of such action, namely, where the unqualified person has been associated in so acting with a properly qualified person. In such a case the section deals with it as a compound offence, and it gives the court power, upon complaint being made, to proceed in a summary way and to deal with the qualified person by striking him off the rolls, and with the unqualified person by committing him to prison. Pausing there for a moment, I think it is clear that the Legislature was dealing in that section with a particular form of the general offence which was created by sect. 2, and was giving to the courts a summary mode of trying a person in respect of that particular offence. It was argued that the proceeding under sect. 32 was nothing like a criminal trial, and that without a criminal trial there could not be a criminal conviction; but underlying that argument was the notion that there cannot be a criminal trial except before a judge and jury, or a justice of the peace. I know of no good reason why a power of summary trial and conviction should not be intrusted to judges of the Superior Courts, who are magistrates of a higher grade than a justice of the peace, and I think that such a power has been given by this section. But it was then urged that the committal was a committal for contempt, and reliance was placed upon sect. 26 of 23 & 24 Vict. c. 127. It rather seems to me that the inference arising from that section is that the jurisdiction given by 6 & 7 Vict. c. 73, s. 32, was to deal with the matter not as a contempt; but, however that may be, it is clear that by sect. 32 jurisdiction is given to any of the Superior Courts in which the solicitor proceeded against, together with the unqualified person, was admitted; so that if the solicitor was admitted in the Court of Chancery, that court might exercise the jurisdiction under the section in respect of an acting in the Queen's Bench, and *vice versâ*. That shows it is not contempt, because a provision dealing with contempt would only treat it as a contempt of the particular court in which the contempt was committed. The next point raised was that sect. 41 of the Prisons Act 1877 applied. It was argued that that section applied to any person imprisoned under any rule or order of court, whether for contempt or otherwise; that argument prevailed with the learned judge. I do not think that is the true construction of the section. It would lead to this remarkable result, that every person imprisoned under any rule or order of court, whether for contempt or otherwise, would be

entitled to be treated as a first-class misdemeanant. I think that section applies only to imprisonment for contempt. The marginal note, though of course not binding as part of the statute, seems to me to give the effect correctly when it describes the section as relating to "treatment of persons committed for contempt of court." For these reasons I think that the appeal should be allowed.

Appeal allowed.

Solicitor for plaintiff, *Godfrey.*

Solicitor for defendant, *Hare* and *Co.*, for Solicitors to the Treasury.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Tuesday, June 7, 1887.

(Before STIRLING, J.)

WALLASEY LOCAL BOARD *v.* GRACEY. (*a*)

Public nuisance—Action to restrain—Action by local board in its own name—Absence of Attorney-General—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *s.* 107.

A local board brought an action in its own name to restrain the commission of a public nuisance within its district. The local board had sustained no damage by the nuisance. Upon a motion for an injunction:

Held, that the Local Board could not bring the action in their own name, but ought to have applied to the Attorney-General for his sanction, and, if it were given, proceeded by an action in the way of an information by him.

THIS was an action by the plaintiffs, the local authority for the district of Wallasey, for an injunction to restrain the defendant from depositing filth, dust, rubbish, refuse, and night soil, and other noxious and offensive matter on any land or place within the plaintiff's district, and from conveying any filth, dust, rubbish, refuse, and night soil along any street within the plaintiff's district in such a manner as to allow any portion of the same, or any offensive odour therefrom to escape from the cart, carriage, or other means whereby the same were conveyed; and for other ancillary relief.

The defendant had entered into a contract with the corporation of Birkenhead to empty and remove the contents of ashpits, &c., in that borough. He owned a farm within the district of the plaintiff board, and he brought the refuse and filth from Birkenhead, and put it upon the land on his farm, so as to cause, as it was alleged, an offensive smell to arise, and create a nuisance to the inhabitants of the Wallasey district. He also, it was stated, carted the refuse along the public roads in open carts, whereby a further nuisance was occasioned. The plaintiffs now moved for an injunction in the terms of the writ until the trial of the action, or further order.

Graham Hastings, Q.C. and *Bardswell* for the motion. [*Buckley*, Q.C., for the defendant, intimated that he intended to make the objection that the action was not properly constituted, inasmuch as the object of it was to restrain a public nuisance, and the sanction of the Attorney-General had not been obtained.] It is not necessary to get the consent of the Attorney-General to an action of this kind, and make him a party to the action:

Nuneaton Local Board v. *General Sewage Company*, L. Rep. 20 Eq. 127.

The nuisance interferes with the comfort of the persons living in the district of the plaintiff board, and is injurious to health, and ought to be restrained. It is one of those in respect of which the local board could take summary proceedings under sect. 91 of the Public Health Act 1875:

Bishop Auckland Local Board v. *Bishop Auckland Iron Company*, 48 L. T. Rep. N. S. 223; 10 Q. B. Div. 138.

They have thought it better to proceed under sect. 107, which enables them to bring the action in their own name.

Buckley, Q.C. and *F. Smith* for the defendant.—It is not pretended that the Local Board have sustained any damage in this case, and the nuisance is a public nuisance, and any action to restrain it must be by the Attorney-General on behalf of the public:

Vestry of Bermondsey v. *Brown*, 13 L. T. Rep. N. S. 574; L. Rep. 1 Eq. 204.

Nuneaton Local Board v. *General Sewage Company* was a different case. That was a case of contract. Sect. 107 of the Public Health Act 1875 (*a*) was not meant to transfer the powers of the Attorney-General in these cases to the Local Board.

Graham Hastings, Q.C. replied.

STIRLING, J.—This is a motion by a local board, purporting to act under the powers of the Public Health Act 1875, to restrain an alleged nuisance. It is not disputed that the local board has sustained no damage by the nuisance, and the objection has been taken that the action has been wrongly framed, and that it should have been brought in the name of the Attorney-General on behalf of the public. On the other hand, it is said that sect. 107 of the Public Health Act 1875 enables the board to bring the action in their own names. [His Lordship read the section, and continued:] Now the particular nuisance which it is sought to abate in this case, is one of those mentioned in sect. 91, sub-sect. 4 of the Act, and I assume that it is the opinion of the Local Board that any summary proceedings, which they can take in their own name, would afford inadequate remedy. The power given by the Act is to cause any proceedings to be taken in any superior court of law or equity to abate the nuisance; that is, they can take such proceedings as are known to the law to obtain the abatement or prohibition of the nuisance. Is this, then, a proceeding known to the law? No, because it is well settled that no one can sue in respect of a public nuisance, but the Attorney-General, or a person who has sustained special damage by reason of it. This is not a case that falls within the class of special

(*a*) Reported by A. J. HALL, Esq., Barrister-at-Law.

(*a*) 38 & 39 Vict. c. 55, s. 107:—Any local authority may, if in their opinion summary proceedings would afford an inadequate remedy, cause any proceedings to be taken against any person in any superior court of law or equity to enforce the abatement or prohibition of any nuisance under this Act, or for the recovery of any penalties from or for the punishment of any persons offending against the provisions of this Act relating to nuisances; and may order the expenses of and incident to all such proceedings to be paid out of the fund or rate applicable by them to the general purposes of this Act.

damage, therefore this is not a proceeding which the Local Board can take in their own name. They may go to the Attorney-General, and if he thinks fit to sanction it they can proceed by action in the way of an information to obtain the desired relief. If he does not sanction that form of proceeding, then they must take some other proceeding to abate the nuisance, which must be one known to the law. That is how the matter strikes me, irrespectively of the authorities. There are two authorities. In one case, *Vestry of Bermondsey* v. *Brown*, the vestry, who were authorised by Act of Parliament to indict any person stopping a right of way within the parish, and to take such other proceedings for the opening thereof as to them should seem expedient, filed a bill in their own name to obtain the removal of an arch built over a public way within the parish. The objection was raised that the Attorney-General ought to have been before the court, and it was sought to get over that by reference to the local Acts relating to the matter, which empowered the local authority to take such proceedings for the opening of any landing places or rights of way as should appear expedient, but Lord Romilly said: —"I thought at the time, and further examination of the Acts of Parliament tends to confirm that view, that it was not intended by those Acts, or by any clauses to be found in them, to delegate to the commissioners named in the first Act, or to the vestry, who have now delegated to them the powers conferred on the commissioners, any powers or authorities previously vested in the Attorney-General; and that, accordingly, if the vestry indict any one under that Act, they must proceed in the name of the Queen before a grand jury, who must find a bill before it can be tried; and if they apply to the Court of Chancery, it must be with the name of the Attorney-General as plaintiff in an information." That appears to be applicable to the present case. It does not follow from sect. 107 that, because the local authorities are empowered to enforce the remedies mentioned in that section, that it was intended to delegate to them any of the powers before vested in the Attorney-General; but when it is necessary to proceed otherwise than in a summary manner, they should at once apply to the Attorney-General, who would lend his name where it should appear to him proper to do so. The other case is *Nuneaton Local Board* v. *General Sewage Company*. That was a case of contract, and of interference with the property of the plaintiffs. The board had entered into an agreement with the defendant company, in pursuance of which they afterwards granted them a lease of the sewage works of the town and a plot of land, and the company covenanted during the term to keep the outfall of the works, with the engines, pumps, and apparatus in proper working order, so as to admit of the free flow of sewage through the sewers communicating with the works, and so that they might not at any time be stopped. The board alleged that the company's works were insufficient, and that they were only pumping a portion of the sewage out of the sewers, and were damming up or heading back the residue in the sewers, so as to be a nuisance to the inhabitants of the town, and they asked for an injunction to restrain this. In that case the Vice-Chancellor held that the local board had shown a case for relief. As to that I have no doubt, but the case was at first argued on demurrer, and one ground was that the Attorney-General should have been a party, and *Vestry of Bermondsey* v. *Brown* was cited; but the Vice-Chancellor expressly left that point open, and said that upon the allegations in that case the plaintiffs were entitled to sustain a suit in that court. Sending the sewage back into the drains of the local board appears to me to be damage, and so it would have been right to grant the injunction.

Method (*amicus curiæ*).—I was counsel in that case, and it may be of assistance to your Lordship to know that before applying for the injunction the leave of the Attorney-General was obtained.

STIRLING, J.—That being the state of the authorities, I think that the objection is well founded, and that the motion must stand over for the parties to consider what course they will adopt.

Solicitors for the plaintiffs, *Jaques* and *Co.*, agents for *Layton* and *Steel*, Liverpool.

Solicitors for the defendant, *Wynne, Holme*, and *Wynne*, agents for *Simpson* and *North*, Liverpool.

QUEEN'S BENCH DIVISION.

Wednesday, May 11, 1887.

(Before Lord COLERIDGE, C.J. and SMITH, J.)

REG. v. LICENSING JUSTICES OF MARKET BOSWORTH. (a)

Licensing Acts—Renewal of licence—What is renewal as distinguished from new licence—Application after expiration of licence—9 *Geo.* 4, *c.* 61, *s.* 14—*Licensing Act* 1872 (35 *&* 36 *Vict. c.* 94), *s.* 74—*Licensing Act* 1874 (37 *&* 38 *Vict. c.* 49), *s.* 32.

P. was the tenant of a licensed house, and was duly licensed to sell intoxicating liquors therein. At the general annual licensing meeting, held on the 23*rd Sept.* 1885, *P. applied for a renewal of his licence. No previous notice of opposition had been served on him, but on his application being made, the police superintendent gave evidence that P. had been twice convicted of being drunk on his own licensed premises, and the justices thereupon, without any further adjournment or notice, refused to renew the licence, merely saying that P. was not a fit person, but that, if a new tenant was found, the licence might be renewed. The licence expired on the* 10*th Oct.* 1885, *but P., having a lease of the house, refused to quit until the* 24*th June* 1886, *when he left, and C. entered into possession. C. applied at the general licensing meeting, held on the* 1*st Sept.* 1886, *for a licence for the house, which had thus been unlicensed since the* 10*th Oct.* 1885. *No evidence on oath was given against his application. The justices refused to grant a licence, merely saying that another licensed house was not required in the district.*

Held, on the authority of Reg. *v.* Justices of Liverpool (49 *L. T. Rep. N. S.* 244; 11 *Q. B. Div.* 638; 52 *L. J.* 114, *M. C.*), *that the application was for a "renewal" of a licence, and not for a "new licence," and that the reason given by the justices for the refusal, although applicable to*

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

the case of a "new licence," was not applicable to the case of a "renewal."

RULE for a *mandamus*, to the licensing justices of the Market Bosworth division of the county of Leicester, to hold an adjournment of the general annual licensing meetings of the 23rd Sept. 1885 and 1st Sept. 1886, and to hear and determine an application of one Samuel Chitham, for the renewal or grant of a licence to sell intoxicating liquors by retail at the Wheatsheaf Inn, at Market Bosworth.

This inn had been licensed for many years, and in 1882, one Palmer became tenant, and was duly licensed up to October 1885. At the general annual licensing meeting, held for Market Bosworth division, on the 23rd Sept. 1885, no previous notice of opposition to the renewal of his licence had been served on Palmer, and he applied on that day to take out his renewal licence. On his application being made, the superintendent of police gave evidence that Palmer had been twice convicted of being drunk on his own licensed premises, and that these convictions were endorsed on his licence, and that no other complaint was ever made against Palmer, nor against the management of his house. The justices thereupon, without any adjournment or other notice, refused to renew the licence of Palmer, merely saying that Palmer was not a fit person, but that if a new tenant were found the licence might be restored. Palmer did not appeal to the quarter sessions against the refusal, but, having a lease of his house, refused to leave or give up possession until 24th June 1886. After the general annual meeting on the 23rd Sept. 1885, and after the refusal of Palmer's licence, it was stated that application had been made by one Godson, who was willing to take the house, but the justices refused to give him a renewal of the licence, because he was not in possession of the premises.

Palmer continued to sell liquor at the Wheatsheaf Inn until the expiration of his current licence, which came to an end on the 10th October 1885, when the house was shut up; but as he held a lease, he continued to occupy the house until the 24th June 1886, when he gave up possession, and Chitham entered into possession. Chitham, with a view to an application at the next general annual licensing meeting for a renewal of the licence on the 2nd Aug. 1886, duly served the statutory notices on the superintendent of police and overseers, stating that he would apply for a licence for the Wheatsheaf Inn, which had for many years been kept as a licensed house, and which he intended to keep as an inn.

At the general annual meeting, held on 1st Sept. 1886, Chitham duly proved his notices, and gave evidence of good character. No evidence on oath was heard in opposition to his application, and he proved that the justices at the previous meeting in September 1885 had held out the hope that they would, on a new tenant being found, renew the licence to the house. The justices present said they had nothing to do with that, and refused the licence to Chitham, merely giving as a reason, that they considered another licensed house was not required at Bosworth; but that they were sorry for him, as they were perfectly satisfied with his character.

By sect. 74 of the Licensing Act 1872, the "renewal of a licence" means a licence granted at a general annual licensing meeting by way of renewal.

By sect. 32 of the Licensing Act 1874, a "new licence" means a licence for the sale of any intoxicating liquor granted at a general annual licensing meeting in respect of premises in respect of which a similar licence has not theretofore been granted.

Sills showed cause.—This is an application for a new licence, and not for a renewal of a licence, because the house had ceased to be a licensed house for nearly a year; and also because the application is not by the same person who previously had the licence. The definition of what is a new licence, as distinguished from a renewal, is given in sect. 74 of the Licensing Act 1872, and by the definition of a new licence, as given in sect. 32 of the Licensing Act 1874, which is substantially the same as the definition in the Act of 1872, and substituted for it, a new licence means a licence in respect of premises in respect of which a similar licence has theretofore not been granted. The word "theretofore" does not mean a licence existing many years ago, but one still subsisting, at the time of the application for a renewal. Here the licence had been lost by Palmer, and there could be no application made for a renewal of it. A new licence was necessary, and therefore the justices had an absolute discretion as to granting or refusing it, as they might think right, and the application not being one for a renewal, the provisions of sect. 42 of the Act of 1872, requiring that no evidence should be given except on oath, do not apply to the present case.

Charles, Q.C. and *James Paterson* in support of the rule. — The applicant, Chitham, wants to get the licence in his own name, and the question really turns upon this point, whether this is an application by Chitham, for a renewal or a new license. It is an application for a renewal. Palmer's licence was wrongly taken away from him at the September meeting. [SMITH, J. —Why did he not appeal?] If he had appealed he would have lost his right to a *mandamus*. He was under no obligation to appeal, as the provisions of sect. 42 of the Act of 1872, requiring evidence to be given on oath, had not been complied with, therefore his licence was wrongly taken away. *Reg.* v. *Justices of Liverpool* (49 L. T. Rep. N. S. 244; 11 Q. B. Div. 638; 52 L. J. 114, M. C.) decided that it was not necessary that the application should be made before the expiration of the period for which the old licence was in force. [Lord COLERIDGE, C.J.—Is there any judicial definition of the word "theretofore"; is it limited to any interval—say twenty years or five years?] It is a new licence only where the house has never before been licensed. [Lord COLERIDGE, C.J.—Then it is a renewal if there has been an interval of five years? SMITH, J.—My difficulty is on the words of sect. 42 of the Act of 1872. The question is, can a person get a renewal of a licence under this section without being a licensed person?] The case of *Reg.* v. *Justices of Liverpool* shows that he can. There, as in the present case, the applicant applied after the licence had lapsed. Here, the premises have gone out of use as licensed premises, by the consent of all parties. [SMITH, J.—Did Chitham

apply under sect. 14 of 9 Geo. 4, c. 61, or under sect. 42 of the Act of 1872?] No, under neither of them. [SMITH, J.—My difficulty is this: if you do not come in under sect. 14 of 9 Geo. 4, c. 61, then you are thrown back on sect. 42 of the Act of 1872, which provides that a licensed person may apply for a renewal.] By sect. 42 of the Act of 1872, seven days written notice of an intention to oppose the application must be given, and the case of *Reg.* v. *Justices of Merthyr Tydvil* (14 Q. B. Div. 584; 54 L. J. 78, M.C.) shows that the service of this written notice is a condition precedent to the right of the justices to refuse the renewal. No such written notice of objection was served in this case. Before the case of *Reg.* v. *Justices of Liverpool* it was generally believed that it was necessary, in order to get a renewal, to apply before the old licence had run out. But that case has decided that it is not so. On the authority of that case this application was one for a renewal, and it has never been heard and determined, and, consequently, this rule ought to be made absolute.

Lord COLERIDGE, C.J.—In this case, I think the application must succeed, and the *mandamus* must go. Substantially, it comes to this, that the real question is, whether this is an application for a new licence, or for a renewal of an old licence. If it be an application for a new licence, Mr. Charles has admitted that he must fail, but he says that it is an application for a renewal. I come to the conclusion that it is an application for a renewal, and I come to this conclusion on the authority of *Reg.* v. *Justices of Liverpool*. In the present case there was a person, Palmer, who had a licence for the house in question, and he committed certain offences which might justify the justices in refusing his licence. I will not now inquire into, or decide whether, under the circumstances, they were right in refusing Palmer's licence; he has acquiesced in their decision, and we have not to deal with that refusal at present. Before the case of *Reg.* v. *Justices of Liverpool* it followed that any application of this kind would have been an application for a new licence, and the objection could not have been got over. But that case decided that, when a person applied for a renewal and was refused, and the refusal was acquiesced in, such refusal was not a bar to a subsequent occupier applying for a renewal of the licence. The court there held that such application was one for a renewal, and that the word "theretofore" in the Act gave them power to do so. The present case is really in substance the same. The tenant, Palmer, applies for a renewal; he is refused, he acquiesces in that refusal, and his licence runs out on the 10th Oct. 1885, but his tenancy does not expire until June 1886. Between these dates the landlord of the premises can do nothing. In June 1886 the present applicant, Chitham, went into possession as occupier of the premises, and he applied at the annual licensing meeting, on the 1st Sept. 1886, for a licence for the premises. The justices refused to grant him a licence on the ground that there were too many licensed houses already in the place, a reason which would not be sufficient if the application were one for the renewal of the licence. The case of *Reg.* v. *Justices of Liverpool* distinctly, and in terms, overruled the case of *Ex parte Todd* (47 L. J. 89, M.C.), and that case is binding on us. I think, therefore, that this was an application for a renewal of the licence, and this rule for a *mandamus* must be made absolute.

SMITH, J.—I am of the same opinion, and I agree with the observations made by my Lord. The question is whether this is an application for a new licence, or for the renewal of a licence. On the 10th Oct. 1885 the licence then existing ran out, and it is unnecessary to say why it ran out. If Palmer had gone out on the next day after the refusal, it could not be doubted that this would have been an application for a renewal, and, by the case of *Reg.* v. *Justices of Liverpool*, you can make an application for a renewal after the old licence has expired. In the present case the applicant could not make the application, which he made in 1886, sooner than he did make it, because Palmer was in possession as occupier of the premises, so that he made his application as soon as it was possible for him to make it, and this was the same as if he had made his application in 1885.

Solicitors for the applicant, *Tyas* and *Huntingdon* for *Bland*, Nuneaton.

Solicitors for the justices, *Robinson*, *Preston*, and *Co.*, for *Pilgrims* and *Preston*, Market Bosworth.

Thursday, June 23, 1887.

(Before MATHEW and CAVE, JJ.)

MAYOR, ALDERMEN, AND BURGESSES OF BURY v. LANCASHIRE AND YORKSHIRE RAILWAY COMPANY. (*a*)

Railways—Bridges—Roadway over bridge—Liability of railway company to repair roadway over bridge, where level of such roadway has not been altered—Railways Clauses Consolidation Act 1845 (8 *&* 9 *Vict. c.* 20), *s.* 46.

By two Acts of Parliament which incorporated the Railways Clauses Consolidation Act 1845 *a railway company was empowered to make certain extensions of their line. For the purpose of doing so it became necessary to carry the extensions under a certain turnpike road (since disturnpiked). The deposited plans described the road as "turnpike road, level unaltered." The extension lines, as they approach the road, are in deep cutting, and pass by means of a bridge under the road at a considerable depth. The road and soil thereunder are supported by the two arches of the bridge under which the lines of railway pass, the distance from the crowns of the arches to the surface of the roadway being about seven feet and four feet respectively. No alteration was made in the level of the road, and no additional expense had been caused in respect of the maintenance and repair of any additional length or width of roadway, owing to the construction of the lines. Identically the same length and width of roadway would have had to be maintained if the lines had never been constructed.*

Held, that sect. 46 *of the Railways Clauses Consolidation Act* 1845 *imposed on the railway company the liability of maintaining and keeping in perpetual repair the roadway over the bridge and the approaches thereto, although no alteration had been made in the level of the road, and no additional expense in the maintenance and repair*

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

of the roadway had been caused by the extension lines of the company.

THE action was commenced on the 7th April 1886, by a writ of summons whereby the plaintiffs claimed 273*l.* 18*s.* 3*d.* for work done and materials provided by the plaintiffs in paving and flagging a railway bridge in Manchester-road, Bury, and for interest upon the same. The parties concurred under Order XXXIV., r. 1, in stating the questions of law arising herein in the following case for the opinion of the court:—

1. The plaintiffs are the Urban Sanitary Authority of the borough of Bury for the purposes of the Public Health Act 1875.

2. By the Manchester and Leeds Railway Act, No. 2, 1845, and the Manchester and Leeds Railway Act, No. 3, 1847, the defendants were authorised to make the railways in the said Acts mentioned. The said Acts incorporate the Railways Clauses Consolidation Act 1845.

3. Sect. 46 of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20) is as follows:

And with respect to the crossing of roads or other interference therewith be it enacted as follows:

If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge of the height and width, and with the ascent or descent, by this or the special Act in that behalf provided; and such bridge with the immediate approaches, and all other necessary works connected therewith, shall be executed, and at all times thereafter maintained, at the expense of the company: provided always that, with the consent of two or more justices in petty sessions, as after mentioned, it shall be lawful for the company to carry the railway across any highway other than a public carriage road on the level.

And sect. 50 of the same Act is as follows:

Every bridge erected for carrying any road over the railway shall (except as otherwise provided by the special Act) be built in conformity with the following regulations (that is to say):

There shall be a good and sufficient fence on each side of the bridge of not less height than four feet, and on each side of the immediate approaches of such bridge of not less than three feet.

The road over the bridge shall have a clear space between the fences thereof of thirty-five feet if the road be a turnpike road, and twenty-five feet if a public carriage road, and twelve feet if a private road.

The ascent shall not be more than one foot in thirty if the road be a turnpike road, one foot in twenty if a public carriage road, and one foot in sixteen feet if a private carriage road not being a tramroad or railroad; or if the same be a tramroad or railroad the ascent shall not be greater than the prescribed rate of inclination, and if no rate be prescribed, the same shall not be greater than as it existed at the passing of the special Act.

And sect. 51 of the same Act is as follows:

Provided always, that in all cases where the average available width for the passage of carriages of any existing roads within fifty yards of the points of crossing the same is less than the width hereinbefore prescribed for bridges over or under the railway, the width of such bridges need not be greater than such average available width of such roads, but so nevertheless that such bridges be not of less width in the case of a turnpike road or public carriage road than twenty feet, provided also that if at any time after the construction of the railway the average available width of any such road shall be increased beyond the width of such bridge on either side thereof, the company shall be bound, at their own expense, to increase the width of the said bridge to such extent as they may be required by the trustees or surveyors of such road, not exceeding the width of such road as so widened, or the maximum width herein or in the special case prescribed for a bridge in the like case over or under the railway.

4. By sect. 53 of the Bury Improvement Act 1846 (9 & 10 Vict. c. ccxciii.), all streets within the district of the said Act were vested in commissioners appointed under the said Act, and by sect. 96 of the said Act it is enacted that the said commissioners shall be liable to indictment for the non-repair of any public highway within the limits of the said Act in the same manner as the inhabitants were liable before the passing of the said Act.

5. In or about the year 1847 the defendants, acting in pursuance of the powers given them in that behalf by the said Manchester and Leeds Railway Act, No. 2, 1845, and the Manchester and Leeds Railway Act, No. 3, 1847, made under the first mentioned Act, an extension of the defendants' Heywood Branch to Bury, and under the secondly mentioned Act an extension of the defendants' Liverpool and Bury Railway. Those railways crossed a certain turnpike road (since disturnpiked) situate within the district of the said Improvement Act.

The deposited plan relating to the said Heywood Branch Extension described upon the sections the said turnpike road as "turnpike road at Bury, level unaltered," and the deposited plan of the said Liverpool and Bury extension described upon the sections the same turnpike road as "turnpike road, level unaltered."

The said lines of railway as they respectively approach the said turnpike road are in deep cutting, and pass under the said turnpike road at a depth (measuring from the rail level to the crown of the arch), in the case of the Heywood Branch Extension, varying from 18ft. 5in. to 19ft. 5in., and in the case of the Liverpool and Bury Railway Extension at a depth (measuring between the same points) varying from about 23ft. to 24ft., and without, in constructing either of the said lines of railway, altering the levels of the said turnpike road. The said turnpike road and the soil thereunder were and are still supported by two arches under which the said two lines of railway pass; the distance from the crowns of the said arches to the surface of the said turnpike road is in the case of the Heywood Branch Extension about 6ft. 11in., and in the case of the Liverpool and Bury Extension Railway about 4ft. 3in.

No additional burden or expense has been cast upon the plaintiffs or their predecessors in respect of the maintenance and repair of any additional length or width of roadway owing to the construction of the two lines of railway hereinbefore referred to; or, in other words, had the two lines of railway never been constructed the plaintiffs or their predecessors would still have had to maintain and repair the identically same length and width of roadway.

6. The said improvement commissioners have from time to time repaired the roadway upon the said bridge, and the defendants have from time to time repaid to the said improvement commissioners the moneys expended in such repairs. These payments were made by the defendants in ignorance of what they contend are their legal rights in respect of the said road.

7. In the year 1876 the borough of Bury was incorporated by Royal Charter, and thereupon, by virtue of sect. 310 of the Public Health Act

1875, all the rights and liability of the said improvement commissioners became vested in and imposed upon the plaintiffs as urban sanitary authority.

8. The plaintiffs have from time to time repaired the roadway upon the said bridge, and the defendants have from time to time, up to and including the year 1879, repaid to the plaintiffs the moneys expended in such repairs. Such payments were made by the defendants under the circumstances stated in paragraph 6.

9. In the year 1880 the roadway upon the said bridge was out of repair, and thereupon the plaintiffs, in accordance with the course previously taken by the plaintiffs and their predecessors, the said Bury Improvement Commissioners, proceeded to repair the said roadway, and for that purpose incurred the expenses mentioned in the indorsement on the writ herein.

10. The defendants have refused to repay to the plaintiffs any portion of the said expenses, on the ground that, as the defendants contend, the defendants are not liable for the maintenance or repair of the roadway of the said bridge.

The question for the opinion of the court is, whether the defendants are liable, under the provisions of the 46th section of the 8 & 9 Vict. c. 20, to keep the roadway of the said bridge in repair.

If the court shall be of opinion in the affirmative, then judgment shall be entered for the plaintiffs for the sum of 273*l.* 18*s.* 3*d.*, the amount claimed in the writ of summons and for costs.

If the court shall be of opinion in the negative, then judgment shall be entered for the defendants with costs.

R. S. Wright for the plaintiffs.—The short question is, whether the railway company are liable to keep the roadway over the bridge in repair, under sect. 46 of the Railways Clauses Act 1845. That section clearly imposes such a liability upon the company. In *Leech* v. *North Staffordshire Railway Company* (29 L. J. 150, M. C.; 8 W. R. 216; s. c. 5 H. & N. 160) it was held, in circumstances similar to the present, that, when a turnpike road was carried over a railway, the railway company were bound perpetually to maintain the roadway over the bridge and the approaches thereto.

Henn Collins, Q.C. (*W. Graham* with him).—My point is that, although this case is binding on us, the circumstances of the present case are altogether different. The cases where the railway company have been held liable to repair the roadway over a bridge are either when there is an alteration of the level of the road by means of an incline upwards, then a bridge over the railway, then a decline downwards, or where there is an alteration of the level of the road by a decline downwards, and an incline upwards, when the road goes under the railway. In these cases there is a liability to repair; but when there is no alteration in the level of the road, there is no liability in the railway company to repair. Here there has been no alteration in the level of the road, and this state of things is dealt with in other sections. The meaning to be given to the words "carried over" in sect. 46 points to cases where there has been an alteration in the level of the road.

MATHEW, J.—In this case it is quite clear that the case cited by Mr. Wright decides the question. Sect. 46 of the Railways Clauses Act imposes on the railway company the liability of keeping in perpetual repair the roadway over the bridge and the approaches thereto, whether the turnpike road is carried over the railway, or the railway is carried over the road by means of a bridge. My judgment will therefore be for the plaintiffs, with costs.

CAVE, J.—I agree.

Judgment for the plaintiffs, with costs.

Solicitor for the plaintiffs, *E. Andrew*, for the *Town Clerk*, Bury.

Solicitors for the defendants, *Clarke, Woodcock*, and *Ryland*, for *Moorhouse*, Manchester.

Thursday, June 23, 1887.

(Before MATHEW and CAVE, JJ.)

HOUNSELL AND OTHERS (pets.) *v.* SUTTILL AND OTHERS (resps.). (*a*)

Municipal election—Election of aldermen—Outgoing alderman elected mayor—Right of outgoing alderman, being mayor-elect, to vote, after subscribing the declaration, and taking the chair as mayor — Municipal Corporations Act 1882 (45 *& 46 Vict. c.* 50), *s.* 60, *sub-sects.* 3 *and* 6.

At an election of aldermen, held under the Municipal Corporations Act 1882, *an outgoing alderman, who had previously, and at the same meeting, been elected mayor, and had made and subscribed the required declaration, and had taken the chair at such meeting, voted in the election of aldermen. Such vote was given before the counting of the votes, and not as a casting vote. Excluding such vote, the number of votes for all the candidates was equal.*

Held, that the election was invalid, on the ground that the vote given by the chairman was void, as being against the provisions of sub-sect. 3 *of sect.* 60 *of the Act, which provides that an outgoing alderman, although mayor-elect, shall not vote.*

SPECIAL CASE, stated for the opinion of the court, by Samuel Henry Day, barrister-at-law, pursuant to the order of the Hon. Mr. Justice Manisty, dated the 4th March 1877, and made under sect. 93, sub-sect. 7, of the Municipal Corporations Act 1882.

1. On the 9th Nov. 1886 the quarterly meeting of the council of the borough of Bridport was held for the ordinary election of mayor and aldermen for the said borough.

2. The election of mayor was the first business transacted at the said meeting. Charles Edmunds was elected mayor, and thereupon made and subscribed a declaration, as in the 8th schedule to the Municipal Corporations Act 1882.

3. Immediately after the said election, and the making and subscribing the said declaration, the council proceeded to the election of aldermen.

4. The outgoing aldermen at such last-mentioned election, subject to the question as to whether the said Charles Edmunds, by his election to the office of mayor, and by his making and subscribing the said declaration, had ceased to be an outgoing alderman within the meaning of sect. 60,

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

sub-sect. 3, of the said Act, were John Pickard Suttill, James Beach, and the said Charles Edmunds.

5. The said Charles Edmunds presided as chairman at the said election of aldermen.

6. The respondents, the said John Pickard Suttill, James Beach, and William Knight, and Messrs. Charles George Nantes, Stephen Whetham, and Daniel Ewens Biddlecombe, were duly proposed as candidates.

7. The said election was held by the aldermen and councillors entitled to vote to the number of twenty signing and personally delivering at the said meeting to the chairman voting papers containing the surnames and other names and places of abode and description of the persons for whom they respectively voted, and by the chairman signing and placing amongst the said voting papers a voting paper containing the same particulars with reference to the persons for whom he purported to vote.

8. The chairman, upon all the voting papers being delivered to him as mentioned in the last paragraph, and upon his own voting paper being added to the voting papers to be counted, openly produced and read all the said voting papers, when it was found that eleven votes purported to have been given for each of the respondents, the said John Pickard Suttill, James Beach, and William Knight, and ten votes each for the said Charles George Nantes, Stephen Whetham, and Daniel Ewens Biddlecombe.

9. Thereupon, without doing any further act, and without professing to give any further or casting vote, the chairman declared the respondents, the said John Pickard Suttill, James Beach, and William Knight, duly elected.

10. One of the voting papers counted by the chairman as being a good vote for each of the respondents, the said John Pickard Suttill, James Beach, and William Knight, and necessary to make up the eleven votes purporting to have been given for each of the said respondents, was the voting paper signed by the chairman as mentioned in the 7th paragraph hereof, and containing the surnames and other names and places of abode and descriptions of the respondents, the said John Pickard Suttill, James Beach, and William Knight.

11. If the chairman's voting paper was not the voting paper of a person entitled to vote at the said election, or was not a paper which ought to have been received and counted, or was a paper which had not been duly delivered to the chairman, then the lawful votes for the various candidates would have been ten each for the respondents, the said John Pickard Suttill, James Beach, and William Knight, and ten each for the said Charles George Nantes, Stephen Whetham, and Daniel Ewens Biddlecombe, in which case the chairman would have had the casting vote under sect. 60, sub-sect. 6, of the said Act.

The question for the opinion of the court is, whether, in the circumstances set out, the respondents, the said John Pickard Suttill, James Beach, and William Knight, were duly elected by a majority of lawful votes.

If the court shall be of opinion in the affirmative, the election of the said John Pickard Suttill, James Beach, and William Knight, to the office of aldermen is to stand.

If the court shall be of opinion in the negative, the election of the said John Pickard Suttill, James Beach, and William Knight, is to be declared null and void.

Charles, Q.C. (*Mattinson* with him) for the petitioners.—Rule 9 of the 2nd schedule of the Municipal Corporations Act 1882 provides that the mayor, if present, shall be the chairman at these elections. *Reg.* v. *Stanley* (11 Ad. & E. 882; 9 L. J. 248, Q. B.; 3 P. & D. 561) really decides this case. That case was decided upon the old Act, but the Municipal Corporations Act 1882 reproduces the old law with this addition, that instead of saying that an outgoing alderman shall not vote, it says an outgoing alderman, "if mayor-elect," shall not vote. Here Edmunds was mayor, and therefore disqualified. Here is an unlawful vote, strike it off, then there is equality, and no person can tell how the chairman would have given his casting vote. Therefore this election cannot stand.

Sir *C. Russell*, Q.C. (*Coward* with him) for the respondents.—There is a difference between the former Act and the present Act. The first Act referred to is 5 & 6 Will. 4, c. 76, sect. 25 of which provides that an outgoing alderman shall not be entitled to vote in the election of a new alderman, and sect. 69 provides that the mayor shall have a second or casting vote, and sect. 14 of 7 Will. 4 & 1 Vict. c. 78, merely carries this further, by providing that the mayor or chairman shall have a casting vote, whether or not he was entitled to vote in the first instance. Then comes the present statute, in which considerable distinction is to be found. Sub-sect. 3 of sect. 60 provides that an outgoing alderman, "although mayor-elect," shall not vote. Here Edmunds was mayor, and not mayor-elect. *Reg.* v. *Stanley* (*ubi sup.*) was decided upon a statute, the words of which were different from the present. Here the words are "mayor-elect." "Mayor-elect" is the mayor selected or chosen, but not entitled to take his seat until he has done something more. Sub-sect. 3 of sect. 15 of the present Act provides that the mayor shall continue in office till his successor has accepted office and made the required declaration, and by sect. 35 a person elected shall not act till he has made the required declaration. *Reg.* v. *Stanley* was different from the present case; it decided that there should be a restriction against an outgoing alderman voting. Here the character of outgoing alderman had ceased. Edmunds was not mayor-elect, but had become mayor; there was thus no disqualification against his vote, and no straining of the law in allowing the vote given by him as mayor. If he had not given this vote, the numbers would have been equal, and he would then have given his casting vote in the same way as he did before.

Charles, Q.C. in reply.—Edmunds was still disqualified as outgoing alderman, even though elected mayor.

MATHEW, J.—I am of opinion that this election was invalid, and I come to this conclusion on the words of the Act of Parliament itself. Sect. 60 of the Act provides for the election of aldermen, and sub-sect. 3 says that an "outgoing alderman, though mayor-elect, shall not vote." The "mayor-elect" is the person who was elected as mayor on that 9th of November, and then

sub-sect. 4 lays down the mode of voting, viz., by signing and personally delivering at the meeting to the chairman a voting paper containing the names, &c., of the persons for whom the voter votes. These provisions of the Act must be strictly followed. Here the Act has not been complied with, and the election is invalid. It has been said that this was in reality a casting vote, but the case does not find how the casting vote would have been given.

Cave, J.—I am of the same opinion, and I do not know that there is anything to add. It is unfortunate that the person should have done what he has done here, but, if a person goes against the plain words of an Act of Parliament, he must take the consequences.

Election declared void. Judgment for the petitioners, with costs.

Sir *C. Russell*, Q.C. asked for leave to appeal.

Mathew, J.—Is there power to give leave to appeal?

Sir *C. Russell*.—Yes, on the authority of *Line* v. *Warren* (53 L. T. Rep. N. S. 446; 14 Q. B. Div. 548; 54 L. J. 291, Q. B.).

Leave to appeal.

Solicitors for the petitioners, *Nicholson* and *Graham*.

Solicitors for the respondents, *Meredith* and *Co.*

April 19, 20, 21, *and June* 23, 1887.

(Before Lord Coleridge, C.J., Grove, J., Pollock, B., and Hawkins, J.)

Reg. on the prosecution of The National Liberal Land Company Limited *v.* The Inhabitants of the County of Southampton. (*a*)

Bridge—County, liability of, to repair—User and utility—Acquiescence and adoption—Dedication to the public—Statute of Bridges (22 *Hen.* 8, *c.* 5).

To render the inhabitants of a county liable for the repair of a bridge built by a private individual, and used by the public, mere utility to and user by the public are not conclusive against the county; nor, on the other hand, is it necessary in every case to prove, in addition to such utility and user, any overt act of acquiescence or adoption by the county. It is in each case for the jury to say whether the evidence of utility and user is sufficient, under all the circumstances of the case, to show a dedication to and adoption by the county. In the latter event only will the county be liable to repair the bridge.

Decision of Divisional Court (*reported in* 55 *L. T. Rep. N. S.* 322) *in part dissented from.*

This was a motion to make absolute a rule *nisi* obtained by the prosecutors for the new trial of an indictment preferred against the inhabitants of the county of Southampton for the non-repair of a bridge built by the prosecutors, the National Liberal Land Company Limited, over the river Itchen.

The indictment first came on for trial before Stephen, J. and a special jury at the Bristol Assizes in Feb. 1886, when, in answer to a question left to them by the learned judge, the jury found that the bridge in question had been dedicated to the public by the prosecutors, and thereupon a verdict of guilty was entered against the defendants on one of the counts. Upon the other counts of the indictment the defendants were acquitted.

On a motion for a new trial, a divisional court (consisting of Wills and Grantham, JJ.) made absolute the rule *nisi* which had been obtained for a new trial, on the ground that mere dedication to the public of the bridge was not sufficient to make the county liable for its repair, unless there was also evidence of acquiescence by the county in the building and dedication of the bridge.

The facts of the case, and the grounds upon which this new trial was granted, are fully reported in 55 L. T. Rep. N. S. 322; 17 Q. B. Div. 424; 55 L. J. 158, M. C.

On the re-trial of the indictment before Mathew, J. and a special jury at the Bristol Assizes in Feb. 1887, the jury found a verdict of not guilty, and the defendants were acquitted accordingly.

Mathew, J. summed up the case to the jury as follows:—Gentlemen of the jury, the defendants in this case are the inhabitants of the county of Southampton. That somewhat vague and indeterminate description is the one by which the present defendants are prosecuted, and the prosecutors, whom we are now informed are the National Liberal Land Company, insist that the inhabitants of the county of Southampton accepted a gift of this bridge from them, the Land Company, with the obligation, from the time they accepted it, to keep that bridge in repair. Now, that is the case which is sought to be made out by the prosecutors against all the inhabitants of the county. The inhabitants of the county say: "We never took upon ourselves any such burden, and you cannot point to any act of any constituted authority, that, under any statute, or by usage, or by any other understanding, could be fairly said to represent us as a body, and you cannot show that we ever accepted of the gift of the bridge, with the consequent liability to keep it in repair." Now, gentlemen, the law upon the subject is certainly left in some degree of uncertainty. The whole law of dedication to a community is a difficult topic to deal with, because it is not easy, when a community does not act through properly constituted representatives, but difficult to prove the assent of every individual, or the assent of such a majority of all the individuals as to lead to the conclusion that the general body agreed; but, at the same time, the wiser and safer course is to put to you, as plain men of business, the question whether you think there has been any such action on the part of the inhabitants of this county as to indicate that they accepted this gift with the consequent burden. Now, gentlemen, what is the history of this property? I can well understand a case being presented to a jury, where, for a long time, the necessity has been felt for constructing a bridge in a particular locality, and where public meetings have been held indicating the necessity for such communication; and where applications have been made to quarter sessions and other public bodies, to aid in the construction of a bridge, and where

(*a*) Reported by F. A. Crailsheim, Esq., Barrister-at-Law.

someone has stepped forward, after objection has been made that the expenditure would be too great, some man of public spirit, and said, "Now I will build a bridge." I can well understand the jury saying, under such circumstances, there was a public demand for it, and if a man of public spirit found the money to build the bridge, that he did that for the public benefit, and the public took it with the understanding that they would undertake the repair of it. In such a case as that I do not say that it would be law, but I can well understand in such a case as that, if the inhabitants after some years had refused to bear their burden, a jury saying, "We are satisfied, after what took place with reference to the erection of this bridge, that it was to public munificence that they owed the bridge, and it was accepted on behalf of the public on the understanding that the man who found the money to build it should not be under the obligation of keeping it for all time in repair." As I say, I can understand that, but is this a case of that sort? Now, you have heard the inhabitants of the county twitted with their ingratitude to the National Liberal Land Company. Here was 17,000*l.* worth of iron handed over to this ungrateful county, and the county took it, and then, when called upon to lay out a few pounds in painting, it declines to do it. Gentlemen, do you really think that the land company had any regard to the county in the construction of the bridge? It is all very well to bring down an eminent politician, and to have the great man hand over the bridge to the mayor of Southampton. The mayor of Southampton is not one of the present defendants. He is mayor of the town of Southampton, a different county from this. Certain minds of an ingenious character no doubt might be disposed to infer that what was being done was done purely out of public spirit, and from no other motive. But what do we know about it now? We know now why that bridge was built. The National Liberal Land Company had bought an estate on the other side of the river. We do not know what they gave for it, but we know what it is worth now. That estate, probably consisting of green fields, being cut off from Southampton, and cut off from the rest of the neighbourhood by that intervening river, the Itchen, the first thing to do, you know, to bring those green fields into the character of a building estate, was to connect them with the town of Southampton, and coax the city across the river into the green fields on the other side of the Itchen. For that reason, and for that reason only, I should think (it is entirely for you), the 17,000*l.* was paid. That is a good round sum, and the property must have been acquired under favourable circumstances to admit of that expenditure, and you will have very little doubt, I should think, that it was the fact that the bridge was put there that gave that property the value of 300*l.* an acre, which now they put the property at. Those are the circumstances under which this bridge came into existence, and I asked the learned counsel to point out to me any case in which, a bridge having been built for purely personal objects in the first instance, and where there was nothing more than the fact that the public used it afterwards, it was held that there had been a dedication to and an acceptance by the public; and, although cases were referred to, I am not aware of any clear authority upon that point. Now, gentlemen, that being so, and these being the circumstances under which the bridge came into existence, it is said: "Why did not someone object to what this company was doing, if the inhabitants of the county were not afterwards to repair the bridge?" But why should anyone object? The individuals who lived in the neighbourhood had the convenience of the bridge. It was to be a free bridge, and it was convenient of course that the estate should communicate readily with the town. Why should anyone object? It is said that the navigation was interfered with. What proof is there that it was interfered with, so that anybody would be likely to prosecute this company for what it was doing? What evidence of assent of the whole body is there? It is said that this road brings Southampton into close communication with Chichester and Portsmouth. Is that the reason why the bridge was put there? People had been living there for centuries without it. Do you think there was any anxiety on the part of the people of Southampton to have a bridge there? It is nonsense, it appears to me (but it is entirely for you), to say that any such motive induced the making of that bridge. What object had this company in bringing their estate nearer Portsmouth and Chichester? None. They wanted to bring it nearer Southampton. That is the one point to which their attention was directed. They appear to have known perfectly well what this structure meant, and from the first have had considerable anxiety about getting the county to accept it. In those days they appear to have had a natural doubt as to how the county was to get it. They applied to the trustees in quarter sessions, who I am by no means clear in law represent the county, but there is very strong evidence that the sessions did not undertake the repair of this structure. The quarter sessions did nothing in the world to lead the land company to suppose they would accept the burden, and the company had early intimation that the county did not, so far as quarter sessions could decide the matter, undertake the burden of these repairs. You know, shortly after the solemn dedication of this bridge, the embankment on one side of it began to give way, there was what is called a settlement, and that was within a few months almost after the bridge was constructed. No one can predict to what extent the settlement of a structure of that kind may go, or what may take place after it has been standing for some time. In this case there was a subsidence, and we do not know what it cost to set it right, but it was set right by those who are suggested to be the real owners of the property, namely, the National Liberal Land Company, who built the bridge. Since then there appears to have been a further settlement. Now what took place with reference to that is worth adverting to. This company placed itself in communication with the surveyor of the county. The surveyor had certain powers under an Act of Parliament which has really no bearing on the question of liability whatever. It was one of the conditions of being allowed to build the bridge that they should have his sanction under an Act of Parliament, and they applied for his sanction, and he does appear to have superintended the erection of the bridge in a certain sense, but he never was satisfied about

these approaches, and never gave a final certificate in respect of them. The people who tell you they have dedicated the bridge to the public, and that the public have accepted it, go on discussing with him what final steps are to be taken, and do some repairs long after the period at which the bridge is thrown open, and, as they say, the repairs are taken from their shoulders and put on to the shoulders of the public. If this company was not liable for that, I suppose they afterwards could say, "We are entitled to come down upon you the county, not only to repair it, but to keep the bridge standing, which is what you undertook to do when you accepted the dedication from us." They might, or might not, say that. So much for the repairs of the embankment. But then there was something more. A few months after this bridge had been thrown open, and presented, with three coats of paint, to the mayor of Southampton, it wants a new coat of paint, or rather two coats, within a few months. That requires an expenditure of 100*l.* odd, or thereabouts, and we are told that the expenditure under very favourable circumstances would require to be renewed every two years, but the witness was not prepared to say it might not be in a much less time, because this bridge is in an unusually exposed position, and so close to sea water that the process of rust and corrosion may go on very rapidly. That being so, the public might well think twice before they accepted a bridge with an obligation of that sort upon the inhabitants who found their way from Southampton previously without this bridge, and without any complaint, so far as we can see. Why should the county accept this burden from year to year, and what is the consideration? The erecting of this bridge might be a convenience to people coming from a distance, but it would be far more convenient to those who expected to buy or obtain land on this estate. Gentlemen, I do not know that I can assist you further than I have. You must give your own view about it. Do you believe the inhabitants of this county ever took to this bridge, and are under any obligation to repair it? If you think they are, you will say they are guilty on the third count of this indictment. If you think that is not made out to your satisfaction, you will acquit them.

The jury found a verdict of not guilty.

The prosecutors, being dissatisfied with the summing-up of Mathew, J., obtained a rule *nisi*, calling upon the defendants to show cause why this verdict should not be set aside and a new trial had on (*inter alia*) the following grounds: (1) That the judge did not direct the jury that if they found that so much of the bridge as is within the county of Southampton, and in a highway, was erected in a substantial and commodious manner, under the directions and to the satisfaction of the county surveyor, and that it had been dedicated to and used by the public, and was of public utility, and was out of repair, they ought to find a verdict of guilty against the defendants; (2) That the judge did not direct the jury that the bridge had been irrevocably dedicated to the use of the public, and that the prosecutors could not therefore legally remove the same; (3) That the judge directed the jury that they ought to acquit the defendants unless they had accepted the dedication of the bridge with the intention of keeping it in repair; (4) That the judge left the question of the obligation to repair the bridge to the jury, whereas such question was upon the evidence a question of law and not of fact; (5) That the judge did not direct that if acquiescence or adoption of the bridge by the public, or the county, otherwise than by user, was necessary in order to render the county liable to repair it, the fact that no proceedings by indictment or otherwise had been taken against the prosecutors in respect of their erection of such bridge in a navigable river, or in respect of their interference with the rights of the public in the foreshore, was evidence of such acquiescence or adoption, and the judge did not direct the jury how, or on whose part, acquiescence or adoption, if necessary, could have arisen or taken place.

Charles, Q.C. (*J. V. Austin* and *Sclater Booth* with him), for the defendants, showed cause against the rule.—The defendants having been acquitted on a criminal charge, it is submitted that the court has no jurisdiction to grant a new trial. The prosecutors had no power to dedicate the bridge in perpetuity, by reason of the terms of their grant from the Crown, which did not constitute the prosecutors owners in fee simple:

Rex v. *The Inhabitants of Lindsey*, 14 East, 317.

The dedication of a way to the public must be in perpetuity; it cannot be made for a limited time, certain or uncertain:

Dawes v. *Hawkins*, 4 L. T. Rep. N. S. 288; 8 C. B. N. S. 848; 29 L. J. 343, C. P.

In the present case there is a power of purchase left in the Crown; a right has also been reserved to the Board of Trade to order the bridge to be pulled down. The property may be taken away from the prosecutors, therefore they cannot dedicate it:

Reg. v. *East Mark Tything*, 11 Q. B. 877;
Reg. v. *Inhabitants of Dorset*, 45 L. T. Rep. N. S. 308.

The grant is a licence revocable by the Crown, as owner of the foreshore, reserving to itself power to rescind the grant upon a particular state of things arising. The Crown has, at any rate, a right of re-entry, and that this is not unlawful, even assuming the grant to have been in fee, is shown by 21 Jac. 1, c. 25, and the Queen's Remembrancer's Act (22 & 23 Vict. c. 21), s. 25. The case of *Flower* v. *Hartopp* (12 L. J. 507, Ch.; 6 Beav. 476) is also in point. There was no power in anyone to dedicate the bridge to the whole public:

Rex v. *The Inhabitants of Bucks*, 12 East, 192.

Unless a bridge is built in the line of an existing highway, there must be affirmative evidence of acquiescence by the county, in order to impose upon it a liability to repair. The county must acquiesce, in order to make it liable, in the building and dedication. This bridge is not in the line of an existing highway within the meaning of the Statute of Bridges (22 Hen. 8, c. 5); it is not "broken in a highway." The county should not be burdened with a great expense without having some means of warding it off. The following cases were also cited:

Rex v. *The Inhabitants of St. Benedict*, 4 B. & Ald. 447;
Rex v. *The Inhabitants of the West Riding of Yorkshire*, 2 East, 342;

Rex v. *The Inhabitants of the County of Glamorgan*, 2 East, 356;
Rex v. *The Inhabitants of Kent*, 2 M. & S. 513.

Rigby, Q.C. (with him *Bucknill*, Q.C., *Pitt-Lewis*, Q.C., and *Alexander Glen*), for the prosecutors, supported the rule.—The prosecutors were in a position to dedicate the bridge in question to the public, with the concurrence of the Crown. Whether or not the Crown did dedicate it is a question for the jury. If the tenant at will dedicates, and the owner in fee approves, there can be no objection to the dedication. The owner in fee did *de facto* consent to the dedication of the bridge in question to the public. A fee simple estate carries with it the right to dedicate the land:

The London and South-Western Railway Company v. *Gomm*, 46 L. T. Rep. N. S. 449; 20 Ch. Div. 562.

The question of dedication assented to by the Crown is one for the jury, and it ought to have been distinctly left to them. They ought also to have been asked as to whether there was an adoption of the bridge by the public. It is submitted that, upon the grounds in the notice of motion, there ought to be a new trial.

Lord COLERIDGE, C.J.—We have experienced considerable difficulty in arriving at a decision in this case, which, in my opinion, is one of extreme importance and one which raises questions on many points. However, we have at last come to the conclusion that the matters involved can be decided on one clear ground, and the question to which we shall now address ourselves is, whether the verdict of acquittal has been obtained by a misdirection to the jury on the part of my brother Mathew. It will be noticed that the course of litigation in this case has been somewhat remarkable. The prosecutors, for the admitted purpose of developing a valuable building estate which was their property, and for the purpose of inducing the inhabitants of Southampton to cross the river Itchen and inhabit the new houses on the county side of the river, connected the town of Southampton with their estate by building the bridge in question. The bridge itself was built very carefully under the authority of the surveyor, and a very considerable amount of money was expended upon it. Upon its completion, so far as form and ceremony are concerned, there was a most solemn opening and handing over of the bridge to the mayor and councillors of Southampton, and it was duly dedicated by the prosecutors as far as it could be dedicated by their Act, and from that day to the present time there has no doubt been a very considerable user of the bridge by the public, using the word in the sense which I am about to explain. User by the public is always treated as an element in cases of this sort; but the term public cannot always be used in its widest sense, as including all the subjects of the Queen, for in this instance it is really only the inhabitants of a particular neighbourhood who use this particular bridge and who benefit by the user of it. Still there has undoubtedly been abundant user, and proof of user by and utility to that portion of the public who have used the bridge. In course of time the bridge fell into disrepair, and the prosecutors indicted the inhabitants of the county of Southampton for its non-repair. That indictment was tried at the Bristol Assizes before my brother Stephen and a jury, and a verdict of guilty was pronounced upon a substantial part of the indictment, while the defendants were acquitted upon several other counts. With this result both parties were dissatisfied, and consequently cross-applications were made to a divisional court, consisting of Wills and Grantham, JJ., for a new trial. In the result the court discharged the rule obtained by the prosecutors, but upon the defendants' rule they sent the case down for a new trial. The case was accordingly re-tried at Bristol, this time before Mathew, J. and a jury, and upon this second occasion, as a result of the summing-up of the learned judge, a verdict the other way was pronounced and the county were acquitted. It is against that verdict of acquittal, and upon the question of the summing-up, that the prosecutors now move for a second new trial. Therefore the question now before us is, whether under the summing-up of my brother Mathew this verdict of acquittal can be properly upheld, and whether the learned judge in summing-up as he did misdirected the jury. There arises, however, a preliminary question, whether under any circumstances, a new trial could be granted, seeing that this case is a criminal proceeding, and the verdict one of acquittal. One of the points which has been laboured by counsel on behalf of the defendants is, that the county having been acquitted on a criminal charge cannot again be tried. This is a technical argument, and we accede to it. I think the true view of the matter is that expressed by Lord Ellenborough, C.J. in the case of *Rex* v. *The Inhabitants of Wandsworth* (1 B. & Ald. 63). In that case the learned judge said: "My objection to making this rule absolute is, that the court will thereby be doing indirectly that which, if they did directly, would be contrary to the established practice of the court, acted upon in a variety of cases; that is, they will in effect be granting a new trial in a criminal case where the defendant has been acquitted. But there certainly have been instances (as in the cases of *Caversham* and *Kingston Bridge*) where the court has suspended the effect of a former verdict when great injustice would arise from precluding further discussion. So in this case, it seems to me that, to maintain the present verdict, would be to send the parties to a second trial with a millstone about their neck, the weight of which it would be impossible to resist. There are circumstances which differ this from ordinary cases, and make it a case fit to be tried again. By staying the proceedings, we do in effect give the parties the benefit of an ulterior consideration. But, inasmuch as this is an indulgence, we shall impose it as a term that the parishioners of Wandsworth (whose testimony would not be legal evidence, on the ground of interest) shall be examined at the next trial, and this rule shall only therefore be made absolute upon the terms of the prosecutor consenting to that effect." Well, that seems admirably expressed and to contain the true rule which should govern the practice in this case. If it were necessary here, we should therefore follow that example, and should not grant a new trial, but we should suspend all further proceedings upon the present indictment, and refuse the rule in its form, and allow the county to be freshly indicted, quite independently of the first indictment. But

in this case we do not propose to take that course, because we think that the learned judge was right in his direction to the jury, and that the verdict passed ought to be sustained. In all cases of this kind the question for the jury is, what was the true effect of the evidence before them of dedication and adoption by the county. There must be a dedication and adoption in a certain sense. We consider that Mathew, J. correctly laid down the law to the jury, without dissenting from the law as laid down by Stephen, J., or the judgment of Wills and Grantham, JJ. in the Divisional Court. The opinions of those learned judges undoubtedly conflicted. Stephen, J. seems to have laid it down that user by the public was sufficient in itself to render the county liable, whilst Wills and Grantham, JJ. held that, in addition to user, there must be evidence of adoption and acquiescence by the county in the building and dedication of the bridge. In his summing-up of the case to the jury, Mathew, J. seems to have steered a middle course between the law as laid down by those two courts. Whether Stephen, J. actually meant that, granted a private person built a bridge, and granted that there was strong evidence of utility and user, that was conclusive against the county, we need not stay to inquire. If he did so, we are of opinion that such was not a correct statement of the law. If he meant that user by the public of a private bridge built by a private individual for his own purposes was sufficient to throw the burden of repairing the bridge upon the county, we do not think that proposition sustainable. If, on the other hand, Wills and Grantham, JJ. said, granted the same premises, with proof of user and utility, in order to cast the liability on the county there must also be some overt act of adoption by the county, we think that for that statement of the law there is not sufficient authority, and we are compelled to some extent to differ, and to say that to hold that where there is no such proof of an overt act of adoption, as well as of user and utility, there is no evidence to fix the county with liability to repair, is a proposition too broad to be maintainable. User may to some extent be evidence of dedication. Proof of adoption as well as of user is not absolutely necessary in order to cast the burden of repair upon the county. In every case it is a question of evidence, and it is for the jury to say whether the utility and the amount of user are sufficient, under all the circumstances of the case, to show a dedication, and to throw the liability to repair upon the county. Suppose a case of a bridge built by a private individual for his own ends, but which, as time went on, became of constant utility to the public. In such a case it is clearly the province of the jury to judge whether the evidence is sufficient to fix the county with the burden of its repair. The evidence may or may not be sufficient to fix them. In each case it is for the jury to decide that question. That is the law which Mathew, J. intended to lay down at the second trial, and we think he so laid it down. We are unable to extract from his summing-up anything that is not the law, or misleading to the jury. He tells us, moreover, that with the verdict of the jury he is not dissatisfied. As we find, therefore, that the verdict of acquittal has been obtained under a correct statement of the law, it follows that it must be sustained, and the rule for a new trial discharged. But, inasmuch as many old cases of great authority have been cited in argument, in which many very general expressions have been used by lawyers of the highest standing, such as Lord Ellenborough, Lord Mansfield, Blackstone, and many others, it is felt that I ought to say that we do not intimate the slightest doubt as to the correctness of the law as laid down in all those cases, and notably in the two cases of *Rex* v. *The West Riding of Yorkshire* (2 East, 342), and *Rex* v. *The Inhabitants of Kent* (2 M. & S. 513), and also in the case of *Rex* v. *The Inhabitants of the County of Glamorgan* (2 East, 356, note). We apprehend that all those cases contain a correct exposition of the law. We take the law to be this, that, granting a private bridge, built by a private man for his own private ends, turns out to be useful to and used by the public, those facts are strong and cogent, but not conclusive, from which a jury may well be warranted in finding, if there is sufficient evidence of adoption by the county, that the county is liable to repair it for the future. We also entirely agree that the law in those cases is all the stronger when the evidence shows, as a matter of fact, that the bridge in question was built in and so formed part of an existing highway, that is, if its termini end in a highway on either extremity. Holding, therefore, as we do, that there has been no misdirection, and that the verdict is amply supported by the evidence, and that the law is to be found substantially correctly stated by Mathew, J. in his summing-up, the rule for a new trial obtained by the prosecutors must be discharged.

GROVE, J., POLLOCK, B., and HAWKINS, J. agreed.

Rule for new trial discharged.

Solicitor for the prosecutors, *F. A. A. Rowland.*

Solicitor for the defendants, *H. Sowton*, for *T. B. Woodham*, Winchester.

April 19 *and July* 5, 1887.

(Before SMITH and WILLS, JJ.)

GARDNER (app.) *v.* MANSBRIDGE (resp.). (*a*)

Criminal law—Wilful or malicious damage to real property — Picking mushrooms — Malicious Injuries to Property Act 1861 (24 *&* 25 *Vict. c.* 97), *s.* 52.

The appellant was the occupier of an uncultivated field in which mushrooms grew in a wild state. The mushrooms which grew in the said field were a source of profit to the appellant. The respondent gathered mushrooms to the value of 2*s. in the said field, but otherwise did no damage or injury. The appellant having thereupon taken out a summons against the respondent under sect.* 52 *of the Malicious Injuries to Property Act* 1861:

Held (affirming the decision of justices, who had dismissed the summons), that no actual damage to the realty itself having been proved, no offence had been committed by the respondent within the meaning of sect. 52 *of the said Act.*

SPECIAL CASE, stated by justices of the peace for the county of Sussex, under 20 & 21 Vict. c. 43.

1. Upon the hearing of a certain summons taken out by the appellant against the respondent under sect. 52 of the Act 24 & 25 Vict. c. 97, intituled, "An Act to consolidate and amend the Statute Law of England and Ireland relating to malicious

(*a*) Reported by F. A. CRAIGENEM, Esq., Barrister-at-Law.

injuries to property," charging the respondent for that he, on the 16th Oct. 1886, at the parish of Poynings, in the said county, did wilfully and maliciously commit damage on New House Farm, Poynings, to certain herbage, mushrooms, and fences there, to the amount of 2*s.* 6*d.*, contrary to the statute in that case made and provided, the justices dismissed the said summons.

2. The following facts were proved before them:

3. That the appellant was the occupier of a certain farm at Poynings, in the said county, and that a field called Bramleigh Field was part of his farm. That mushrooms grew in the field, and that they were a source of profit to him. The mushrooms in this field were worth about 7*l.* a year to the appellant. That on the 16th Oct. 1886 the appellant saw the respondent in the Bramleigh Field in a stooping position, and he appeared to be picking mushrooms, and that, when he saw the appellant, he ran away, and the appellant gave chase and caught him in an adjoining field. About 2*s.* worth of mushrooms were then found in his basket. The appellant accused the respondent of taking the mushrooms, and the appellant said they were worth 2*s.* The respondent then offered to give him 2*s.* for them. Some of the mushrooms were stated to be smaller than the appellant would have gathered them himself, and that, if they had been allowed to have grown till the next day, they would have been worth double their then value; the appellant further said that he did not cultivate the field for the growth of mushrooms, but that they grew there in a wild state. He turned cattle out to graze in this field. There was no damage done to the grass or the fences.

4. It was submitted on behalf of the appellant by his solicitor, that there was proof of wilful and malicious damage, within 24 & 25 Vict. c. 97, s. 52, by the gathering of the mushrooms, which were said to be of the value of 2*s.*, and that the mushrooms had been gathered prematurely, and would have been worth 4*s.* had they been allowed to remain growing one more day.

5. The respondent was not professionally represented, and put forward no argument.

6. The justices were of opinion that, as the mushrooms were growing in a wild and spontaneous manner in the appellant's field, they did not come within the definition of cultivated roots or plants so as to be within the provisions of sect. 24 of the said Act. Also that there was no injury done to the herbage or fences. That mushrooms growing in a wild, spontaneous manner, not being the subject of larceny at common law or by statute, the circumstances of this case did not come within the provisions of sect. 52 of the said Act; and they therefore gave their determination against the appellant in the manner before stated.

The question of law upon which this case was stated for the opinion of the court therefore was, whether the taking of mushrooms growing in a wild state in the manner herein described would subject the respondent to a conviction under either the 24th or 52nd section of the said Act.

If the court should be of opinion that the decision of the justices dismissing the said summons was wrong, then it was desired that the court would, according to the power vested in it under the statute 20 & 21 Vict. c. 43, remit the case back to them the said justices, with the opinion of the court thereon for further consideration and adjudication by them the said justices; but, if otherwise, then their decision was to stand.

By sect. 24 of the Malicious Injuries to Property Act 1861 (24 & 25 Vict. c. 97), it is enacted that,

> Whosoever shall unlawfully and maliciously destroy, or damage with intent to destroy, any cultivated root or plant used for the food of man or beast . . . and growing in any land, open or inclosed, not being a garden, orchard, or nursery ground, shall, on conviction thereof before a justice of the peace . . . either be committed to the common gaol or house of correction . . . for any term not exceeding one month, &c.

By sect. 52 of the same Act it is enacted that,

> Whosoever shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, shall, on conviction thereof before a justice of the peace, either be committed to the common gaol or house of correction . . . for any term not exceeding two months, &c.

Corrie Grant, for the appellant, contended that an offence had been committed within the meaning of sect. 52 of the Malicious Injuries to Property Act 1861, and that there ought to have been a conviction. The Act was wilful, and the real property would have been more valuable if the mushrooms had not been taken away.

Boxall for the respondent.—It is submitted that the magistrates were right in acquitting. The damage done was not wanton:

Reg. v. *Prestney*, 3 Cox C. C. 505.

"Wilfully" in the Act cannot mean "intentionally" only; there must be malice also. If not, the result of sects. 24 and 52 of the Act would be that, for injury to plants growing wild there would be a liability to imprisonment for two months, while, under sect. 24, the punishment for injury to cultivated roots or plants is limited to imprisonment for one month. Moreover, it is submitted that a mushroom, which is a fungus growing spontaneously, cannot be said to be real property. There is no legal property in mushrooms. He also cited

Lawe v. *Eltringham*, 46 L. T. Rep. N. S. 64; 8 Q.B. Div. 283.

Corrie Grant in reply.

Cur. adv. vult.

The judgment of the Court (Smith and Wills, JJ.) was delivered by

SMITH, J.—The question for determination in this case is whether a person who gathers mushrooms growing in their natural state in a field, and who does no other damage or injury, except what may be done by the fact of gathering and carrying away the mushrooms themselves, can be found guilty of having "wilfully or maliciously" committed any damage, or injury, or spoil, to or upon any real or personal property of a public or private nature, within the intent and meaning of sect. 52 of the Malicious Injuries to Property Act 1861 (24 & 25 Vict. c. 97). It could not, in our judgment, be really contended that a person who merely picked mushrooms growing in a state of nature in a field was guilty of maliciously committing injury to real or personal property; but it is to be noticed that in this 52nd section the words are not "wilfully and maliciously," but "wilfully or maliciously," and it is said that an offence is created by this section if a person wilfully commits the act even though he has no malice, or, in other words, if he does the act com-

plained of intentionally and on purpose. To this proposition we assent, but the question remains, whether the act complained of is damage, injury, or spoil to or upon real or personal property within the meaning of the Act. It was argued that there are only two kinds of property, real and personal, and if the act complained of was not damage to personal property, which in this case it was not, it must consequently be injury to real property within the meaning of the Act. To this we do not assent. The question is, do the words used in the Act creating the offence mean damage, injury, or spoil to the realty itself, or to the product of the realty which may happen to be growing thereon at the time of the commission of the act. This, it appears to me, is the point in this case. In our judgment, the Legislature, in the group of sections commencing at sect. 16 and ending at sect. 24, deals with the products *de facto* growing upon the realty itself as something distinct and apart from the realty. For instance, sects. 20, 21, and 22 deal with injuries to trees, saplings, shrubs, and underwood, and make injuries to such things offences under the Act; why so, if such trees, saplings, shrubs, and underwoods were to be taken as part of the realty? Again, sect. 23 deals with injuries to plants, roots, fruit, and vegetable production growing in a garden; why, we ask, if such are to be taken as part of the realty? Moreover, sect. 52, which is the section now in question, has a proviso in sect. 53. Sect. 52, together with this proviso, reads as follows: "Whoso wilfully or maliciously commits any damage, injury, or spoil to or upon any real or personal property whatsoever (including injuries to trees, saplings, shrubs, or underwood), either of a public or private nature, for which no punishment is hereinbefore provided, shall be guilty of an offence." We are aware that it may be said that the proviso was inserted so that it might not be argued that injury to a tree under the value of 1*s.* was not punishable under the Act (see sect. 22), and we think that it may be so; but, in our judgment, the proviso also tends to show that the Legislature did not consider the damage done to things growing upon the realty was damage to the realty itself. We are unable to give the reason, nor has any been given at the bar, why the phraseology of sect. 52 should have been altered from "unlawfully and maliciously," which is that used in sects. 16 to 24, and in many other sections, to "wilfully or maliciously." The history of the legislation in this matter is this: By 6 Geo. 3, c. 48, s. 4, persons were made punishable by summary conviction who should, "not being lawful owners thereof," go into woods or underwoods and commit certain classes of damage to wood, underwood, &c. By 9 Geo. 3, c. 41, s. 8, similar pains and penalties were imposed upon persons who, "without legal right or authority," should cut down or destroy hollies or thorns, or certain other specified things growing within woods or wood-grounds. By 1 Geo. 4, c. 56, s. 1, persons were rendered punishable by summary conviction who should "wilfully or maliciously do any damage to or upon (*inter alia*) any building, fence, hedge, tree, wood, underwood, orchard, garden . . . crops, vegetables, plants, land, or other matter or thing growing or being thereon, or to or upon real or personal property of any nature or kind soever." By 7 & 8 Geo. 4, c. 27, these and a vast number of Acts creating offences of various descriptions were repealed, and by other Acts of the session their provisions were consolidated and amended. Chapter 30 of that session is the Act for consolidating and amending the laws relating to malicious injuries to property, and in this Act the classes of acts which were before made punishable if done by persons "not being lawful owners" of the property to which they relate, or if done "without legal right or authority," were, for the most part, introduced into the new Act, but made punishable if done "wilfully and maliciously." The language of 1 Geo. 4, c. 56, s. 1, in so far as it made the offence complete if done "wilfully or maliciously," was preserved, though the class of acts dealt with was restricted considerably. It may be that the difference escaped the draftsman. The conjunction "or," however, is in 7 & 8 Geo. 4, c. 27, s. 24, from whence it has been copied into the similar consolidating and amending Act 24 & 25 Vict. c. 97, and whatever its origin may be, there it is, and must be given effect to and respected. We are aware that, in the present case, the defendant had gathered mushrooms to the value of 2*s.*, and that it is found by the justices in the case that the field in which they were gathered grew annually mushrooms to the value of 7*l.*, but this, in our judgment, can make no difference to the determination of this case. It has been held that, in order to bring a case within the Act for causing malicious injury to property, some actual positive damage must be proved, and that imaginary damage will not suffice (see per Best, C.J. in *Butler* v. *Turley*, 2 C. & P. 589); but, in our judgment, it is not the amount of damage done (if some actual damage is proved) which is the test whether or not an offence within the Act has been committed. The Legislature moreover has by sect. 24 of 24 & 25 Vict. c. 97, made it an offence to unlawfully and maliciously destroy, or damage with intent to destroy, any cultivated root or plant used for food of man, and for other purposes therein named, and has not made it an offence (unless it has done so by sect. 52) to destroy or damage uncultivated roots or plants. In our judgment, to constitute an offence within sect. 52 for committing damage, injury, or spoil to real property, proof must be forthcoming of actual positive damage (to use the words of Best, C.J.) to the realty itself, and if, as in this case, proof of damage is confined solely to damage to the product growing upon the realty and consequent loss to the owner of such product, no offence is established within sect. 52 of the Act. There are numerous sections in the Act, as above pointed out, making it an offence to damage the product of realty, and, in our judgment, unless a case is brought within those special sections relating to such products, damage done to the product alone, and not to the realty itself, is no offence within the Act. The words of the Act are damage "to real property," not "loss to the owner thereof." To hold otherwise would render a person liable to be convicted of a crime, and sent to hard labour for two months, for merely gathering primroses, blackberries, or the like, upon proof given of some actual loss to the owner thereof; whereas the Legislature by sect. 24 has created the penalty of one month only for maliciously destroying any cultivated root or plant used for the use of man. Can it be conceived that the Legislature intended that, for simply gathering mushrooms growing

wild in a field and uncultivated, a person might be liable to two months' hard labour, whereas for maliciously destroying cultivated roots or plants used for food of man, he was only to be liable to one month? It seems to us impossible. The case of *Laws* v. *Eltringham* (46 L. T. Rep. N. S. 64; 8 Q. B. Div. 283) has decided nothing contrary to the above, for in that case it was not necessary to decide the point now under discussion, nor was it decided, or indeed discussed. In our judgment, the justices were right in refusing to convict in this case. No damage to the realty itself was proved, and the sole evidence of damage given was the loss of the mushrooms to the owner. The remedy of the appellant was by action of trespass in a County Court, and not by a criminal prosecution before justices. This appeal must therefore be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant, *Henry Sowton*, for *J. C. Buckwell*, Brighton.

Solicitors for the respondent, *Prince* and *Co.*, Brighton.

Thursday, June 16, 1887.

(Before MATHEW and CAVE, JJ.)

THE DARENTH VALLEY MAIN SEWERAGE BOARD *v.* THE GUARDIANS OF THE POOR OF THE DARTFORD UNION. (*a*)

Local government—Joint board—Component districts — Apportionment of expenses — "Special expenses"—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 230, 283, *and* 284*—Provisional Order Confirmation* (*Darenth Valley*) *Act* 1878 (41 *&* 42 *Vict. c. cxi.*), *schedule, ss.* 16 *and* 17.

By sect. 16 *of the Provisional Order Confirmation* (*Darenth Valley*) *Act* 1878, *it is provided that "The expense incurred by the joint board in carrying out the duties prescribed by this order . . . shall be defrayed out of a common fund, to be contributed by the urban sanitary district and several contributory places mentioned in the schedules hereto, in manner provided by sect.* 283 *of the Public Health Act* 1875."

By sect. 17 *of the same provisional order, it is provided that, "The contributions of the rural sanitary authorities of the Dartford and Sevenoaks Unions respectively towards the common fund of the united district shall be contributed and raised in the same manner in every respect as if such contributions were required to defray 'special expenses' within the meaning of the Public Health Act* 1875."

Held, upon a case stated, that in apportioning the amount of the expenses incurred by the plaintiff joint board among its component districts, the joint board should do so in proportion to the rateable values of the properties in such districts, such values to be ascertained according to the valuation list in force for the time being, as provided by sect. 283 *of the Public Health Act* 1875.

THIS was a special case stated for the opinion of the Queen's Bench Division pursuant to the Rules of the Supreme Court, Order XXXIV.

1. The plaintiffs were constituted a joint board, within the meaning of the Public Health Act 1875, by the Local Government Board's Provisional Order Confirmation (Darenth Valley) Act 1878, for the Darenth Valley Main Sewerage District, with the powers and authorities mentioned in the said Acts and in the provisional order set forth in the schedule to the last-mentioned Act.

2. The expenses incurred by the plaintiffs in carrying out their duties are required to be defrayed out of a common fund to be contributed by the component districts of the said Darenth Valley Main Sewerage District (namely, the Sevenoaks Urban Sanitary District, the Sevenoaks Rural Sanitary District, and the Dartford Rural Sanitary District), in the manner provided by article 16 of the said provisional order, and sect. 283 of the Public Health Act 1875, and no part of the said districts had been exempted from assessment under sect. 7 of the Local Government Board's Provisional Order Confirmation (Darenth Valley) Act 1878.

3. In pursuance of sect. 284 of the Public Health Act 1875, for the purpose of obtaining payment from the said component districts of the sums to be contributed by them towards the expenses incurred by the plaintiffs as aforesaid, the plaintiffs had from time to time issued their precepts to the respective local authorities of such component districts requiring payment of the sums therein mentioned, and such sums had been paid accordingly, with the exception of 1555*l.* required to be paid by the defendants by the precept of the 12th Oct. 1885, which amount came due on the 1st Feb. 1886.

4. Two other precepts had since been issued, dated respectively the 12th April 1886 and the 11th Oct. 1886, for 1269*l.* and 1289*l* respectively, the same being due on the 1st Aug. 1886 and the 1st Feb. 1887 respectively. Neither of such sums had been paid.

5. In apportioning the amount of the said expenses of the plaintiffs amongst the said component districts for the purpose of issuing the precept of the 12th Oct. 1885, the rateable values of the properties in such districts were not all taken upon the same basis, and in no case was the full rateable value of all the property in the district, as appearing in the valuation list in force for the time being, taken as a rateable value for the purpose aforesaid.

6. The question for the opinion of the court was, whether the plaintiffs, in apportioning the amounts of their said expenses among the said component districts, should do so in proportion to the rateable values of the properties in such districts, such values to be ascertained according to the valuation list in force for the time being, or whether the rateable values of tithes, tithe commutation rentcharges, and land used as arable, meadow, or pasture ground only, or as woodlands, market gardens, or nursery grounds, or covered with water, or used as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, should be taken at one-fourth of the rateable values thereof appearing in the said valuation lists, or in what other way, and upon what other basis, the said apportionments should be made.

7. By an agreement in writing, dated the 18th Dec. 1886, and made between the plaintiffs and the defendants in pursuance of Order XXXIV. r. 6, of the Rules of the Supreme Court 1883, it was agreed that, upon the judgment of the court

(*a*) Reported by F. A. CRAILSHEIM, Esq., Barrister-at-Law.

being given upon the point of law raised by this case, a sum of money to be ascertained in the mode therein mentioned, or in such other manner as the court might direct, or such other sum as might be ascertained by the court, should be paid by the defendants herein to the plaintiffs as therein directed, and that the costs of this action and of the inquiry therein mentioned should be in the discretion of the court, and that judgment should be entered accordingly for the sums so to be ascertained as aforesaid, with or without costs as the court should direct.

By sect. 230 of the Public Health Act 1875 (38 & 39 Vict. c. 55) it is enacted that,

For the purpose of obtaining payment from the several contributory places within their district of the sums to be contributed by them, the rural authority shall issue their precept to the overseers of each such contributory place, requiring such overseers to pay, within a time limited by the precept, the amount specified in such precept, to the rural authority, or to some person appointed by them, care being taken to issue separate precepts in respect of contributions for general expenses and special expenses, or to make such expenses respectively separate items in any precept, including both classes of expenses.

The overseers shall comply with the requisitions of such precept by paying the contribution required, in respect of general expenses, out of the poor rate of their respective parishes, and, with respect to special expenses, by raising the contribution required by the levy . . . of a separate rate, in the same manner as if it were a rate for the relief of the poor, with this exception; (namely),

That the owner of any tithes, or of any tithe commutation rentcharge, or the occupier of any land used as arable, meadow, or pasture ground only, or as woodland, market gardens, or nursery grounds, and the occupier of any land covered with water, or used as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall, where a special assessment is made for the purpose of such rate, be assessed in respect of one-fourth part only of the rateable value thereof, or, where no special assessment is made, shall pay in respect of the said property one-fourth part only of the rate in the pound payable in respect of houses and other property.

By sect. 283 it is enacted that

Any expenses incurred by a joint board in pursuance of this Act, unless otherwise determined by the provisional order, shall be defrayed out of a common fund, to be contributed by the component districts or contributory places in proportion to the rateable value of the property in each district or contributory place, such value to be ascertained according to the valuation list in force for the time being.

By sect. 284 it is enacted that,

For the purpose of obtaining payment from component districts of the sums to be contributed by them, the joint board shall issue their precept to the local authority of each component district, stating the sum to be contributed by such authority, and requiring such authority, within a time limited by the precept, to pay the sums therein mentioned to the joint board, or to such person as the joint board may direct.

By sect. 16 of the schedule to the Local Government Board's Provisional Order Confirmation (Darenth Valley) Act 1878 (41 & 42 Vict. c. ccxi.) it is provided that

The expenses incurred by the joint board in carrying out the duties prescribed by this order, including all establishment charges, remuneration to clerk, treasurer, officers, and servants, shall be defrayed out of a common fund, to be contributed by the urban sanitary district and several contributory places mentioned in the schedules hereto, in manner provided by sect. 283 of the Public Health Act 1875; and, for the purposes of this order, any person appointed by the joint board may inspect, take copies of, or make extracts from, any valuation list, or rate for the relief of the poor within the united district, or any part thereof, or any book relating to the same.

By sect. 17 of the same provisional order it is provided that

The contributions of the rural sanitary authorities of the Dartford and Sevenoaks Unions respectively towards the common fund of the united district shall be contributed and raised in the same manner in every respect as if such contributions were required to defray "special expenses" within the meaning of the Public Health Act 1875.

F. Meadows White, Q.C. (*Alexander Glen* with him), for the plaintiffs.—It is submitted that the plaintiffs have apportioned the amount of their expenses in the proper manner, and in accordance with the provisions of the Public Health Act and of the provisional order. Sect. 17 of the provisional order provides that the contributions of the authorities of the Dartford and Sevenoaks Unions are to be contributed and raised as if such contributions were required to defray "special expenses" within the meaning of the Public Health Act 1875. Sect. 230 of the Public Health Act 1875 states how special expenses are to be raised, namely, upon the reduced estimate of the fourth part of the rateable value of certain kinds of property. Thus uniformity in the proportions payable by different districts will be secured. It is therefore submitted that the Darenth Valley Board, in apportioning their expenses between the constituent authorities, should take the rateable value of the districts of such constituent authorities upon the reduced rateable values.

Channell, Q.C. (*H. F. Dickens* with him) for the defendants.—It is submitted that the joint board should apportion their expenses between the constituent authorities, by taking the rateable value of the districts of such authorities at the amount appearing in the valuation lists. Sect. 16 of the provisional order states in terms that the apportionment of the expenses is to be made in manner provided by sect. 283 of the Public Health Act. Sect. 17 of the provisional order and sect. 284 of the Public Health Act relate to the mode in which the amount of the apportionment is to be contributed and raised within the districts, and not to the mode in which the joint board are to apportion the expenses among the constituent authorities. Sect. 16 of the provisional order and sect. 283 of the Public Health Act 1875 apply to the apportionment of their expenses by the joint board. That is the reason why, in sects. 16 and 283, the word "contributed" only is used, while in sect. 17 the words are "contributed and raised." The joint board have first to apportion their expenses among the constituent authorities; this having been done, the amount of such contribution has itself to be apportioned among the contributory places in the district of the constituent authority, and the contribution having been so apportioned, has to be raised in the contributory places. The meaning of the sections when taken together appears therefore to be this: that the expenses are to be apportioned by the joint board upon the basis of the full rateable value according to the valuation list; the sums to be paid by the constituent authorities are to be contributed by the contributing places within the district, and raised in the same way as if such contributions were required to defray special

expenses (to this extent sect. 17 of the provisional order alters the provisions of sect. 284 of the Public Health Act); these latter sums must therefore be raised according to the provisions of sect. 230 of the Public Health Act 1875, that is, upon the reduced estimate. Therefore it is submitted that clearly the apportionment of expenses should be made by the joint board in proportion to the rateable value appearing on the valuation lists, and not upon the reduced estimate.

F. Meadows White, Q.C. in reply.

Mathew, J.—It appears to me in this case that the board are bound to apportion the amount of the expenses among the different districts, and to do so in proportion to the rateable value of the properties in those districts. The values are to be ascertained according to the valuation list. It seems to me that, when we look at the provisional order and the Public Health Act, the matter is perfectly clear. Under sect. 16 of the provisional order, it is directed that "The expenses incurred by the joint board in carrying out the duties prescribed by this order, including all establishment charges, remuneration to clerk, treasurer, officers, and servants, shall be defrayed out of a common fund to be contributed by the urban sanitary district, and several contributory places mentioned in the schedules hereto, in manner provided by sect. 283 of the Public Health Act 1875." I turn to sect. 283. That provides that any expenses incurred by a joint board shall be defrayed: "out of a common fund to be contributed by the component districts or contributory places, in proportion to the rateable value of the property in each district." What does that mean? It appears to me that the meaning is made perfectly plain by the words that follow, "Such value to be ascertained according to the valuation list in force for the time being." And the provisional order also provides under sect. 16 that, "For the purposes of this order any person appointed by the joint board may inspect, take copies of, or make extracts from, any valuation list, or rate for the relief of the poor within the united district or any part thereof, or any book relating to the same." What the valuation list does contain as a general rule we know. The meaning of sect. 283 of the Public Health Act has, I think, if illumination were needful, light thrown upon it by sect. 230, which my learned brother called attention to during the argument. But here there does not appear to me to be any room for any misgiving or doubt as to what is meant, when you come to the next clause of the provisional order. The next clause directs how the contributions are to be procured. It provides for the contribution from two of the districts only, and with reference to these two it points out that the contributions shall be "raised in the same manner in every respect as if such contributions were required to defray special expenses within the meaning of the Public Health Act 1875." Then the clause as to special expenses in sect. 230 of the Public Health Act directs that the deductions shall be made which are referred to in the case, but they are only to be made then, and that clause does not apply here. It appears to me, therefore, that the contention of Mr. Meadows White fails, and that our judgment must be for the defendants.

Cave, J.—I am of the same opinion. Mr. Meadows White has said all that can be said in favour of his contention, but the argument of Mr. Channell was so clear and so cogent, that it has carried conviction to my mind. The one point to which I paid some attention which Mr. White made was, that the construction we are putting upon the clauses of the provisional order might lead to a different rate being levied upon one portion of the district from that levied upon another. If, of course, the provisional order, instead of dealing with one single joint board, were dealing with a great number, there would be a great deal to be said for that contention, and one would have to struggle against any construction which might lead to what would apparently be so unfair; but the provisional scheme does not deal with any board except the particular Darenth Valley Board. That being so, it was open, of course, to us to consider what was the best mode of ascertaining the proportion which each of the three contributory bodies should bring into the common fund. We have heard nothing to show that the construction which we have adopted will lead to any injustice whatever, and it may be that, having regard to the peculiar nature of this district, all of it being more or less of a suburban character, there may be really no such disproportion as would make it worth while to go to the trouble of distinguishing, for the purposes of the proportion which each is to pay, between the land which ultimately will be assessed at one-fourth of its rateable value and the land which will be assessed at the full rateable value. However that may be, we cannot, because there is a possibility of anything of this kind, do otherwise than look to see what is the plain meaning of the Act, and, as far as I can judge from the provisions to which my attention has been called, the plain meaning is that which my brother Mathew has stated. I agree with his observations and also in the conclusion at which he has arrived.

Judgment for the defendants.

Solicitors for the plaintiffs, *Kingsford, Dorman, and Co.*, for *Carnell and Son*, Sevenoaks.

Solicitors for defendants, *Pyke and Parrott*, for *J. and J. C. Hayward*, Dartford.

Saturday, June 25, 1887.

(Before Lord Coleridge, C.J. and Day, J.)

Reg. v. The Assessment Committee of St. Mary, Islington. (a)

Poor rate—Assessment—Alteration of value of hereditament during year—Reduction of rent—Provisional list—Mandamus — Valuation of Property (Metropolis) Act 1869 (32 & 33 *Vict. c.* 67), *s.* 47.

Where a requisition is made to the assessment committee of a parish to appoint a person to make a provisional list under sect. 47 *of the Valuation of Property (Metropolis) Act* 1869, *containing the gross and rateable value of an hereditament as reduced since the making of the valuation list, on the ground that the value has been diminished by the falling off of receipts during the year, if a primâ facie case of reduction has been made out, a mandamus will be granted to compel the assessment committee to comply with such requisition.*

(a) Reported by F. A. Challerehe, Esq., Barrister-at-Law.

Rule *nisi*, ordering the assessment committee of the parish of St. Mary, Islington, to show cause why a writ of *mandamus* should not issue directed to them, commanding them to appoint a person to make a provisional list for the said parish, containing the gross and rateable value of the Royal Agricultural Hall, as reduced since the making of the valuation list now in force.

The only fact material to the decision is that, since the making of the last valuation list, and within the current year, the receipts of the Royal Agricultural Hall had decreased by about 2000*l.* as compared with former years. The proprietors thereupon obtained the above rule *nisi* for a *mandamus* that a provisional list be made under sect. 47 of Valuation of Property (Metropolis) Act 1869.

By sect. 46 of the Valuation of Property (Metropolis) Act 1869, it is enacted that

Every valuation list shall be revised in manner directed by this Act, and such revision in every period of five years shall be conducted as follows:

(1) In each of the first four years of such period a supplemental list shall, if necessary, be made out in the same form as the valuation list, and shall show all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list, but shall contain only the hereditaments affected by such alterations:

(2) In the fifth year of every such period the overseers shall make a new valuation list.

By sect. 47 of the same Act, it is enacted that,

If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect:

(1) The overseers of the parish in which such hereditament is situate may, and on the written requisition of the assessment committee, or of any ratepayer of the union, or of the surveyor of taxes for the district shall, send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditament.

(2) A copy of the requisition shall be sent by the person making it to the clerk of the assessment committee, and if within fourteen days after the requisition has been served on the overseers they make default in sending such provisional list, he shall forthwith summon the assessment committee, and the assessment committee shall appoint a person to make such provisional list, in the same manner as is in this Act provided in this case of the overseers failing to transmit a valuation list.

Jelf, Q.C. (*J. V. Austin* with him), for the assessment committee, showed cause.—First, it is submitted, that the alteration which has taken place here in the value of the Agricultural Hall is not an alteration within the meaning of sect. 46 of the Act of 1869. Secondly, if the alteration is within that section, the application of sect. 47 is confined to cases where the nature of the alteration is structural or *quasi*-structural. The alteration must be structural or *ejusdem generis*, such as building a new wing, or pulling one down, which would be a tangible change. But the section gives no right to introduce even a large reduction in rent. The case of *Reg.* v. *The Overseers of Bermondsey* (14 Q. B. Div. 351) is relied upon by the other side, but, as far as the discretion of the overseers is concerned, that is a decision in favour of the assessment committee. The case of *Reg.* v. *The New River Company* (40 L. T. Rep. N. S. 322; 4 Q. B. Div. 309) was also cited.

Castle, for the Royal Agricultural Hall, was not called upon.

Lord Coleridge, C.J.—I understand a *primâ facie* case to have been made out of the reduction in value of the premises of the applicants from some cause or other. The present application is made under sect. 47 of the Valuation of Property (Metropolis) Act 1869, and we are asked to say that a person should be appointed to make a provisional list, showing the decrease in value of the Royal Agricultural Hall within the year. It is suggested that sects. 46 and 47 of the Act of 1869 both apply to cases where there have been structural alterations, and counsel for the assessment committee have argued at great length to show that there might be inconveniences in from time to time applying the provisions of sect. 47 in any case where a *primâ facie* case of reduction in rateable value has been made out. Whether that is so I am not prepared to say. These statutes deal with practical matters, and their interpretation is to be governed by practical considerations. It is manifest that where there is a set-up standard of valuation for a fixed time, common justice demands that there should be a means of correcting great changes in value, if they take place within the year. As to the beginning of each year, sect. 46 enacts that a supplemental list may be made out, showing the alterations in value which have taken place during the preceding twelve months. But inasmuch as there may be changes of value in individual cases sufficient to call for a reduction or increase within the course of one year, as well as within the course of five years, sect. 47 has been added. It provides, and in my opinion very justly, that "if in the course of any year the value of any hereditament is increased by the addition thereto or the erection thereon of any building, or is from any cause increased or reduced in value," the overseers of the parish may, and in certain cases must, make a provisional list containing the gross and rateable value of such hereditament as so increased or reduced. The only question for us, as it seems to me, is whether a *primâ facie* case has been made out to call upon the assessment committee to hear and determine whether, from any cause, the Royal Agricultural Hall has been increased or reduced in rateable value within the course of the year. The assessment committee may decide the question one way or the other, but I think they must hear and determine it. That is in accordance with the plain and simple construction of the Act of Parliament. I venture to adopt, and to adopt with satisfaction, the words of Cockburn, C.J. in the case of *Reg.* v. *The New River Company* (40 L. T. Rep. N. S. 322; 4 Q. B. Div. 309). In his judgment in that case he says: "Now, the matters stated in the valuation list (that is, the quinquennial list) include, amongst others, the gross and the rateable value. If, therefore, any alteration has taken place in any year of the quinquennial period in the gross or rateable value, that is to be the subject-matter of this supplemental list. The provision of the Act is very clear, and more intelligible than statutory enactments usually are. I cannot help thinking that it was intended to rectify what might otherwise work very unjustly—a valuation to extend for a period of five years without any opportunity of amending it if it ceased to be in harmony with the actual facts. If by any extraordinary or unlooked-for circumstances the value of the given

property should be greatly increased on the one hand, or greatly decreased on the other, then the assessment ought not to continue to exist and taxes to be levied upon such an altered state of circumstances." It is true that that is a decision upon sect. 46 of the Act, and sect. 46 only, but I agree with the principle there expressed and I adopt it entirely; the language used is precise and excellent, and it exactly expresses my view. The language of sect. 47 shows plainly what the Legislature meant. It would be unjust that the assessment committee should not take into account a reduction in value of 2000*l.* a year. The decision in *Reg.* v. *The Assessment Committee of the Poplar Union* (51 L. T. Rep. N. S. 97; 13 Q. B. Div. 364) is also in favour of this view. It is immaterial, for the purposes of this case, to consider the difference of opinion between Lord Esher, M.R. and Fry, L.J., but they both agree as to the effect of sect. 46 of the Act during the quinquennial period, where there has been a diminution in the rateable value within the year. The principle acted upon there is applicable to the case before us. In my opinion, whether we look at the Act apart from or together with the cases, it is clear that the *mandamus* must go.

DAY, J.—I agree.

Rule absolute for mandamus.

Solicitors: *Kingsford, Dorman*, and *Co.*; *William Lewis.*

Tuesday, July 19, 1887.

(Before STEPHEN and WILLS, JJ.)

REG. *v.* ROBINSON. (*a*)

Coroner—Jurisdiction—Coroner for the county—Prison for the county—Prison Act 1865 (28 *&* 29 *Vict. c.* 126), *ss.* 48 *and* 57—*Prison Act* 1877 (40 *&* 41 *Vict. c.* 21), *ss.* 30 *and* 48—*Municipal Corporations Act* 1882 (45 *&* 46 *Vict. c.* 50), *ss.* 171 *and* 228, *sub-sects.* 3 *and* 4.

By sect. 48 *of the Prison Act* 1865: "*It shall be the duty of the coroner having jurisdiction in the place to which the prison belongs to hold an inquest on the body of every prisoner who may die within the prison.*"

By sect. 57 *of the same Act*: "*Every prison, wheresoever situate, shall for all purposes be deemed to be within the limits of the place for which it is used as a prison.*"

By sect. 30 *of the Prison Act* 1877, *the Secretary of State may make rules as to the place to which certain prisons are to be considered to belong, but until such rules are made, the transfer under this Act of the prisons is not to affect the jurisdiction of any sheriff or coroner.*

By sect. 171 *of the Municipal Corporations Act* 1882: "*The council of a borough . . . shall appoint a fit person . . . to be coroner of the borough; and thenceforth no person other than the coroner so appointed shall take in the borough any inquisition belonging to the office of coroner.*"

By sect. 228, *sub-sect.* 4, *of the same Act*: "*Any gaol . . . which at the commencement of this Act is parcel of a county shall continue to be parcel of the county.*"

When the Prison Act 1865 *came into operation, Oxford Castle, which was situate within the limits of the city, was the prison for the county, and the coroner for the county held inquests on prisoners dying there. At that time there was a separate gaol for the city. No rule was made as to Oxford Castle under sect.* 30 *of the Prison Act* 1877.

Held, that upon the true construction of the statutes, the coroner for the county still had jurisdiction to hold inquests in Oxford Castle, which was the prison for the county, and was parcel of the county, and not in the city.

THIS was a rule *nisi* obtained by the coroner for the city of Oxford, calling upon the coroner for the county to show cause why certain inquisitions taken by the coroner for the county on the bodies of prisoners who had died in Oxford Castle should not be removed by writ of *certiorari* to the Queen's Bench Division to be quashed.

The facts were as follows: From 1843 to 1877 the predecessor of the present coroner for the county had held and exercised the office of coroner for the county and also for the city of Oxford. In 1877 the present coroner for the county was elected coroner for the central district of the county of Oxford. Since 1878 he, as county coroner, had held inquests upon prisoners who died in Her Majesty's prison at Oxford. In 1877 the present coroner for the city was elected to the office of coroner for the city of Oxford. At the date of the passing of the Prison Act 1865, Oxford Castle was used as the prison for the county. The Secretary of State had made no order in respect of the prison in question, under sect. 30 of the Prison Act 1877. The prison is situate in the district of the county of Oxford, but within the city. The coroner for the city now claimed to hold inquests in the said prison to the exclusion of the county coroner, on the ground that, the prison being wholly within the city, since the Prison Act of 1877 the county coroner had no jurisdiction there, and, in order to have the question determined, he obtained the rule *nisi*.

By sect. 41 of the Municipal Corporations Act 1837 (7 Will. 4 & 1 Vict. c. 78) it is enacted that

All county gaols, courts, depôts for arms, and all lands, buildings, easements, and appurtenances thereunto belonging, which before the passing of the Act passed in the last session of Parliament, . . . were in, of, or belonging to any county, shall be taken to be and considered and shall remain part and parcel of such county, and under the exclusive jurisdiction of the authorities of such county, as if the said last-mentioned Act had not been passed.

By sect. 48 of the Prison Act 1865 (28 & 29 Vict. c. 126) it is enacted that

It shall be the duty of the coroner having jurisdiction in the place to which the prison belongs, to hold an inquest on the body of every prisoner who may die within the prison.

By sect. 57 of the same Act,

Every prison, wheresoever situate, shall for all purposes be deemed to be within the limits of the place for which it is used as a prison.

By sect. 30 of the Prison Act 1877 (40 & 41 Vict. c. 21) it is enacted that

The Secretary of State may, from time to time, if he think it expedient so to do, for the purpose of any enactment, law, or custom, descriptive of or dependent on the circumstance of a prison being the prison of any county, riding, county of a city, county of a town, liberty, borough, or other place having a separate prison jurisdiction, by any general or special rule direct

(*a*) Reported by F. A. CRAILSHEIM, Esq., Barrister-at-Law.

that, for such purpose as aforesaid, any prison locally situate within the county in which such riding, county of a city, county of a town, liberty, borough, or place is situate, or any prison which he may, in pursuance of this Act, have appointed as a prison to which prisoners may be committed, is to be considered to be the prison of such county, riding, county of a city, county of a town, liberty, borough, or other place, but subject to any such rule as in this section mentioned, and until the same be made, the transfer under this Act of the prison to which this Act applies, and of the powers and jurisdiction of prison authorities and of justices in sessions assembled, and of visiting justices, shall not affect the jurisdiction of any sheriff or coroner, or, save as provided by this Act, of any justice of the peace or other officer having at the commencement of this Act jurisdiction in, over, or in respect of such prison.

By sect. 48 of the Prison Act 1877 it is enacted that

The legal estate in every prison to which this Act applies, and in the site and land belonging thereto, and in the furniture and effects, shall, on and after the commencement of this Act, be deemed to be vested in the Prison Commissioners, and not in the Secretary of State, but shall from time to time be disposed of by such commissioners in such mode as the Secretary of State, with the consent of the Treasury, may direct.

By sect. 171 of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50) it is enacted that

The council of a borough having a separate court of quarter sessions shall, within ten days next after receipt of the grant thereof by the council, and thenceforth from time to time appoint a fit person, not an alderman or councillor of the borough, to be coroner of the borough; and thereafter no person other than the coroner so appointed shall take in the borough any inquisition belonging to the office of coroner.

By the same Act, sect. 228, sub-sect. 3:

But nothing in this Act shall prevent any gaol, house of correction, lunatic asylum, court of justice, or judges' lodging, which, at the passing of the Municipal Corporations Act 1835, was, and at the commencement of this Act is, taken to be, for any purpose, in any county, from being still, for that purpose, taken to be in that county, as if this Act had not been passed.

Sub-sect. 4:

Any gaol, court, depôt for arms, and any land thereto belonging, which, at the commencement of this Act, is parcel of a county, shall continue to be parcel of the county, and under the exclusive jurisdiction of the authorities of the county, as if this Act had not been passed.

Ashton Cross, for the county coroner, showed cause against the rule.—At the date of the passing of the Prison Act of 1865 Oxford Castle was the prison for the county, and used for county purposes exclusively. That is clear from sects. 48 and 57 of that Act. The county coroner, therefore, had jurisdiction to hold inquests in this prison at that time. It is submitted that, although sect. 48 of the Prison Act 1877 provides that "the legal estate in every prison to which this Act applies shall, on and after the commencement of this Act, be deemed to be vested in the Prison Commissioners, and not in the Secretary of State," that Act does not alter the jurisdiction of the county coroner. Sect. 30 of this Act makes this clear. The effect of the Act of 1877 was to make Oxford Castle the general prison for both the county and the city. Previously the county and the city gaols had been distinct. Therefore, at the beginning of 1878, when this Act came into operation, the county coroner had jurisdiction in the prison in question; and it is submitted that, in the absence of any special direction under sect. 30 to the contrary, his jurisdiction has not been interfered with. The other side rely on sect. 171 of the Municipal Corporations Act 1882, but that cannot affect the jurisdiction of the county coroner, because he has not, in fact, taken any inquisition in the borough. The general words of that section do not interfere with the old jurisdiction. Sub-sects. 3 and 4 of sect. 228 of the Municipal Corporations Act 1882 leave the gaol as it was before—parcel of the county. The provisions of sect. 41 of the Municipal Corporations Act 1837 have never been interfered with, and still stand. Therefore the prison in question remains a county prison, and one in which the county coroner has jurisdiction.

Melsheimer in support of the rule.—The prison in question belongs in no sense to the county. Under sect. 48 of the Prison Act 1877 the property is deemed to be vested in the Prison Commissioners, and not in the Secretary of State. Since the Act of 1877 the prison no longer belongs to the county. It is locally situated within the city. The prison having ceased to belong to the county, the county coroner now has no jurisdiction there. Sect. 171 of the Municipal Corporations Act 1882 is a positive enactment that the city coroner is to hold inquests in the city. It is therefore submitted that the county coroner has no jurisdiction to hold inquests in this prison.

STEPHEN, J.—I am of opinion that the probable interpretation to be put upon the statutes that have been cited, is that suggested by counsel for the county coroner. I confess that I cannot feel complete and absolute satisfaction as to the proper construction to be put upon these Acts, because we are arguing upon a fiction and upon a fictitious state of things. My view is that, under the circumstances, the fictions must be kept up. That, at any rate, is a more convenient course than to throw them aside. I think that the effect of the Prison Act 1865 was to give the county coroner jurisdiction in the prison now in question, as at that time it was clearly used as a prison for the county. I do not think that the effect of the Prison Act 1877 was to alter that. It is suggested by counsel for the city coroner, that the effect of the Act of 1877 is that all gaols are to be gaols at large, so to speak; I cannot, however, agree with that construction of the Act. The Prison Act of 1865 confirms the jurisdiction in the coroner of the county, and the Act of 1877 does not, in my opinion, take it away. Neither does sect. 171 of the Municipal Corporations Act 1882 take it away, because the county coroner does not take inquisitions in the borough, but he does so in the county in fact. The general theory of the Acts points to the conclusion at which I have arrived, namely, that the county coroner has jurisdiction to take inquisitions in Oxford Castle. The rule must therefore be discharged.

WILLS, J.—I am of the same opinion. Sect. 48 of the Prison Act 1865 points out the duty of the coroner. That section is founded upon the notion that the prison belongs in some sense to some particular place. Sect. 57 says that, "every prison, wherever situate, shall for all purposes be deemed to be within the limits of the place for which it is used as a prison." It is rather difficult to say exactly what that section means, because there are places where the same prison is used for both the county and the borough. But whatever the meaning of sect. 57 may be, I cannot

doubt that it was not intended to interfere with a gaol belonging to a particular place within the meaning of sect. 48. What place should the gaol belong to but the county? Then it is said that a complete alteration was effected by the Prison Act of 1877. But I do not think so for a moment. Sect. 57 of the Act of 1865 says that every prison shall "be deemed" to be within the limits of the place for which it is used as a prison. The words "shall be deemed" are there inserted for the very purpose of preventing this difficulty which is now suggested from being raised. The jurisdiction of justices and quarter sessions to commit prisoners to the gaol of the county has not been altered, and the power to commit to such a gaol belongs to the common law. Besides, there is the general jurisdiction existing at common law to send offenders to prison, and that depends upon the right to commit to the gaol of the county where the offence is committed. Yet it is argued that the county gaol has ceased to exist. But, as a matter of fact, in the greater part of commitments under which prisoners are now undergoing terms of imprisonment, the prisoner is conveyed to the county gaol. The Castle of Oxford is still the county gaol, except in so far as its use has been infringed by Act of Parliament. Therefore, in my judgment, notwithstanding sect. 48 of the Prison Act 1877, which enacts that the legal estate in every prison shall be deemed to be vested in the Prison Commissioners, and not in the Secretary of State, the gaol still belongs to the county to which it belonged when the Act of 1865 came into operation. Then, it is further contended that the effect of the Municipal Corporations Act 1882 is to vest in the city coroner jurisdiction to hold inquests in the gaol in question. Sect. 171 of that Act says that "the council of a borough, having a separate court of quarter sessions shall appoint a fit person to be coroner of the borough and therefore no person other than the coroner so appointed shall take in the borough any inquisition belonging to the office of coroner." But the county gaol is not in the borough; it may be said to be locally in the borough, but when it was created a county gaol it ceased to be in the borough. That is the effect of sect. 57 of the Act of 1865, which provides that "Every prison, wheresoever situate, shall for all purposes be deemed to be within the limits of the place for which it is used as a prison." At the time when the Prison Act of 1865 was passed this gaol was used exclusively for the county, and not for the city. Sect. 30 of the Prison Act of 1877 carefully preserved this state of things, which, in my judgment, is not affected by the Municipal Corporations Act 1882. Moreover, sub-sect. 3 of sect. 288 of that Act expressly provides that "nothing in this Act shall prevent any gaol, house of correction, &c., which, at the passing of the Municipal Corporations Act 1835, was, and at the commencement of this Act is, taken to be, for any purpose, in any county, from being still, for that purpose, to be taken to be in that county, as if this Act had not been passed." For the reasons I have given I think that the prison in question was, at the time when the Municipal Corporations Act 1882 was passed, parcel of the county of Oxford. I therefore come to the same conclusion as my brother Stephen, that this rule must be discharged. *Rule discharged.*

Solicitor for the city coroner, *Charles Mallam*, for *Thomas Mallam* and *Co.*, Oxford.

Solicitors for the county coroner, *Prior, Church*, and *Adams*, for *W. W. Robinson*, Oxford.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE BUSINESS.

Tuesday, July 20, 1886.

(Before Butt, J.)

The Guardians of the Poor of the Parish of Lambeth v. The Next of Kin of Maria Bradshaw (deceased). (a)

Administration — Creditors — Deceased a pauper lunatic — Expenses of maintenance — Right of poor law guardians to recover against estate of lunatic after her death—12 & 13 *Vict. c.* 103, *ss.* 16, 17.

The deceased had, for over six years prior to her death, been supported as a pauper lunatic at the county lunatic asylum.

During the whole of this period she was, in fact, entitled to an annuity of 24*l.* 16*s.* 6*d.*, *payable by the Commissioners for the Reduction of the National Debt. This fact only came to the knowledge of the guardians at the time of her death, or shortly thereafter.*

Held, that the guardians were creditors of the deceased, within the provisions of 12 & 13 *Vict. c.* 103, *ss.* 16, 17, *and, as such, entitled to administration of her estate.*

Held, also, that the claim of the guardians was not limited to the period of twelve months prescribed by sect. 16 *of that statute, but that, in respect of such period, they were entitled absolutely to repayment, under the statute, and, as to a further period not exceeding five years (making six years in all), they were entitled to come in and claim as ordinary creditors, notwithstanding the fact of their having taken no steps to recover payment for such expenditure, during the lifetime of the deceased pauper lunatic.*

This was a motion for a grant of letters of administration, in respect of the estate of Mary Bradshaw, deceased, to Walter Benjamin Wilmot, the nominee of the Poor Law Guardians for the parish of Lambeth, claiming as creditors of the deceased, who was an inmate of the county asylum, at Wandsworth, from 1879 down to the time of her death, which occurred in Dec. 1885.

During that time, there became due to the guardians, in respect of her maintenance as a pauper lunatic, a sum of 181*l.* 19*s.* 11*d.*

About the time of her death, or soon afterwards, it was for the first time brought to the knowledge of the board of guardians, that Mary Bradshaw, the deceased, had, before and during the whole time she had been an inmate of the asylum, been entitled to receive, from the Commissioners for the Reduction of the National Debt, an annuity of 24*l.* 16*s.* 6*d.*

It appeared that she received the last payment in respect of this annuity, about six months before she went into the asylum. Therefore fourteen half-yearly payments were, at the time of her death, due to her or her representatives, amounting to a sum of 173*l.* 15*s.* 6*d.*, or somewhat

(a) Reported by H. Dudley-Grazebrook, Esq., Barrister-at-Law

less than the total amount expended upon her maintenance by the guardians.

Citation issued to the next of kin, on the 5th May, 1886, but none of them appeared.

Glen appeared for the Lambeth guardians.

BUTT, J.—Has there been any notice to the Queen's Proctor?

Glen.—No.

BUTT, J.—Should there not, in strictness, be such notice?

Glen.—The Queen's Proctor, of himself, would have to move.

BUTT, J.—No; if he is interested, he is entitled to notice. There is another question. Is not some order of a justice or justices required, under the Act of 1853 (16 & 17 Vict. c. 97, s. 104)?

Glen.—Here is an authority in which the court granted an application of this kind, but that point does not seem to have been raised at all. The only question was, whether letters of administration should be granted to the guardians of the union (which, in that case, was the Totnes Union) under 12 & 13 Vict. c. 103, ss. 16, 17. The case is *Windeatt* v. *Sharland* (23 L. T. Rep. N. S. 877; L. Rep. 2 P. & D. 266.) The marginal note, read at the request of the learned judge, is as follows:

The deceased, at the time of his death, had been for many years at a county lunatic asylum as a lunatic, at the expense of the union to which he belonged. At that time he was beneficially interested in a sum of 400*l*, Three per Cent. Consols standing in the names of trustees. His sister, the only next of kin or person entitled to the property, was also a pauper lunatic.

The Court held, that the guardians of the union to which the deceased belonged were, under the provisions of 12 & 13 Vict. c. 103, ss. 16, 17, creditors of the deceased, and granted administration to them, for the use and benefit of the lunatic next of kin.

BUTT, J.—Now read sect. 16.

Glen read the section:

Where any pauper shall have in his possession or belonging to him any money or valuable security, the guardians of the union where such pauper is chargeable may take and appropriate so much of such money, or the produce of such security, or recover the same as a debt before any local court, as will reimburse the said guardians for the amount expended by them, whether on behalf of the common fund or of any parish, in the relief of such pauper during the period of twelve months prior to such taking and appropriation, or prior to such proceeding for the recovery thereof (as the case may be); and, in the event of the death of any pauper having in his possession or belonging to him any money or property, the guardians of the union or parish wherein such pauper shall die, may reimburse themselves the expenses incurred by them in and about the burial of such pauper, and in and about the maintenance of such pauper at any time during the twelve months previous to the decease.

BUTT, J.—Now let us see whether you come within that sect. 16. That only makes you creditors for six months' maintenance. Have you referred to the case of *The Guardians of the Poor of Mile End* v. *Findlay* (9 L. T. Rep. N. S. 346; 3 Swa. & Tris. 365)?

Glen.—I have not. But the case of *The Guardians of the Derby Union* v. *Sharratt* (51 L. T. Rep. N. S. 319; 27 Ch. Div. 710) establishes my first proposition, which is, that the sums paid for maintenance are a debt, recoverable in a creditor's action against the real and personal representatives of the deceased pauper lunatic, notwithstanding the fact that no steps to recover payment of expenses incurred in respect of such maintenance were taken in the pauper's lifetime.

BUTT, J.—What is occurring to me is this: you cite the case, to show that where the parish has paid to the union certain sums for the maintenance of this pauper lunatic, that debt may be proved against the estate of the pauper by the union. But in order to constitute that a debt, must there not be an order by the justices upon the parish to pay the union? Where that order has not been made, I have some little doubt about this matter.

Glen.—The section I have read entitles them to repayment absolutely, in respect of the cost incurred for the maintenance of the pauper, so that, under the terms of the section, I submit they are constituted creditors.

BUTT, J.—That is for one year, in express terms. I think they are constituted creditors by that section to that extent.

Glen.—Under that section they would be entitled only in respect of one year; but in the case of the *Derby Union* v. *Sharratt*, a claim for three and a half years' maintenance was allowed, and therefore what I put before your Lordship is this: Under the Act, the guardians are entitled to help themselves, for one year, but, in respect of five years previous to that one year, they are creditors of the estate, and in order to realise their debt, all they would have to do, would be to bring an action to recover the amount, so that the effect would be, that if this court grants letters of administration — there being no difference here between the union and the parish—no suit will be necessary; and in this present case service has been effected, but no appearance has been entered to the citation.

BUTT, J.—If the lunatic were alive, it is clear that the proceedings would be taken under the section to which reference has been made, by getting an order from justices, directing a seizure of the property; but where the lunatic is dead, is that the right course? There is a provision in this Act expressly authorising justices to make that order. I am only pointing out the distinction. If the lunatic had been alive, that would have been the remedy under that section; but now that she is dead, and you can get no such order as that, the question is, are you creditors under the section?

Glen.—I submit we are, upon the authority of the case of the *Guardians of the Derby Union* v. *Sharratt* (51 L. T. Rep. N. S. 319; 27 Ch. Div. 710).

BUTT, J.—I have referred to the case of *The Guardians of Mile End* v. *Findlay* (3 Swa. & Tris. 366), and it seems to me that Sir J. P. Wylde, in that case, granted administration to the guardians under sect. 73 of the Probate Act, they being not otherwise entitled to the grant.

Glen.—Yes. But since that decision we have the very recent authority I have cited, which removes the doubt expressed by Sir J. P. Wylde in the earlier case.

BUTT, J.—I think you ought to communicate with the Queen's Proctor. You may take the grant in the terms asked for, subject to the Queen's Proctor's assent.

Solicitor, *W. J. Fraser.*

CHANCERY DIVISION.

Friday, June 10, 1887.

(Before CHITTY, J.)

THE ATTORNEY-GENERAL *v.* THE CORPORATION OF BLACKBURN. (*a*)

Municipal corporation — Application of borough fund—Municipal Corporations Act 1882 (45 & 46 *Vict. c.* 50), *ss.* 15, *sub-sect.* (4), 140, 141, 143.

A municipal corporation passed resolutions to the effect that, pursuant to sect. 15, *sub-sect.* 4, *of the Municipal Corporations Act* 1882, *a certain sum should be paid to the mayor by way of remuneration, and that the mayor should be requested to take such steps as he might deem proper for the due celebration of the Jubilee of Her Majesty's reign. Some of the burgesses moved to restrain the corporation from applying any part of the borough fund in the celebration of the Jubilee.*

Held, that the provisions of the Municipal Corporations Act 1882 *had not been contravened, and that an interlocutory injunction would not be granted.*

Quære, whether sect. 141, *sub-sect.* 2, *of the Municipal Corporations Act* 1882 *contemplates the allowing of extraordinary expenditure if reasonable.*

THE Corporation of Blackburn is a municipal corporation subject to the provisions of the Municipal Corporation Act 1882, the Public Health Act 1875, and the Acts amending the same. In pursuance of the Municipal Corporations Act 1882 the corporation was governed and represented by the town council, and the town council was empowered, under the Municipal Corporations Act 1882 and certain local Acts, to appoint committees of their own body for carrying on the work of the town council, and such committees were empowered to appoint sub-committees, and the acts of such committees and sub-committees required to be confirmed by the town council prior to having effect.

The town council appointed a committee called the General Purposes and Paid Officers Committee, consisting of all the members of the town council. This committee duly appointed a sub-committee out of its own body, called the General Purposes (Jubilee) Sub-committee.

The General Purposes and Paid Officers Committee and the General Purposes (Jubilee) Sub-committee respectively passed a series of resolutions directing certain acts and things to be done for the purpose of celebrating fittingly throughout the borough the jubilee year of the reign of Her Majesty Queen Victoria, all which resolutions were duly confirmed by the town council.

The result of carrying the resolutions into effect would be the expenditure of money in relation to the following matters: (1) The illumination of the townhall and market-house and tower. (2) The illumination of the Corporation Park and the providing therein of a military band on the night of the 20th June, and of fireworks on the night following. (3) The providing of suitable conveyances on the 20th June to convey the members of the town council to a new park in the borough called the Queen's Park for the purpose of opening the same. (4) The cost incurred by the corporation in manufacturing the gas to be supplied free of charge to such of the inhabitants of the borough having premises abutting on the principal streets of the borough as might desire to illuminate the same premises.

It appeared that the expenditure would be about 600*l.* In addition to the borough fund maintained in pursuance of the Municipal Corporations Act 1882 the town council had at its disposal the general district fund, maintained in pursuance of the Blackburn Improvement Act 1882. Any deficiency in the borough fund or the general district fund was made good by a borough rate or a general district rate as the case might require. The town council had also sources of income derived from profits on their gas undertaking, profits on their market undertaking, and rents from farms and houses.

On the 4th June 1887 the following resolutions were duly passed at a meeting of the General Purposes and Paid Officers Committee:

1. That the mayor might be respectfully requested to take such steps as he might deem fitting for the due and proper celebration in the borough of the Jubilee of Her Majesty.

2. That there should be paid to the mayor by way of remuneration for his expenses during the current year, including any special expenses incurred or to be incurred by him in giving effect to the foregoing resolution, the sum of 700*l.*

3. That no payment should be made out of the borough fund for any of the purposes specified in the resolution passed by this committee and the General Purposes (Jubilee) Sub-committee relative to the celebration of Her Majesty's Jubilee, except in so far as such payments should be authorised by law.

This was a motion by the Attorney-General, at the relation of certain burgesses and ratepayers of the borough, to restrain the corporation from applying any part of the borough fund in illuminating the townhall, municipal offices, and market-house, and the Corporation Park at Blackburn, or in paying for a military band, or fireworks, or carriages to be used on the occasion of the Jubilee of Her Majesty's reign.

The material sections of the Municipal Corporations Act 1882 are the following:

Sect. 15, which provides that the mayor may receive such remuneration as the council think reasonable.

Sect. 139. The rents and profits of all corporate land, and the interest, dividends, and annual proceeds of all money, dues, chattels, and valuable securities belonging or payable, to a municipal corporation, or to any member or officer thereof in his corporate capacity, and every fine or penalty for any offence against this Act (except where and as far as the application thereof is otherwise provided for) shall go to the borough fund.

Sect. 140. (1) The borough fund shall be applicable to and charged with the several payments specified in the fifth schedule. (2) The payments specified in part 1 of that schedule may be made without order of the council; those specified in part 2 may not be made without such order. (3) No other payment shall be made out of the borough fund except: (*a*) under the authority of an Act of Parliament; (*b*) by order of the council; or, (*c*) by order of the court of quarter sessions for the borough; (*d*) by order of a justice in pursuance of this Act, or (*e*) in cases in which the court of quarter sessions for a county, or a justice acting in and for a county in the discharge of his judicial duty, might make an order for the payment of money on the treasurer of the county.

Sect. 141. (1) An order of the council for payment of money out of the borough fund shall be signed by three members of the council, and countersigned by the town

(*a*) Reported by G. WELBY KING, Esq., Barrister-at-Law.

clerk. (2) Any such order may be removed into the Queen's Bench Division of the High Court by writ of *certiorari*, and may be wholly or partly disallowed or confirmed on motion and hearing with or without costs according to the judgment and discretion of the court.

Sect. 143. (1) If the borough fund is more than sufficient for the purposes to which it is applicable under this Act, or otherwise by law, the surplus thereof shall be applied, under the direction of the council, for the public benefit of the inhabitants and improvement of the borough.

Sir *Arthur Watson*, Q.C. and *Method* for the motion.—The fund cannot be applied in the manner proposed. The expenditure is not a proper expenditure of trust money which can only be applied for the purposes for which municipal corporations were established:

Municipal Corporations Act 1882, ss. 139, 140, 141, 143;
The Attorney-General v. *Aspinall*, 2 My. & Cr. 613;
The Attorney-General v. *The Vestry of Bermondsey*, 48 L. T. Rep. N. S. 445; 23 Ch. Div. 60.

Romer, Q.C. and *W. D. Rawlins* for the Corporation of Blackburn.

CHITTY, J.—This motion relates to two matters; the first is the application of the borough fund, and the second is the supply of the gas gratis. The proposed application of the borough fund is said to be unlawful, and it is said that the supply of gas gratis is also unlawful. Now, in regard to the gas, which is a subsidiary matter, I will deal with it very shortly. The corporation have vested in them the gas undertaking, and there are many sections and provisions to be found in the elaborate Acts of Parliament relating to this matter. Those Acts of Parliament have not been examined, nor probably could have been examined in court with any great care during this argument; but the result appears to me to be this, that what the corporation by its mayor has sworn to I must accept for the purposes of this action, that there is nothing contained in these Acts of Parliament prohibiting the corporation from supplying gas free of charge. I cannot see that the expenditure of gas by giving it away gratis for the purposes of illumination on the celebration of the Jubilee is likely to bring any charge upon the district fund, and I think there ought to be no injunction on this point. A more important part of the motion is that which relates to the borough fund. It is said on behalf of the Attorney-General that this is an action by him at the relation of certain burgesses. It is said that the intention of the corporation is to apply the borough fund in illuminating the townhall, the municipal offices, the market-place, and other public buildings in Blackburn, in paying military bands, and for fireworks and carriages to be used on the occasion of the Jubilee of Her Majesty. These purposes are said not to be lawful within the Act of Parliament which relates to the borough fund and its application. The corporation, however, meet this motion by saying: "First, we have not applied any part of the borough fund for any such purposes; and secondly, there is no sufficient ground for showing an intention or a threat on our part so to do. Therefore, whatever may be our intention, no injunction ought to be granted, and we ought not to be asked to give an undertaking." An undertaking it is said will only be a sort of sign of triumph, and nothing more, to the parties who are here. Now it is incontestible that no part of the borough fund has yet been applied for any of these purposes. The first material question of fact to be considered is, whether there is that which in point of law—for it is a mixed question of law and fact—amounts to a threat and intention. Now, it is necessary to state shortly some of the resolutions which were come to by various committees of the town council, and I think, against the corporation, that the right view is that the corporation could only speak by the voice of the resolutions. Of course there may be cases brought against the officers of the corporation, and it may be shown that by the things which they have done their intention is to misapply the moneys belonging to the corporation. But when it is a question of imputing an intention to the corporation, it seems to me that the right rule is to see what the corporation, in its corporate capacity, has resolved upon—in fact, what are its resolutions which alone express its intent. And further, that, unless some sort of case of fraud is made out, the resolutions must be taken truly to express what the corporation intended to do, otherwise the court would be pressing the matter unduly against the corporation, because some of the corporators might have been minded at one time to do something which is unlawful. I think it ought to be brought home to the corporation, through its regular acts, such as its resolutions, or a strong case ought to be made against the corporation that the corporation is saying one thing and meaning another. I think there is no ground for coming to the second conclusion on the matter of fact as against the corporation. Therefore I proceed to examine what the corporation and its committee and its council have said they intend to do. A resolution was passed at the General Purposes and Paid Officers Committee of the corporation on the 31st March 1887, and this resolution related to what would be termed generally "Jubilee proceedings," and the ninth resolution was the only resolution which related to the fund out of which the expenses of these proceedings, or any of them, were to be defrayed, and that resolution dealing with only a part of the Jubilee proceedings ends with a statement that the expenses are to be defrayed by the respective committees out of the corporate funds. That is not in itself a resolution binding on the corporation, but it is a resolution as passed by the committee. That is not a resolution passed by the committee in terms that these expenses should be defrayed out of the borough fund. It is part of the corporation's case that they have other funds applicable to purposes of this character—funds not bound by the provisions of the Municipal Corporation Act of 1882, and funds which, according to the Acts of Parliament which regulate them, are free to be disposed of for these purposes. The parties moving had the opportunity of amending their notice of motion so as to make it apply to these other funds, but for reasons which I need not enter into they have been unable to amend their notice of motion, and it is confined to the borough fund. Now that is the only resolution of any sort in force in regard to the funds out of which the proposed expenditure was to be defrayed at the time when the notice of the intention to bring this action was given, and such notice was given on the 26th May. Thereupon, in due course, a meeting of the town council was called, and was held on the 2nd June.

A town council, of course, cannot be got together at two hours' notice, and there appears to me to have been no delay in bringing the town council together. This is the resolution that was then passed. It is headed "Jubilee Celebration," and is as follows: "The town clerk read a notice served upon him by Messrs. Darley and Crossley, solicitors for certain burgesses named therein, of their intention to apply for an injunction to restrain the town council from charging any expenses incurred in celebrating the Jubilee year of the Queen's reign upon the borough fund. Motion made, and question proposed, and resolved, that subject to any directions to be given by the committee hereafter mentioned, any action against the corporation commenced in pursuance of the notice to be defended, and any application for an injunction resisted, and that it be an instruction to the town clerk to take such steps for giving effect to this resolution as he may deem advisable, also that it be referred to the General Purposes, &c., Committee to take into consideration the whole question, and to give such further directions from time to time to the town clerk as they consider expedient, and generally to deal with the whole subject. Also the corporation seal be affixed to any copy of this order." Now upon that it is said that, having the notice of this intended action, the corporation at once insisted on their right, for it must be put as high as that, and that is the meaning of the argument, although it is not quite so expressed, to apply the borough fund for this purpose, I think that is a misreading of the resolution. The whole matter, as is plain upon the face of the resolution, is referred for consideration, and it is subject to the direction which is to be given that the action is to be defended, and, there is no reason why a corporation, being told they are going to do something in an unlawful manner, may not reconsider their position, and, although there may be underlying what had taken place before some intention to apply borough funds, yet it cannot be charged on them because they say they will defend an action in this way that they have determined, or shown a determination, or "threatened and intended," in the technical language of the court, to use the fund in that way. It is proper, on the notice being given, that the corporation should reconsider the matter, and they say they will, and they proceed to reconsider it. The result is, the writ having been issued on the 2nd, and the notice of motion being dated the 3rd, that on the 4th, that is the following day, the General Purposes Committee of the town council, with reference to the Jubilee celebration, passed this resolution: "That it be a recommendation to the town council to adopt and give effect to the following resolutions: namely, first, that the mayor be respectfully requested to take such steps as he may deem fitting for the due and proper celebration in this borough of Her Majesty's Jubilee; secondly, that there be paid to the mayor, by way of remuneration for his expenses during the current year, including any special expenses incurred or be incurred by him in giving effect to the foregoing resolutions, the sum of 700*l.*; thirdly, that no payment be made out of the borough fund for any of the purposes specified in the resolutions passed by this committee and the General Purposes (Jubilee) Sub-committee relative to the celebration of Her Majesty's Jubilee, excepting so far as such payments be authorised by law." That was the recommendation only of this committee, and the recommendation went to the town council. On the 8th June the town council passed resolutions which are, I hold for the purposes of this motion, the operative resolutions of the corporation, and I take it that that which is here expressed is only what the corporation say they intended to do. The town council was advised either at the meeting or otherwise, it is quite immaterial which, not to adopt those resolutions, and it did not adopt them, but it passed resolutions something to the same effect. The first resolution is headed, "Remuneration of the Mayor. Pursuant to section 15, sub-section 4 of the Municipal Corporations, Act 1882, there be paid to the mayor" (who is here named "Mr. Appleby") "by way of remuneration the sum of 700*l.*" The 15th section of the Act of Parliament does, in the terms of sub-sect. 4, enact, that the mayor "may receive such remuneration as the council think reasonable." As an instance, and to my mind a good instance, of the mode in which an Act of Parliament of this kind is framed, the Legislature says that a large body like the town council, subject to the common opinion of the burgesses, may make this remuneration to the mayor. Therefore, in express terms, the Legislature has said that the mayor may receive such remuneration as the council think reasonable; that is to say, they could vote away the corporate property. But that is not likely, and this is part of the fallacy of some of the argument which I have had addressed to me. The Legislature, say the town council, will not do such a thing as that; we leave it in the hands of the town council to vote such remuneration as they may think reasonable, and that remuneration, though on the face of this resolution it does not appear to be in terms directed to be paid out of the borough fund, yet it is a payment which is chargeable (which term, as I have said during the argument, is advisedly used in the 140th section, having reference to the first part of the 5th schedule) upon the borough fund. That resolution has not been impeached, and it may be, I daresay, that many may think that the 700*l.* has been voted to the mayor to enable him to make due provision for the celebration of the Jubilee. But this is a matter I decline to go into. I think the council had the power of passing this vote and charging the borough fund with it. I cannot but say that, upon a public occasion such as this is, perhaps the municipal life of the borough of Blackburn requires something in the way of moderate pageantry. I cannot say that I think this an undue remuneration to the mayor for any expense he may be put to. At any rate I think that resolution is unimpeachable. Then I am told, "But this is doing indirectly what cannot be done directly." Of course, underlying this argument is the assumption that numbers of these things could not have been paid for out of the borough fund. Accepting for a moment that proposition as correct, and that these things could not have been paid for out of the borough fund, it is said that this is doing indirectly what you could not do directly. But I disagree, for the purposes of a case like this, with that mode of attempting to express the law on the subject. There are things which you cannot do at all directly or indirectly; but when it is said that some act has been done

which is a violation of an Act of Parliament, and which it is said is a direct violation, which is a phrase which is not uncommon, the meaning is that it is a violation. There is no such thing in strictness as an evasion of an Act of Parliament, using that term in the proper sense, because, if you can get outside an Act of Parliament, you are not within its provisions. Of course that is not the common sense of what is meant. What is meant is, that what you are doing is substantially within the provisions of the Act, although you may try to colour or gloss it, still what you are doing is within its prohibitions. That, to my mind, is what is prohibited. It does not follow that, because you cannot do a thing in one way, you may not do it in another. It seems to me that the first resolution is unimpeachable standing by itself. I do not think, standing as it does in connection with the next resolution, it is in any way shaken. The next resolution is headed, "Public Rejoicings. Resolved that, pursuant to the recommendations of the General Purposes and Paid Officers Committee, the mayor be respectfully requested to take such steps as he may deem fitting for the due and proper celebration in the borough of Her Majesty's Jubilee." I agree with Sir Arthur Watson's argument, having regard to the form in which that resolution has been put, and I think intentionally put, that the mayor is not under any legal or equitable obligation to apply any part of this 700*l.* towards the Jubilee celebration. He may apply his own money, of which the 700*l.* formed part; but there is no condition attached to the remuneration, and I think that that is a mere request to him to do what not impossibly, and I think I may say not improbably, he will do. So much for these two resolutions. Now I come to the last: "Jubilee rejoicings. Resolved, that no payment be made out of the borough fund for any of the purposes specified in the resolutions passed by the General Purposes and Paid Officers (Jubilee) Sub-committee, and confirmed by this council, relative to the celebration of Her Majesty's Jubilee, except any payment or payments which is or are legally permissible." On that resolution the principal argument in support of the motion has turned. It is said that it shows as against the corporation that previously to this time they had the intention to apply it. It was said that they were asked in so many terms not to apply the borough fund, and the answer they gave is, not that we will do not this thing which you say is a misapplication, but we will not do anything which is illegal. It permits them, therefore, notwithstanding this resolution, to do the thing which the motion seeks to restrain them from doing. I think that is not the right way to read it. I think that up to this time there was nothing sufficient to enable me to attribute to the corporation the intention of applying the borough fund to these purposes which I am still assuming would not be lawful purposes, and I think that they have there stated that the fund is not to be applied for any payment "except any payment or payments which is or are legally permissible." Now, there may be something in those payments which are not illegal. It may be, when the question has to be considered hereafter, that the whole of them can be legally justified; but I think that I am not called upon at the present moment to express any judicial opinion on that. The subject is one which requires some consideration, and it would be hardly fitting in me, on a motion day, when there are other matters to be attended to, to lay down what I consider to be the definite and final law upon the subject; but I will make an observation or two upon the 140th, the 141st, and the 143rd sections of the Act of 1882, for the purpose of showing that the corporation have at least some substantial ground for arguing that some of these payments might be allowed. Part of the argument which I have heard in support of the motion was founded on the old Act of 5 & 6 Will. 4; but though historically that may be of interest, the Act of Parliament to be considered for the present purpose is the Act of 1882. That Act differs materially from the Act of 5 & 6 Will. 4 with reference to the borough fund. I am not going to point out the difference, because that is unnecessary. The 140th section, following the section which shows of what the borough fund is to consist, is divisible into two main parts, and the first is the part which deals with those payments which are not merely proper payments, but payments which are charged or expenses which are charged upon the fund. The other main portion of the 140th section relates to matters to which the fund is applicable without being charged. Now the 140th section begins in this way: "The borough fund shall be applicable to and charged with the several payments specified in the 5th schedule. 2. The payments specified in part 1 of that schedule may be made without order of the council"—that means the town council—"those specified in part 2 may not be made without such order." Those enactments which I have just read form the first main division of this section, and, as I have said, that is an enactment which not only relates to what the borough fund is applicable to, but what is charged on the borough fund. Then there comes in the 3rd subsection, which is a provision with regard to other payments to be made, and that is expressed by means of a negative clause followed by exceptions. The negative clause runs thus: "No other payment shall be made out of the borough fund except"—and then there come five exceptions: the first is "the authority of an Act of Parliament;" the next is, "by order of the council"; the next is "by order of the Court of Quarter Sessions for the borough;" the next is, "by order of the justices in pursuance of this Act," that is the Act of 1882; and the next is, "in cases in which the Court of Quarter Sessions for a county, or a justice acting in and for a county in the discharge of his judicial duty, might make an order for the payment of money on the treasurer of the county." Then there is a saving clause which I need not read. So that, stopping there, there is an enactment which forms what I have called the second main division of this section, excepting from the negative clause, "that no other payment shall be made out of the borough fund," a payment which is made by order of council. I have heard an argument to say that it would be startling that the Act of Parliament should have confided to the town council so large a jurisdiction as to say what payments might be made out of the borough fund in addition to those which are charged; but the observations I have already made apply to this argument. The Legislature appears to have thought that the town council was a body to whom it could intrust certain powers. Then the 141st section runs

thus: "An order of the council for payment of money out of the borough fund shall be signed by three members of the council, and countersigned by the town clerk." There has been no order at the present moment for payment of anything out of the borough fund. The resolutions which I have read are those which might be acted upon, but, before any application for payment pursuant to the resolutions can be made, there must be an order in this form. Now, that power which is intrusted to the council in the 140th section is clearly put under a restriction or check, for the second part of the 141st section runs thus: "Any such order"—that is, any order for payment of money out of the borough fund—"may be removed into the Queen's Bench Division of the High Court by writ of *certiorari*, and may be wholly or partially disallowed or confirmed on motion and hearing with or without costs, according to the judgment and discretion of the court." So that the authority which is apparently given by the 140th section to the council is one which is subject to revision by the Queen's Bench Division. Sect. 143, it was said, ought to be so read as to lead in the result to the striking out of all that part of sect. 140 which follows, including sub-sect. (1). That clause runs thus: "If the borough fund is more than sufficient for the purposes to which it is applicable under that Act, or otherwise by law, the surplus thereof shall be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough." That clause relates only to the surplus which remains after applying it to the purposes to which the borough fund is made applicable in the Act, and one of those purposes is the purpose which has been directed by the order of council, subject to the revision or check which I have mentioned. The result is this, that (though I do not express a final opinion on it) there is a ground at law on the part of the corporation to argue, if the authority (that is to say the council) which Parliament has thought fit to intrust with this power should exercise it, and that exercise should be upheld by the Queen's Bench Division, that the payment would be a good payment, although it may be made for some of these purposes. I am not at all persuaded that the Legislature did not mean that. There may be special exceptional occasions which would justify the application of a reasonable part of the borough fund for purposes such as the purposes now proposed, namely, the celebration of Her Majesty's Jubilee. There may be purposes of this kind which the Court of Queen's Bench, revising the order of the council, would think fit to allow. As it stands, there being that resolution that no part of the borough funds shall be applied except in a lawful manner, I think it is at least questionable whether some moderate reasonable payment for the purposes indicated might not be allowed out of the fund, and I think that is a question well worthy of consideration hereafter. In the result I refuse the motion with regard to the borough fund, because I think the defence at least is made out for the purposes of this motion, that the corporation have not misapplied any part of the borough fund, and have not in any sense sufficient to justify my granting an injunction threatened or intended to do so.

An order was taken by consent to stay all proceedings in the action, and costs were not asked for.

Solicitors: *Bolton, Robbins, Busk,* and *Co.*, agents for *W. E. L. Gaine*, Town Clerk, Blackburn; *Blachford, Riches,* and *Wood*, agents for *Darley* and *Crossley*, Blackburn.

Wednesday, July 27, 1887.

(Before CHITTY, J.)

Re NEWBEGIN; EGGLETON *v.* NEWBEGIN. (*a*)

Poor law—Pauper lunatic—Part maintenance—Lunatic Asylums Act 1853 (16 *&* 17 *Vict. c.* 97), *s.* 104—*Statute of Limitations* (21 *Jac.* 1, *c.* 16).

The guardians of a parish are only entitled to recover six years' arrears in respect of past maintenance of a pauper lunatic.

IN May 1867 Thomas Yeoman Newbegin, a pauper lunatic, was, pursuant to an order for removal, removed from Hanwell Asylum to the Sussex County Asylum at Haywards Heath, and had since that time up to the date of the present application been maintained at the last-mentioned asylum at the cost of the parish of Brighton. A sum of 376*l.* 2*s.* 9*d.* was owing to the guardians in respect of payments for maintenance of the lunatic.

By his will, dated in 1858, the father of the lunatic gave his residuary estate to his three children in equal shares, and by a codicil, dated in 1872, he bequeathed to the lunatic an annuity of 25*l.* The testator died in 1880, leaving his widow and his sons William John Newbegin and the lunatic him surviving. Consequently the lunatic was entitled to the annuity and arrears thereof, to a third of the residue, and a moiety of a third of the residue by reason of the death of the lunatic's sister in her father's lifetime. It appeared that the lunatic's share, without taking the annuity into account, was sufficient to pay the guardians' claims and leave a residue of about 300*l.*

An originating summons having been taken out for the administration of the testator's estate by his executors, the judge in chambers ordered that the guardians should be served with notice that the originating summons had been issued for liberty to pay into court a sufficient sum to answer the annuity given to the lunatic, and also the arrears of the annuity, and also the one-third part of the testator's estate. This notice was served on Nov. 6, 1886.

The question to be decided upon adjourned summons was, whether the guardians' claim for maintenance was limited to six years' arrears, or whether they could claim for the whole period since 1867.

Whitehorne, Q.C. and *Robert F. Norton* for the guardians.—This is an application under the Lunatic Asylums Act 1853. By that Act a statutory duty is cast on the guardians, which they cannot decline, of maintaining the lunatic, and they are entitled to be repaid the sums they have expended for maintenance since 1867:

Re Upfull's Trust, 3 M. & G. 231;
Re Drewery's Trusts, 23 L. T. Rep. N. S. 108;
Re Buckley's Trust, Johns. 700;
The Lunatic Asylums Act 1853, ss. 67, 94, 96, 97, 98, 99, 104;
12 & 13 Vict. c. 103, s. 16.

(*a*) Reported by G. WELBY KING, Esq., Barrister-at-Law.

There is no reason why the court, acting for the benefit of the lunatic, should set up the statute, which would be acting for the benefit of the lunatic's heir-at-law, or next of kin, as the case may be.

Upjohn contra.—The court may pay a lawful debt, that is to say, a debt recoverable by law, but this is not a debt recoverable by law. Sect. 104 creates no right in the guardians, but only gives a remedy. It is the duty of the guardians to have regard to the Statute of Limitations, and that is what was done in *Re Buckley's Trust* (*sup.*), which is the case on which I rely:

Re Weaver, 48 L. T. Rep. N. S. 93; 21 Ch. Div. 615;
Re Webster, 27 Ch. Div. 710;
Re Marman's Trusts, 38 L. T. Rep. N. S. 797; 8 Ch. Div. 256. [A previous application in this case, unreported, was also referred to.]

Whitehorne replied.

CHITTY, J.—This is a case to my mind of some difficulty. The point is this: An executor has funds in his hands which belong to a person who is a lunatic, and who has been in the county asylum for a considerable number of years on the footing of being a pauper, and under his father's will he has lately had an accession of property. The executor desires the direction of the court with regard to the application of the funds he has in his hands belonging to the lunatic. The lunatic has no family, and he is still in the asylum, and the question for decision relates to past maintenance. The guardians of the parish chargeable say that for more than six years they have been applying moneys mentioned in sect. 104 of 6 & 7 Vict. c. 97, and that they are entitled to have now repaid to them, out of the lunatic's fund, the whole of the amount without regard to the Statute of Limitations (21 Jac. 1, c. 16). The question is whether this statute does or does not apply to this case. The exact part of the section on which the question turns is a part which I will read: "If any trustee or other person having the possession, custody, or charge of any property of such lunatic, or if the Governor and Company of the Bank of England, or any other body or person having in their or his hands any stock, interest, dividends or annuity belonging or due to such lunatic, pay any money according to any such order" (I will state what that is in a minute) "or pay any money without any such order, to the guardians of any union or parish, or to any overseer of any parish not in a union or under a board of guardians, or to the treasurer of any county or any other officer of any county authorised to receive the same, to defray the charges paid or incurred by or on behalf of such parish," and the like, "for the examination, bringing before a justice or justices, removal, lodging, maintenance, clothing, medicine, and care of such lunatic, the receipt of the person authorised to receive such money under such order, or of such guardian, overseer, or treasurer or other officer, shall be a good discharge to such trustee, governor and company, or other body or persons as aforesaid." That is in its form a mere permissive enactment. The trustee, and not only the trustee but the other persons in a position which, for the purposes of this enactment, the Legislature considered to be analogous, are allowed to make the payment, and if they do not make the payment then the receipt of the guardians and the other persons here mentioned is a good discharge. But this part of the section cannot be interpreted properly without reading the earlier part, and a question which has been argued before me is with regard to the effect of the previous part of this section. Is this previous part founded on an obligation on the part of the lunatic to make the payments mentioned? Is it the creation of a new statutory liability, or is it the recognition of an old liability? Now I must read the earlier part shortly: "If it appear to any justice authorised to make any order for the maintenance of the lunatic, that the lunatic has an estate, real or personal, applicable to his maintenance more than sufficient to maintain his family, if any, he or they, that is the justices: under an order by their hands, shall direct the overseers or other persons here mentioned to seize so much of any money, and to seize and sell so much of the goods and chattels, and to take and receive so much of the rents and profits of the lands and tenements of such lunatic, or other income of the lunatic as may be necessary, to pay the charges of the examination, bringing before a justice, removal, lodging, maintenance, clothing, medicine and care of such lunatic, accounting for the same to such justice or justices, such charges having been first proved to the satisfaction of the justices, and the amount set forth in the order." It is a power to seize and to seize property to the amount required for the payment of the sum mentioned in the order. Land or real estate is mentioned, but there is no charge upon the corpus of the land, and it appears to me that all that the justices can direct to be seized under this is the property of the lunatic, real and personal, to which the lunatic is entitled not through the medium of any trust, and I think that this part of the section must be read as certainly creating a new remedy. But was it intended merely to recognise a pre-existing liability or not? That is a question of some little difficulty. I think, consistently with the decisions that have been pronounced upon this section, or a section in the repealed Act, which for all practical purposes is equivalent to this, I am bound to hold that this statute recognises a liability on the part of the lunatic to pay for the matters which are here mentioned, which are in the nature of necessaries for the lunatic. In *Re Buckley's Trusts*, Wood, V.C. said that his impression was that he often acted on the authority of *Upfull's Trust*, which was Lord Truro's decision. There may be some doubt whether the justices could make an order actually to seize the stock, or whether the overseers could give anything more than the income of the stock under such an order, but he says: "I think that the Court will be acting for the benefit of the lunatic in paying the debts for which he is liable, and saving him from process under which he might be incarcerated." In that part of his judgment he plainly considered that an action might be brought either on the footing that these were necessaries supplied for the benefit of the lunatic, or that the statute created an obligation to pay. The latter may be, after all, the true view. So that it either stands as a recognition of a pre-existing liability, or the creation of a new liability by statute. But it is a liability, according to this judgment, on which an action might be brought. The decision which I am reading was in 1860, when a man might be thrown into prison for debt, and the grounds on which the Vice-Chancellor proceeds

are that he ought now, being placed in the position of a trustee, to do that which would save the lunatic from being incarcerated for a debt for which he is liable. I have slightly transposed, but I have not altered the sense in the least. Then he goes on: "In order, therefore, to relieve the lunatic from the possibility of an execution against him, the court will apply the corpus of his property in satisfaction of the claims of the petitioners. I apprehend that the court has a discretion at any time to say whether it will exercise this power of dealing with a lunatic's property, or whether it will leave the claimants to their remedy by execution. In cases where the application was to take away the whole of the lunatic's property, the court might prefer to leave the creditors of the lunatic to do their worst; but this is not such a case, and there will be an order as prayed." Throughout that (not in the passage which I first relied on, but throughout the judgment) the Vice-Chancellor takes as his principle that there is a debt for which the lunatic might be sued, and then his reasoning is this: I am now acting in the place of the trustee and, in executing this trust, will do that which I think the trustee ought to do. There is no jurisdiction by this section conferred on the old Court of Chancery which then existed, or on the High Court as it now exists. All that is done is to authorise the trustee to make the payment, and then, says the Vice-Chancellor, I will make the payment executing the trust, because I consider it for the benefit of the lunatic so to do, in order to save him from the process of execution and the other liabilities to which a debtor is liable. Now, I am not at liberty to overrule what the Vice-Chancellor decided in the year 1860, and if he has taken a wrong view of the Act of Parliament it is not for me to say so. I find Bacon, V.C. has held, in *Re Webster*, that the guardians, who had not obtained any order under the first part of the section, are creditors of a deceased lunatic, and entitled to be paid. In my opinion, if I may express it, that is right, that this is either a recognition of a pre-existing liability or a new statutory obligation. Now I come to the exact point. If this is a debt apart from the statute, then it follows, as a matter of course, that the lunatic, appearing as he does now by his guardian *ad litem*, is entitled to set up the statute, and there is no pretence, as was partly suggested in argument, that this court is to administer the lunatic's estate in some such way as to pay all the debts without regard to the question of the Statute of Limitations. A lunatic is entitled now to defend this as if it was an action being brought against him, and that is the view I take of the matter. I stated the exact form at the beginning of this judgment, in which the question arises, but it is substantially this: That the guardians are suing the lunatic. Having made that statement, I say it is obvious that the lunatic can set up the statute, that is on the footing of the section being a recognition of the debt. But if it is a statutory liability created, the statute only creates the liability, and is silent with regard to the point of time. It does not say that this debt or obligation shall be paid at whatever time it accrued, or notwithstanding the general law as to the statute. It appears to me to leave the Statute of James applicable to the case where it would apply. As I have tried to point out at the beginning of this judgment, it does not make it, in terms or in substance, obligatory on the trustees to pay. It is merely permissive. I think, if it is a statutory obligation, the lunatic is entitled to set up the statute, and it appears to me that the case is one in substance like the case of necessaries, and I do not see any substantial distinction, for this purpose, between the case of an infant and the case of a lunatic, so far as the Statute of Limitations is concerned. So much for the section itself. I think the section is silent with regard to the Statute of James, and that it is competent for the lunatic to set it up. That is the conclusion I arrive at on the section, having regard to the authorities. But there would be a most extraordinary anomaly if it were otherwise. I admit it is competent for Parliament to create any number of anomalies if Parliament, in its wisdom, thinks fit, and it may consider, in its superior wisdom, that they are not anomalies. But this would be the result, that if there is what is called a "pauper lunatic" he shall remain liable, nothwithstanding the Statute of Limitations, for any number of years for that which has been spent on him, say ten or twenty years; but if he is an ordinary pauper, that is to say, a pauper who is not lunatic, and he has been in the workhouse for a period of ten years, and then suddenly, as sometimes happens, a large fortune accrues to him, possibly by the death of some unknown relation, he shall be liable to pay for his maintenance for one year, and one year only. That is the plain effect of the 12 & 13 Vict. c. 103, where there is a limitation of one year. In the main Act I have been construing there are two other clauses in which there is a limitation of time imposed, and that is where there is one parish, to put it shortly, which has paid for the maintenance of the lunatic, and the other parish, in the result, is found to be the parish that ought to have paid. In that case there is a limitation of a year, and there is another similar limitation. Thereupon, it is argued that when the statute intended to impose a limitation of time it said so. But, to my mind, that argument is not sound as applied to this statute, because that is a shorter time than the time allowed by the Statute of James, and if I had to decide on the sections that I have just been referring to, namely, the 97th and 98th, and if it had not been for the twelve months' limit, I think I must have held that it was a six years' limitation. Therefore, so far from that being an argument against the conclusion I have arrived at, I think it in some slight degree supports it. The question, I agree, is one of difficulty, involving the construction mainly of section 10 of the Act of Parliament. It is impossible, as I have often heard the late Master of Rolls say, to dogmatise on such a matter, but I have given the best opinion I can, and I think the guardians are not entitled to recover more than six years' arrears.

Solicitors, *Clarke* and *Calkin*, agents for *Clarke* and *Howlett*, Brighton; *Digby* and *Liddle*.

QUEEN'S BENCH DIVISION.

Monday, March 7, 1887.

(Before MATHEW and CAVE, JJ.)

MUNRO (app.) *v.* WATSON (resp.). (*a*)

Municipal law — Borough bye-law — Validity — Prohibition of music in street—5 & 6 Will. 4, c. 76, s. 90.

A bye-law made by the town council of a borough under 5 & 6 Will. 4, c. 76, s. 90, provided that every person who in any street should sound or play upon any musical or noisy instrument, or should sing, recite, or preach in any street without having previously obtained a licence in writing from the mayor; and every person who having obtained such licence should fail to observe or should act contrary to any of the conditions of such licence, should forfeit and pay a sum not exceeding twenty shillings, and not less than one shilling.

Held, that the bye-law was unreasonable and ultra vires and therefore void.

THIS was a case stated by justices for the borough of Ryde, in the county of Southampton, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on a question of law.

The case was, so far as material, as follows:

CASE.

At a court of summary jurisdiction holden at the town hall in the borough of Ryde on the 26th July 1886, an information preferred by Richard Watson (hereinafter called "the respondent") against William Allan Munro (hereinafter called "the appellant") for that on the 22nd July 1886, at High-street, in the said borough, he did unlawfully sing without having previously obtained a licence in writing for that purpose from the mayor of the borough, contrary to the bye-laws of the borough, was heard before us, and the validity of the bye-law under which the offence was stated having been questioned by the appellant, we duly considered the objections raised, and, being of opinion that the said bye-law was legal, we convicted the appellant of the offence with which he was charged.

Upon the hearing of the information it was admitted or proved to our satisfaction as follows:

(*a*) That in pursuance of the Municipal Corporations Act (5 & 6 Will. 4, c. 76), s. 90, the town council of the borough of Ryde, in the year 1869, duly made certain bye-laws which have been in operation since that time, and amongst those bye-laws is the one in question which, is as follows:

> Every person who in any street shall sound or play upon any musical or noisy instrument, or shall sing, recite, or preach in any street without having previously obtained a licence in writing from the mayor; and every person who having obtained such licence shall fail to observe or shall act contrary to any of the conditions of such licence, shall forfeit and pay a sum not exceeding twenty shillings and not less than one shilling.

(*b*) The respondent is a police-constable of the borough, and the appellant is a member of a body of persons calling themselves "The Salvation Army," who have a meeting-house or barracks in the borough. A short time before these proceedings, having applied to the mayor for a licence under the above bye-law, which he declined to give, the army, without such licence, accompanied their parades with singing and playing, after being several times warned by the police that such conduct was contrary to the bye-laws, and on the day named in the information it was proved and admitted that the appellant was singing with others without a licence.

On behalf of the appellant it was contended that the bye-law in question was illegal, inconsistent, unreasonable, and repugnant to the law of England, and consequently such singing without a licence on the part of the appellant was perfectly legal and no offence had been committed.

We, after hearing the evidence adduced on behalf of the respondent, and considering the cases of *Reg.* v. *Powell* (51 L. T. Rep. N. S. 92) and the judgment of Hawkins, J. in the case of *Johnson* v. *The Mayor, &c., of Croydon* (16 Q. B. Div. 709), and being of opinion that the said bye-law was a necessary safeguard against indiscriminate playing and singing in the streets, which if allowed without check would occasion annoyance to the inhabitants and be detrimental to the interests of the borough, and did in fact cause an obstruction in one of the principal thoroughfares, and was likely to cause a breach of the peace, and also being of opinion that the bye-law in question was not unreasonable or *ultra vires*, convicted the appellant as hereinbefore stated.

The question of law upon which this case is stated for the opinion of the court, therefore, is, whether the bye-law in question was and is illegal, unreasonable, and contrary to the law of England.

If the court should be of opinion that the said bye-law is illegal, unreasonable, and *ultra vires*, then the information is to be dismissed, otherwise the conviction is to stand.

Horne Payne, Q.C.—The bye-law is unreasonable and *ultra vires* and therefore void:

Johnson v. *The Mayor, &c., of Croydon*, 16 Q. B. Div. 709.

The case of *Reg.* v. *Powell* (51 L. T. Rep. N. S. 92) is distinguishable, the bye-law in that case only imposing a penalty on persons playing musical instruments in a street after having been required by a resident householder to desist. The cases of *Reg.* v. *The Mayor of Croydon* (*ubi sup.*) and *Everett* v. *Grapes* (3 L. T. Rep. N. S. 669), in which a bye-law entirely prohibiting the keeping of pigs was held to be bad, are both exactly in point. The only distinction between this case and *Reg.* v. *The Mayor of Croydon* (*ubi sup.*) is that the mayor has power here to licence the playing, but it is submitted that the bye-law is not less unreasonable on that account. If the thing prohibited is a nuisance the mayor is permitted by the bye-law to license a nuisance and the bye-law is bad on that account; if it is not a nuisance the bye-law is unreasonable in prohibiting it and therefore bad.

Charles, Q.C. (with him *Bullen*).—It is submitted that this is a proper authority to repose in the hands of the mayor, and that the mayor, having the power to license whatever music may be desirable, the bye-law is reasonable.

MATHEW, J.—I am of opinion that the bye-law is unreasonable. I consider that the permission to the mayor to license such music as he may think fit is an additional objection to the bye-law, instead of making it more reasonable than in the

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

case of *Reg.* v. *The Mayor of Croydon* (*ubi sup.*). I think, therefore, that the conviction must be quashed.

CAVE, J.—I entirely agree. There is no difficulty in drawing up a bye-law which will prevent a nuisance being committed, but in the present case the town council have unfortunately gone far beyond the suppression of nuisances, and extended their bye-law to all kinds of noises, whether nuisances or not, no discretion being given to the justices hearing the case, who must, if the bye-law is good, inflict a fine for the infringement of the bye-law, however musical the sound produced may be. As to the power of the mayor to grant a licence, that part of the bye-law gives him power to legalise a nuisance and stop a thing which is perfectly innocent.

Conviction quashed.

Solicitors for the appellant, *Ranger* and *Burton*.
Solicitors for the respondent, *Fardell* and *Dashwood*.

Monday, May 23, 1887.

(Before COLERIDGE, C.J. and SMITH, J.)

WOODHILL AND ANOTHER (apps.) *v.* THE MAYOR AND CORPORATION OF SUNDERLAND (resps.). (*a*)

Local Government Acts—New street—Part of a new street—Notice to lay out new street and erect buildings abutting thereon—Approval of local authority—Erection of buildings before whole of new street constructed to satisfaction of local authority—38 *&* 39 *Vict. c.* 55, *s.* 150—48 *&* 49 *Vict. c. clxxxiii. s.* 37.

The Sunderland Local Improvement Act 1885 *by sect.* 37 *enacts, that it shall not be lawful for any person, except with the consent of the corporation, to erect or build, or begin to erect or build, any new buildings abutting upon any new street or part of a new street, unless the corporation shall have previously approved of the level and available width of such new street or part of a new street, nor until the carriage way and footway of such new street, or part of a new street, shall have been formed to such a level and of such a width, and constructed and sewered to the satisfaction of the corporation in accordance with sect.* 150 *of the Public Health Act* 1875.

The appellants, who were builders, gave notice to the Sunderland local authority, the respondents, of their intention to lay out a certain new street, the plans for the construction of which were approved by the respondents. They subsequently gave notice that they intended to erect four new houses in that street, the plans of which were submitted to and approved by the respondents. The appellants began to erect these houses abutting upon or fronting that part of the new street which had been sewered, levelled, paved, metalled, flagged, and channelled to the satisfaction of the respondents; but the whole of the new street had not been constructed and made good to the satisfaction of the respondents within sect 37 *of the Sunderland Local Improvement Act* 1885. *The appellants were summoned in respect of the infringement of that section, and were fined. They appealed.*

Held, on appeal, that the conviction was right, and that, as the appellants had given notice to lay out the whole of a new street, the urban authority under their local Act, were entitled to withhold their consent to the erection of any house or building abutting on the new street unless the whole of the new street were constructed and sewered to their satisfaction.

THIS was a case stated by justices under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49.

On the 29th Nov. 1886 the appellants were convicted and fined on an information charging them with having between the 22nd Sept. and the 20th Oct. 1886 unlawfully and without the consent of the respondents erected or built, or begun to erect or build, a new building abutting upon a new street, or part of a new street, before the carriage-way and footway of such new street, or part of a new street, had been formed to such a level and of such a width, and constructed and sewered to the satisfaction of the said corporation in accordance with sect. 15 of the Public Health Act 1875, contrary to sect. 37 of the Borough of Sunderland Act 1885.

At the hearing of the said information the following material facts were proved or admitted:—

2. The appellants were builders carrying on business at Sunderland. The respondents were the corporation and the urban authority of the urban district of the borough of Sunderland.

3. The respondents, as such urban authority, in pursuance of sect. 157 of the Public Health Act 1875, had made bye-laws with respect to the matter in such section mentioned, which had been confirmed by the Local Government Board.

5. Punshon-street, named in the summons and information, was a new street forming part of an estate in Sunderland called the High Barnes estate, recently laid out for building upon.

6. On the 27th March 1885 the owner of that estate, by William Milburn, his architect, gave to the respondents notice in writing of his intention to lay out certain new streets including Punshon-street, and at the same time deposited at the office of the surveyor of the respondents a plan of such streets, which was approved of by the respondents on the 1st April 1885.

8. On the 28th Jan. 1886 the appellants, by the said Milburn, their architect, gave to the respondents notice of their intention to erect four new buildings in the said Punshon-street, and submitted to them for their approval a plan showing four houses to be erected by them on the east side of such street. This plan was approved of by the respondents.

9. On the 2nd Feb. 1886 the surveyor of the respondents wrote to the appellants to the effect that the approval of the plan was subject to a compliance with the bye-laws and building regulations, and particularly sect. 37 of the Borough of Sunderland Act 1885, enacting that the streets were to be paved, flagged, &c., prior to the commencement of building operations.

10. On the 26th May 1886 the said Milburn left at the office of the surveyor of the respondents a plan, which showed portions of paving proposed to be done in Punshon-street, to the extent of the frontage of six sites. The respondents' surveyor wrote back at once to Milburn, to inform him that the whole street, or complete sections of the same, must be done in accordance with sect. 37 of the Borough of Sunderland Act 1885.

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

11. During the month of June 1886 the carriage-way of Punshon-street was paved to the extent of six sites only, and the whole of the said street was sewered.

12. On the 22nd July 1886 the appellants gave the borough surveyor the following notice:

To the Borough Engineer.—We hereby give you notice that, at the expiration of two days from this date, we intend to commence and build four houses situate in Punshon-street, in the said borough, and to the construction of which the said urban sanitary authority have signified their approval.—WOODHILL and KIRTLEY.

To this the borough surveyor replied to the effect that until sect. 37 of the Borough of Sunderland Act 1885 had been fully complied with, building operations must not be commenced.

13. During Aug. 1886 the east side of the said street was flagged to the extent of four sites only, such flagging and the paving to the extent of six sites only.

14. On the 22nd Sept. 1886 no buildings had been commenced in Punshon-street.

15. On the 20th Oct. 1886 the appellants were proceeding with the erection of the houses in question, and the walls were then five feet high. The consent of the respondents to the erection of such houses had not been obtained. Except as before mentioned the carriage-way and footway of Punshon-street had not been formed. The house in question abuts upon Punshon-street where the carriage-way is paved and the footway flagged as previously mentioned.

16. It was contended, on behalf of the appellants, that inasmuch as the carriage-way and footway of that part of Punshon-street which actually adjoined the building in question had been formed and sewered, the section had been complied with; whilst on behalf of the respondents it was argued that it was necessary under the section that there should have been formed the carriage-way and footway of such street, or such part of a street, as had been previously approved of by the corporation, and that, as the corporation had in this instance only approved of the whole street according to the plan submitted to them, it was necessary that the whole street should have been formed and constructed; and it was pointed out that, if the other construction were adopted, and persons were at liberty to build at any parts of a street, previously paving and flagging only the parts of the street immediately adjoining their buildings, and leaving intervening portions of the carriage-way and footway unformed, the object of the section, which it was contended was to provide for a new street being constructed and sewered before any buildings were erected therein, as distinguished from sect. 150 of the Public Health Act 1875, which only enabled the authority to compel such construction and sewerage in a street where buildings had been previously erected, would be entirely defeated.

17. The justices were of opinion that the appellants had not complied with sect. 37 of the Borough of Sunderland Act 1885, and they accordingly convicted them both of the offence charged in the summons, and adjudged them each to pay a fine of twenty shillings and costs.

The question for the opinion of the court was, whether the appellants had, under the circumstances above set out, acted in contravention of sect. 37 of the Borough of Sunderland Act 1885.

If the court were of opinion that the appellants had contravened the said section, the convictions were to stand. If the court were of a contrary opinion, the convictions were to be quashed.

By 48 & 49 Vict. c. clxxxiii. s. 37:

It shall not be lawful for any person, except with the consent of the corporation, to erect or build or to begin to erect or build any new building abutting upon any new street or part of a new street, unless the corporation shall have previously approved of the level and available width of such new street or part of a new street, nor until the carriage-way and footway of such new street or part of a new street shall have been formed to such a level, and of such a width, and constructed and sewered to the satisfaction of the corporation in accordance with sect 150 of the Public Health Act 1875, and any person offending against this enactment shall be liable for each offence to a penalty not exceeding twenty pounds.

Manisty for the appellants.—The question here is whether, under the provisions of sect. 37 of the local Act of the respondents, the owner of a particular site in a new street within their jurisdiction is entitled to build a house, or houses, abutting upon, or fronting, that part of the new street as soon as such portion has been constructed to the satisfaction of the local authority within the meaning of sect. 150 of the Public Health Act 1875, or must wait until the whole of such new street has been constructed to the satisfaction of the local authority before he can begin to build at all. It is contended on behalf of the appellants that the first alternative is the proper construction of the section. Sect. 37 of the private Act deals with two classes of persons; first, those who propose to lay out a new street, and next those who propose to erect buildings in such new street. The buildings abutting upon the new street and the new street itself are to be constructed contemporaneously, that is, the building is not to be erected until such part of the new street as it fronts has been properly constructed. This contention is borne out by sect. 150 of the Public Health Act 1875. Sect. 37 was framed to meet the case of buildings being erected before any part of a new street has been properly constructed, for in such a case the local authority would have to give to the owning or occupying frontagers, under the Public Health Act 1875, notice to execute the works for the proper construction of the new street, and if the notice were disregarded they would have to go and do the works themselves. [SMITH, J. referred to *Robinson* v. *Local Board of Barton*, 47 L. T. Rep. N. S. 286; 21 Ch. Div. 621.] That portion of the projected street opposite to which houses are begun to be erected becomes a new street. The contention of the other side, that the whole of the projected new roadway must be finally constructed before building operations can be begun, is unreasonable and not necessary to the object of the section, that is, to prevent houses being build without a properly constructed street in front of them. It is admitted that where there are houses the street must be properly constructed, and that satisfies the intention of the Act. A bye-law of the respondents of a very similar character to their present contention has been held unreasonable:

Rudland v. *Mayor and Corporation of Sunderland*, 52 L. T. Rep. N. S. 617.

The present clause, called the Hastings clause, is inserted usually in local Acts of this kind, but was never intended to have such a sweeping force as is sought to be put upon it.

Charles, Q.C. (*Atherley Jones* with him) for the respondents.—This clause was inserted to obviate the very mischief of the present case. The building owners sent in plans of a new street, which the respondents sanctioned them to make; and they are now liable under sect. 150 of the Public Health Act 1875 to do the required work under that section. If a building owner proposes to lay out a whole new street, the whole street must be properly laid out and constructed by him. If the contention of the appellants be right, all that such building owner need do is to sewer, flag, channel, and pave opposite to his house, and there would be a new street, and the local authority would have no control over the making of such new street. The contention must go to the length of saying that a small piece of sewering is sufficient to enable the building owner to erect a house opposite to it. The clear object of sect. 37 is to enable the local authority to sanction the building of houses along less than the whole of a new street, but that sanction they can withhold; and until it is granted the building owner must wait. There is nothing in *The Corporation of Portsmouth* v. *Smith* (13 Q. B. Div. 184) contrary to the doctrine laid down in *Robinson* v. *Local Board of Barton* (*ubi sup.*). In the former case (p. 195) Brett, M.R. made the following remarks as to the meaning of the word "street": "It has been contended that the Asylum-road is not a 'street,' but it is a 'thoroughfare.' It is true that Asylum-road is not a 'street,' if a 'street' means a way bounded on either side by houses, and we are bound by the finding of the jury to take it that Asylum-road was not a 'street' in the popular sense of the word. We must consider, however, whether it is a 'street' within the meaning of the statute 10 & 11 Vict. c. 34. The interpretation clauses referred to during the argument provide that the word 'street' shall not extend to and include any road. The intention of the clauses is, that in construing the Acts, the word, in addition to its ordinary meaning, shall bear the meanings mentioned in the section; the words 'shall include' mean 'shall have the following meanings in addition to its popular meaning.' I was a member of the Court of Appeal when *Robinson* v. *Local Board for Barton* (21 Ch. Div. 621) was decided; I find I expressed myself in the following terms: 'I think that the first remark to be made on the Act of Parliament is, that it certainly deals with at least two different kinds of streets. One is a street which nobody in ordinary language without the help of an Act of Parliament would have called a street, and the other is a street which everybody without the aid of an Act of Parliament would have called a street. The interpretation clause includes under the word "street" things which one in ordinary parlance would call streets, as for instance, a highway which has not a house on either side of it. But where there is a certain number of houses on each side of a thoroughfare or a roadway, whichever you please to call it, everybody without the assistance of any Act of Parliament would call that thing a street, and call it nothing else. Therefore there are two totally different kinds of streets mentioned in the Act.'" The decision of the Court of Appeal was reversed by the House of Lords (8 App. Cas. 798); but in dealing with the case the law lords did not object to the decision of the Court of Appeal as to the meaning of the word "street."

Manisty in reply.—In sect. 37 the words "part of new street" are equivalent to "portion of new street approved of by the corporation." The governing words in the section are "abutting upon," not "approved of."

COLERIDGE, C.J.—I have no doubt in this case, and think that the meaning of sect. 37 of the Sunderland Local Act is clear. I do not mean to say that the counsel for the appellants has not presented a good argument; I think he has, and it was one which called for an answer from the counsel for the respondents; but that answer has been given, and it makes sense of the Act, and is within the words of the section. Of course, a construction that makes sense is not necessarily right. In my opinion the matter is governed by the frame of the notice which is given by the person who is seeking to lay out a new street or part of a new street. In the case before us the notice was given by the appellants to the respondents to the effect that they intended to lay out certain new streets, including Punshon-street, the street in question. The respondents see and approve of the plans of the new streets. The appellants later on gave notice to the respondents that they are desirous of building four new houses in Punshon-street; the respondents see the plans and approve of them, but notify that their approval was subject to a compliance with their bye-laws and building regulations, and especially sect. 37 of their local Act, by which the streets are to be paved, flagged, &c., prior to the commencement of building operations. It seems to me that that section exhausts the case. First of all, the appellants give notice of their intention to lay out a new street and erect certain houses abutting on it. The corporation approve of the plans of the houses, and give leave to the appellants to erect them after they had laid out and constructed the new street to their satisfaction. The appellants failed to comply with that requirement, and were convicted in respect of a breach of the bye-law. I hold the conviction was right.

SMITH, J.—I am of the same opinion. On the 27th March 1885 the appellants gave notice to the respondents that they proposed to lay out as a new street that which is now Punshon-street. They did not intend to lay it out as part of a new street, but as a whole street. On the 22nd July 1886 they gave a further notice that they were going to erect four new houses in that street. They commenced to build them, but the respondents stopped them from continuing to build on the ground that the provisions of sect. 37 of their local Act had not been complied with. The question for the court is, whether the counsel for the appellants or for the respondents is right in his reading of this section. The appellants did not ask to lay out part of a new street, but the whole of it. They might have asked to lay out a part, and afterwards to build houses abutting on such part. The words of the 37th section are clear. [His Lordship here read them.] They apply to the facts of this particular case. The appellants gave notice of their intention to build certain houses abutting on this new street; but sect. 37 empowers the local authority to withhold their consent to the erection of buildings abutting on such street until it should have been properly constructed

and made good to their satisfaction. If a person asks to lay out only part of a new street, I read the section to mean that it shall not be lawful for him to erect houses abutting on such part without the leave of the local authority, unless that portion of the new street opposite to the proposed houses shall be properly constructed within sect. 150 of the Public Health Act 1875 to their satisfaction. In my judgment that is the true construction of the 37th section of the local Act, and I agree with my Lord that this conviction ought to be affirmed.

Conviction affirmed.

Solicitors for the appellants, *Hickin* and *Fox*, for *J.* and *J. W. Robinson*, Sunderland.

Solicitors for the respondents, *Johnson* and *Weatheralls*, for *Bowey* and *Brewis*, Sunderland.

Wednesday, May 25, 1887.

(Before POLLOCK, B. and FIELD, J.)

JONES (app.) *v.* PARRY (resp.). (*a*)

Public Health Act 1875 (38 *&* 39 *Vict. c.* 55)—*Municipal bye-law—Open space at rear of dwelling-house—Distance across—Opposite property.*

The L. Improvement Commissioners made a bye-law that every person erecting a new building to be used as a dwelling-house should provide in the rear thereof an open space exclusively belonging thereto, to the extent at least of 150 *square feet, free from any erection thereon above the level of the ground, and should cause the distance across such open space between every such building and the opposite property at the rear to be* 10 *feet at least, and if such building be* 25 *feet in height should cause such distance across to be at least* 20 *feet. An information being preferred against P. for a breach of the bye-law, it was proved that he had erected within the jurisdiction of the commissioners a new building to be used as a dwelling-house,* 25 *feet in height; that there was in the rear of the building an open space exclusively belonging thereto to the extent of* 700 *square feet; that the distance across such open space between such building and the boundary of the opposite property at the rear thereof, including the width of the street which divided the building from the opposite property, was* 52 *feet; that the land exclusively belonging to such building was bounded in the rear by a public street, and that the distance across the open space between the building and the public street was* 8 *feet.*

Held, on case stated, that, on the true construction of the bye-law, the public street was the "opposite property," and that, as P. had not caused the distance across the open space between his building and the opposite property to be at least 20 *feet, he had committed a breach of the bye-law.*

THIS was a case stated by justices for the opinion of the court.

The case was, so far as material, as follows:—

1. At a petty sessions holden at the justices' room, Llandudno, in the county of Carnarvon, on the 22nd Nov. 1886, an information preferred on the 17th Nov. 1886 by Owen Jones, Inspector of Nuisances for the Llandudno Improvement Commissioners, who are the urban sanitary authority of the district (hereinafter called the appellant), against Thomas Parry, of Llandudno, builder (hereinafter called the respondent), charging him for that he did on the 31st Aug. 1886 erect a new building, to be used as a dwelling-house, in Caroline-street, Llandudno, which is 25 feet in height from the level of the ground, and at the rear thereof did leave an open space, exclusively belonging to such dwelling-house, which open space is of a less distance across than 20 feet, contrary to the bye-law in that behalf duly made, confirmed, and published by the commissioners for the said town of Llandudno, and which bye-law was at the time of the commission of the said offence and is still in force, was heard and determined.

2. The bye-law is as follows:

Every person erecting a new building to be used as a dwelling-house shall provide in the rear thereof an open space exclusively belonging thereto to the extent at least of 150 square feet, free from any erection thereon above the level of the ground. And he shall cause the distance across such open space between every such building and the opposite property at the rear to be 10 feet at least. If such building be 15 feet in height above the level of such open space he shall cause the distance across to be at least 15 feet. If such building be 25 feet in height he shall cause such distance across to be at least 20 feet.

3. Upon the hearing of the information it was proved that the respondent, on the 31st Aug. 1886, and since the making of the above bye-law, and while it was in full force, had erected in Caroline-street, Llandudno, within the jurisdiction of the said improvement commissioners, a new building to be used as a dwelling-house which was 25 feet in height from the level of the ground at the rear thereof; that there was in the rear of the building an open space exclusively belonging thereto to the extent of 700 square feet; that the distance across such open space between such building and the boundary of the opposite property at the rear thereof, including the width of the street dividing the building from the opposite property, was 52 feet 3 inches; that the land exclusively belonging to such building was bounded in the rear by a public street; and that the distance across the open space between such public street and the building was 8 feet 1 inch.

4. Upon the part of the appellant it was contended that, upon the true construction of the bye-law, the whole of the open space across which the distance of 20 feet should be measured, must be the exclusive property of the respondent, and that the appellant was entitled to require that there should be a clear space of at least 20 feet between any and all parts of the rear of the building and the boundary of the land abutting upon the said street.

5. On the part of the respondent it was contended that the distance of 20 feet should be measured from the rear of the building across the open space in the rear thereof, and across the street adjoining thereon, to the opposite property, and that, as the distance from every part of his building, if so measured, exceeded 20 feet, there had been a sufficient compliance with the bye-law.

The justices being of opinion that this latter was the correct interpretation of the bye-law, dismissed the information.

The question of law for the opinion of this court was, whether, under the circumstances, the information was properly dismissed. If the court should be of opinion that the contention of the

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

respondent was right, then their decision was to stand; but if the court should be of opinion that the contention of the appellant was right, then the information was to be remitted to them for the purpose of enabling them to impose such penalty as they should think fit.

R. S. Wright for the appellant.—The whole of the open space across which the distance of 20 feet is, according to the true construction of the bye-law, to be measured, must be the property of the owner, and he is not entitled to measure in the street in order to make up the distance, otherwise the owner of the property on the other side would be entitled to do the same, and the bye-law would be defeated. The object of the bye-law is to provide a space of 40 feet between building and building, and if the street can be measured in, this object would not be attained, since, in the case of a street 20 feet wide, the owners on either side could build up to the line of the street. [He was stopped by the Court.]

Bigham, Q.C. (with him *E. H. Lloyd*).—The respondent has in this case complied with the bye-law. The object of the bye-law is to provide an open space, and it is immaterial whether the open space is a street and belongs to the public or is private property. It appears on the case that as a fact a distance of 20 feet has been left between the respondent's building and the opposite property. [FIELD, J.—Is not the street the opposite property in this case?] The property contemplated is a property having, or likely to have, buildings upon it. The 157th section of the Public Health Act 1875 (38 & 39 Vict. c. 55), in pursuance of which this bye-law is made, empowers it to be made for the purpose of providing a sufficiency of space about buildings to secure a free circulation of air. If the appellant's construction of the bye-law is the true construction, owners of property would have to set back their buildings 20 feet, even though the adjoining property might be a very large open space incapable of being built upon.

POLLOCK, B.—I quite agree with Mr. Bigham that if we once consent to depart from the words of the bye-law, and argue the matter upon its own merits, there is much to be said in favour of the respondent. But that is a course which we are not at liberty to take. The words of the bye-law are that "every person erecting a new building to be used as a dwelling-house shall provide in the rear thereof an open space exclusively belonging thereto to the extent at least of 150 square feet free from any erection thereon above the level of the ground, and he shall cause the distance across such open space between every such building and the opposite property at the rear to be 10 feet at least if such building be 15 feet in height above the level of such open space, and if such building be 25 feet in height he shall cause such distance across to be at least 20 feet." The words "building" and "dwelling-house" and "property" are used, and a space is described between the building and the opposite property. Now, what is the meaning of the word "property" in the ordinary sense? Mr. Bigham contends that it means in this bye-law "property which is capable of being built upon;" but we do not usually, when we are asked whose property a piece of ground is, reply that it is nobody's property because there is no house upon it. The bye-law has two objects. It is intended, in the first place, to provide that there shall be a certain area of open space in the rear of every dwelling-house; and, in the second place, to prevent any person from bringing, under any circumstances, any building, however small, up to the edge of his property. If we place upon the bye-law the construction contended for by the respondent, these objects would be defeated. I therefore think that the justices were wrong in dismissing this information, and that the case must be remitted to them to impose a penalty.

FIELD, J.—I am sorry to be compelled to make an order involving the demolition of a building which has been erected, but I am bound to construe this bye-law according to the received principles of construction. This bye-law deals with buildings to be used as dwelling-houses—that is, as places for people to live in—and it says that there shall be provided in the rear of such buildings an open space of a certain area exclusively belonging thereto. It then proceeds to provide for the free circulation of air through the open space, and, in order that nothing may interfere with this, it says that the distance across such open space shall be a fixed number of feet, varying with the height of the building, and this distance is to be measured between such building and the opposite property in the rear. In this case the respondent has not caused this distance to be left, and contends that, because the opposite property in the rear happens to be a street, he is not bound to do so. In my judgment, it makes no difference that the public have a right of way over the opposite property, and I therefore think that the case must be remitted for the justices to convict, and that the respondent ought to pay the costs of these proceedings.

Solicitors for the appellant, *Belfrage* and *Co.*, for *R. S. Chamberlain*, Llandudno.

Solicitors for the respondents, *Finney, Thomas*, ad *Co.* or *Louis* and *Co.* Ruthin.

Monday, June 13, 1887.

(Before DAY and WILLS, JJ.)

REG. *v.* HALL AND ANOTHER AND GILLESPIE. (*a*)

Bastardy order — Jurisdiction of justices — Dismissal of application on the merits—Res judicata —7 & 8 Vict. c. 101, *s.* 2.

The mother of a bastard child, whose application at petty sessions for a summons against the putative father are dismissed, may within twelve months of the birth of the child renew such application any number of times; and a dismissal on the merits of an application is no bar to the jurisdiction of the justices to entertain a fresh application.

THIS was an application to make absolute a rule *nisi* for a *mandamus* to certain justices of the county of Durham to hear and determine certain bastardy proceedings brought by the mother of a bastard child against the putative father. The justices had refused to entertain her application on the ground that the matter was *res judicata*.

It appeared from the affidavits filed by the applicant and the justices that in Aug. 1886 the

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

applicant obtained a bastardy summons against the putative father of her child, and that subsequently both the parties attended the defendant Hall and another justice, and that the summons was dismissed on the ground of the insufficiency of the evidence.

The applicant having obtained further corroborative evidence was granted a further summons against the putative father, which was heard on the 8th March 1887 before Pattinson the other defendant and the said Hall, on the merits and dismissed.

On the 15th March 1887 the applicant again attended before the said Hall, and applied for a bastardy summons against the putative father of her child on the ground that she had further corroborative evidence. But the magistrate was of opinion that, under the circumstances of the case, the matter was *res judicata*, and that he had no jurisdiction to issue a third summons.

The applicant obtained a rule *nisi* for a *mandamus* to the justices to hear and determine the matter of her application.

By 7 & 8 Vict. c. 101, s. 2:

Any single woman who may be with child, or who may be delivered of a bastard child . . . may either before the birth, or at any time within twelve months from the birth of such child . . . make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of such child.

J. Lawson Walton in support of the rule.—This rule ought to be made absolute. The mother of a bastard child is within the twelve months from the birth of her child entitled to make any number of applications in bastardy against the putative father, if she has been unsuccessful in obtaining an order against him. Of course it does not follow that she will obtain an order by making these repeated applications:

Reg. v. *Gaunt*, 16 L. T. Rep. N. S. 379; L. Rep. 2 Q. B. 466.

The distinction has been drawn between the decision of magistrates in petty sessions in bastardy matters and that of quarter sessions on appeal, which is final:

Reg. v. *Glynne*, 26 L. T. Rep. N. S. 61; L. Rep. 7 Q. B. 16.

The woman's affidavit states, that on the third occasion she was prepared with fresh evidence, and she was entitled to her summons.

By the COURT.—The rule for this *mandamus* must be made absolute.

Rule for mandamus granted.

Solicitors for the applicant, *A. Abrams* and *Co.*, for *Newlands* and *Newlands*, Newcastle-upon-Tyne.

Monday, June 13, 1887.

(Before Lord COLERIDGE, C.J. and DENMAN, J.)

REG. *v* THE LORD MAYOR OF LONDON AND BROWN. (*a*)

Summary Jurisdiction Act 1884 (47 *&* 48 *Vict. c.* 43), *ss. 7 and* 10—*Court of summary jurisdiction—Power to state case—Proceedings for recovery of sewers rate.*

A special case under the 33*rd section of the Summary Jurisdiction Act* 1879 (42 *&* 43 *Vict. c.* 49), *may, by the operation of the* 7*th section of the Summary Jurisdiction Act* 1884 (47 *&* 48 *Vict. c.* 43), *and notwithstanding the* 10*th section of that Act be stated by a justice sitting to hear a proceeding for the recovery of a sewers rate under the* 194*th section of the City of London Sewers Act* 1848 (11 *&* 12 *Vict. c. clxiii.*).

THIS was a rule calling upon the Lord Mayor of the City of London and one Brown, a collector of rates to the Commissioners of Sewers of the City of London, to show cause why the Lord Mayor should not state a case for the opinion of the court upon a point of law which arose before him upon the hearing of certain proceedings taken against the applicant under the 194th section of the City of London Sewers Act 1848 (11 & 12 Vict. c. clxiii.) by the Commissioners of Sewers to recover a rate levied by them under the 169th section of the same Act.

It appeared that upon the hearing of these proceedings a question was raised, under the 206th section of the Act, as to whether the production of the rate-books alone was a sufficient evidence of occupation, and the applicant having, on the question being decided against him, applied to the Lord Mayor to state a case upon the point for the opinion of the Queen's Bench Division, the Lord Mayor refused to do so on the ground that he had not jurisdiction.

The applicant thereupon applied for and obtained a rule calling upon the Lord Mayor to show cause why a writ of *mandamus* should not issue commanding him to state a case.

The Summary Jurisdiction Act 1884 (47 & 48 Vict. c. 43) provides as follows:

7. Whereas by section fifty of the Summary Jurisdiction Act 1879 it is enacted that the expression "court of summary jurisdiction" shall in that Act and any future Act mean "any justice or justices of the peace or other magistrate by whatever name called to whom jurisdiction is given by or who is or are authorised to act under the Summary Jurisdiction Acts" or any of such Acts; and whereas doubts have arisen as to whether the said section extends to such justice, justices, or magistrate when acting under some Act other than the Summary Jurisdiction Acts, and it is expedient to remove such doubts: Be it therefore enacted as follows:

It is hereby declared that the above-recited definition of court of summary jurisdiction in section fifty of the Summary Jurisdiction Act 1879, includes such justice, justices, or magistrate, as therein mentioned, whether acting under the Summary Jurisdiction Acts or any of them, or by virtue of his or their commission or by the common law.

10. Nothing in this Act shall alter the procedure for the recovery of or any remedy for the nonpayment of any poor rate, or of any rate or sum the payment of which is not adjudged by the conviction or order of a court of summary jurisdiction.

Bodkin, on behalf of the Lord Mayor, showed cause against the rule. He cited

Ex parte May, 2 B. & S. 426; 31 L. J. 161, M. C.;
Sweetman v. *Guest*, 18 L. T. Rep. N. S. 49; L. Rep. 3 Q. B. 262;
Wheeler v. *Brimington*, 2 L. T. Rep. N. S. 171; 29 L. J. 175, M. C.;
Rochdale Building Society v. *Corporation of Rochdale*, 51 J. P. 134;
Mogg v. *The Overseers of Yatton*, 6 Q. B. Div. 10;
The Sandgate Local Board v. *Pledge*, 52 L. T. Rep. N. S. 546; 14 Q. B. Div. 730;
Reg. v. *Price*, 42 L. T. Rep. N. S. 439; 49 L. J. 40, M. C.

[DENMAN, J.—The decision in *Reg.* v *Price* (*ubi sup.*), to the effect that magistrates in issuing

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

warrants of distress for poor rates do not sit as a court of summary jurisdiction under 11 & 12 Vict. c. 43, seems to be entirely in your favour, and it is apparent from the judgment of Smith, J., in *The Sandgate Local Board* v. *Pledge* (*ubi sup.*), that that case does not conflict with it. The only question, therefore, is, whether *Reg.* v *Price* has been affected by any subsequent statutory enactment.] The only Act which can be said to have such an effect is the Summary Jurisdiction Act 1884 (47 & 48 Vict. c. 43), which by the 7th section declares that the definition of court of summary jurisdiction in the Summary Jurisdiction Act 1879 includes justices, whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act; but it is submitted that that section does not apply to the present case, because the 10th section expressly excepts it from its operation. That section provides that nothing in the Act shall alter the procedure for the recovery of any rate or sum the payment of which is not adjudged by the conviction or order of a court of summary jurisdiction. [DENMAN, J.—Does that mean a court of summary jurisdiction as defined by former Acts, or as enlarged by the Act of 1884?] It means a court of summary jurisdiction in the ordinary sense, not as specially enlarged for the Act of 1879. [DENMAN, J.—Does a conditional power to state a case "alter the procedure" for the recovery of a rate?] *Reg.* v. *Price* decided that magistrates in issuing warrants of distress for poor rates are not within the Act of 1879. [DENMAN, J.—Does it not rather decide that they were not within the Act of 1879 until the Act of 1884 was passed?] To cause a justice to sit as an open court of summary jurisdiction instead of as a simple justice is an alteration of procedure within the meaning of the 10th section of the Act of 1884.

H. Stuart Sankey, for the Commissioners of Sewers of the City of London, also showed cause against the rule.

Cluer for the applicant. — There is on the affidavits a point of law suitable for the decision of this court, and similar to that decided in *Reg.* v. *Bradshaw* (29 L. J. 176, M. C.), and under the 7th section of the Act of 1884 the Lord Mayor had power to state a case for the opinion of the court.

Lord COLERIDGE, C.J. — In this case I understand that the Lord Mayor was asked to state a case for the opinion of this court, and that he declined to do so, not because he had any objection to that course, but because it appeared to him that he had no jurisdiction to do so. If the case of *Reg.* v. *Price* (42 L. T. Rep. N. S. 439; 49 L. J. 49, M. C.) was cited to him, I do not wonder that he felt a difficulty as to his right, and that he bowed to that decision. That case was, without doubt, properly decided on the state of the law then in existence. The question there was, whether a justice of the peace sitting to issue a warrant of distress for the recovery of poor rate was a court of summary jurisdiction within the meaning of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49), and it was held that he was not, and that the provisions of that Act in no way affected or applied to proceedings for the recovery of poor rates. As the law then stood, I think that it was perfectly clear that that was so. But since then the Legislature has passed an Act (the Summary Jurisdiction Act 1884, 47 & 48 Vict. c. 43) for the purpose of bringing justices when acting under some Act other than the Summary Jurisdiction Acts within the scope of the Summary Jurisdiction Act 1879. But the Lord Mayor still hesitates as to whether he has power to state a case when acting under the 194th section of the City of London Sewers Act 1848 (11 & 12 Vict. c. clxiii.), the section which provides for the recovery of rates made under the 169th section of that Act. The question, therefore, which we have to decide is, whether the new Act has brought him, when acting in that capacity, within the provisions of the Summary Jurisdiction Act 1879. What, then, are those provisions? The 7th section provides that, "whereas by sect. 50 of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) it is enacted that the expression 'court of summary jurisdiction' shall in that Act and any future Act mean "any justice or justices of the peace or other magistrate by whatever name called to whom jurisdiction is given by or who is or are authorised to act under the Summary Jurisdiction Acts or any of such Acts, and whereas doubts have arisen as to whether the said section extends to such justice, justices, or magistrate when acting under some Act other than the Summary Jurisdiction Acts, and it is expedient to remove such doubts; it is hereby declared that the above-recited definition of court of summary jurisdiction in the 50th section of the Summary Jurisdiction Act 1879 includes such justice, justices, or magistrate as therein mentioned, whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act, or by virtue of his or their commission or by the common law." Then the 10th section provides that "nothing in this Act shall alter the procedure for the recovery of or any remedy for the nonpayment of any poor rate, or of any rate or sum the payment of which is not adjudged by the conviction or order of a court of summary jurisdiction." I do not think that an application to state a case for the opinion of this court is any part of the procedure for the recovery of a rate within the meaning of the 10th section. It seems to me, therefore, that the Lord Mayor has power to state a case, and that this rule must be made absolute.

DENMAN, J.—It is quite plain that the point which was raised before the Lord Mayor in these proceedings, viz., whether the production of the rate-books alone was, under the 206th section of the City of London Sewers Act 1848, sufficient evidence of the occupation of premises, was a point of law very fit to be stated in a case for the opinion of this court. The only question, therefore, is, whether the Lord Mayor had jurisdiction under the Summary Jurisdiction Acts to state a case. I do not think it is necessary to go into the cases prior to the year 1884. The 7th section of the Act passed in that year (47 & 48 Vict. c. 43) declares that the definition of a court of summary jurisdiction in the Summary Jurisdiction Act 1879 includes any justice, justices, or magistrate, as therein mentioned, whether acting under the SummaryJurisdiction Acts, or any of them, or any other Act. Here the Lord Mayor was acting under the City of London Sewers Act 1848, which by the 194th section empowers any justice to summon any owner or occupier refusing or neglecting to pay any rate made under the autho-

rity of the Act, and in default of payment to grant a warrant authorising any person to levy the rate by distress. But it is contended that the Act of 1884 does not apply by reason of the 10th section, which provides that nothing in the Act shall alter the procedure for the recovery of or any remedy for the nonpayment of any poor rate, or of any rate or sum the payment of which is not adjudged by the conviction or order of a court of summary jurisdiction. I think that the 7th section makes any justice sitting in this capacity a court of summary jurisdiction, and that this therefore is a rate the payment of which is adjudged by the conviction or order of a court of summary jurisdiction. The Lord Mayor, therefore, has had, in my opinion, since the passing of the Act of 1884, jurisdiction to state a case in these matters; and as there appears to have been a point of law raised quite worthy of discussion, I think that the order must be made absolute with costs against the Commissioners of Sewers.

Rule absolute.

Solicitors for the applicant, *Harper* and *Battcock*.

Solicitor for the Lord Mayor, *T. B. Nelson*.

Solicitor for the defendant Brown, *E. A. Baylis*, solicitor to the Commissioners of Sewers of the City of London.

Thursday, June 16, 1887.

(Before Lord COLERIDGE, C.J. and DENMAN, J.)

THE SOUTH STAFFORDSHIRE WATERWORKS COMPANY *v.* STONE. (*a*)

Practice—Appeal from court of summary jurisdiction—Special case—Application in writing—The Summary Jurisdiction Act 1879 (42 *& 43 Vict. c.* 49), *s.* 33—*The Summary Jurisdiction Rules* 1886, *r.* 18.

An application to a court of summary jurisdiction to state a special case under the 33*rd section of the Summary Jurisdiction Act* 1879 *must be made in writing, and an oral application to the court is insufficient, the* 18*th rule of the Summary Jurisdiction Rules* 1886 *being peremptory and not merely directory.*

THIS was a case stated by justices of the county of Stafford under the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49), s. 33.

It appeared that during the hearing of the matter before a court of summary jurisdiction, a point of law was raised on behalf of the appellants, and decided by the justices against them. An oral application was thereupon made to the justices to state a case, which the justices granted. A written notice of appeal was afterwards within seven days served by the appellants upon the clerk to the justices.

The Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49), s. 33, provides that

(1) Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the court to state a special case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the court decline to state the case may apply to the High Court of Justice for an order requiring the case to be stated; and (2) the application shall be made and case stated within such time and in such manner as may be from time to time directed by rules under this Act.

The 18th rule of the Summary Jurisdiction Rules 1886 provides that

An application to a court of summary jurisdiction under sect. 33 of the Summary Jurisdiction Act 1879, to state a special case, shall be made in writing, and a copy left with the clerk of the court, and may be made at any time within seven clear days from the date of the proceeding to be questioned, and the case shall be stated within three calendar months after the date of the application, and after the recognisance shall have been entered into.

Hugo Young for the respondents.—The court has no jurisdiction to hear the appeal. The 18th rule of the Summary Jurisdiction Rules 1886, made in pursuance of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49), s. 33, sub-sect. 2, clearly provides that an application to a court of summary jurisdiction, under sect. 33 of the Summary Jurisdiction Act 1879, to state a special case shall be made in writing, and a copy left with the clerk of the court. In this case no application has been made to the court in writing, and, a condition precedent to the right to appeal not having been complied with, the court has no jurisdiction to hear the appeal:

Peacock v. *R.*, 4 C. B. N. S. 164;
Morgan v. *Edwards*, 29 L. J. 108, M. C.

There are many cases in which it has been held that in appeals from justices the rules must be strictly complied with—*e.g.*, *Ex parte Simkin* (29 L. J. 23, M. C.; 2 E. & E. 392), in which it was held that Sunday was to be counted in the two days allowed an appellant under the Nuisance Removal Act 1854 for entering into a recognisance. It is, moreover, a very necessary provision, inasmuch as parties who give notice of appeal on the spot, very frequently change their minds afterwards. In *Ex parte Curtis* (37 L. T. Rep. N. S. 533; 3 Q. B. Div. 13) a notice of appeal against a conviction under sect. 12 of the Licensing Act 1872 by two justices of the Cinque Ports was addressed generally to the justices of the liberties of the Cinque Ports, without naming any particular justices, and was served upon the clerk to the justices out of court, and it was held that such notice and the service thereof were insufficient, as not being in compliance with the 52nd section of the Licensing Act, which requires notice of appeal to be given to the "court of summary jurisdiction." Lush, J., in his judgment in that case, says: "The statute says that notice must be given to the court of summary jurisdiction. That means, in my opinion, the justices who sign the conviction. Then, again, it is a question whether the service on the clerk was a good service on the justices. I am clearly of opinion that it was not. It is not a duty of the clerk to go and find out the justices and serve them. It is made a condition of the right to appeal that notice of it shall be brought home to the justices that they may have an opportunity of supporting their decision before the court above." Further, the rule clearly contemplates two documents—an original to be served on the justices and a copy to be left with the clerk; and it is impossible that a single notice served on the clerk can in any sense satisfy this provision. The 31st section, which prescribes the procedure on an appeal from a court of summary jurisdiction to a court of general or quarter

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

warrants of distress for poor rates do not sit as a court of summary jurisdiction under 11 & 12 Vict. c. 43, seems to be entirely in your favour, and it is apparent from the judgment of Smith, J., in *The Sandgate Local Board* v. *Pledge* (*ubi sup.*), that that case does not conflict with it. The only question, therefore, is, whether *Reg.* v *Price* has been affected by any subsequent statutory enactment.] The only Act which can be said to have such an effect is the Summary Jurisdiction Act 1884 (47 & 48 Vict. c. 43), which by the 7th section declares that the definition of court of summary jurisdiction in the Summary Jurisdiction Act 1879 includes justices, whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act; but it is submitted that that section does not apply to the present case, because the 10th section expressly excepts it from its operation. That section provides that nothing in the Act shall alter the procedure for the recovery of any rate or sum the payment of which is not adjudged by the conviction or order of a court of summary jurisdiction. [Denman, J.—Does that mean a court of summary jurisdiction as defined by former Acts, or as enlarged by the Act of 1884?] It means a court of summary jurisdiction in the ordinary sense, not as specially enlarged for the Act of 1879. [Denman, J.—Does a conditional power to state a case "alter the procedure" for the recovery of a rate?] *Reg.* v. *Price* decided that magistrates in issuing warrants of distress for poor rates are not within the Act of 1879. [Denman, J.—Does it not rather decide that they were not within the Act of 1879 until the Act of 1884 was passed?] To cause a justice to sit as an open court of summary jurisdiction instead of as a simple justice is an alteration of procedure within the meaning of the 10th section of the Act of 1884.

H. Stuart Sankey, for the Commissioners of Sewers of the City of London, also showed cause against the rule.

Cluer for the applicant. — There is on the affidavits a point of law suitable for the decision of this court, and similar to that decided in *Reg.* v. *Bradshaw* (29 L. J. 176, M. C.), and under the 7th section of the Act of 1884 the Lord Mayor had power to state a case for the opinion of the court.

Lord Coleridge, C.J. — In this case I understand that the Lord Mayor was asked to state a case for the opinion of this court, and that he declined to do so, not because he had any objection to that course, but because it appeared to him that he had no jurisdiction to do so. If the case of *Reg.* v. *Price* (42 L. T. Rep. N. S. 439; 49 [illegible] was cited to him, I do not wo[nder] a difficulty as to his right, ar[ising] that decision. That case properly decided on the [ground] existence. The question justice of the peace sittin[g] distress for the recovery [of] of summary jurisdiction the Summary Jurisdictio[n] c. 49), and it was he[ld] the provisions of applied to proc[eedings] rates. As the l[aw] perfectly clear the Legislature

Jurisdiction A[ct] purpose of l[aying] some Act o[r] Acts within [the] diction Act [1879] hesitates as [to] case when a [rate] City of Lond[on] c. clxxi), the covery of ra[tes] that Act. [It] have to d[o] brought bef[ore] the provisio[ns] 1879. Wh[ere] 7th section [of] the Sum[mary] Vict. c. [43] 'court of [summary] and any [justice] of the [peace] name ca[lled] who is o[r] mary Ju[risdiction] wherea[s] said sect[ion] magistra[tes] than the [Act] expedient [to] declared t[hat] of summ[ary] the Sum[mary] such just[ices] mentioned [in] Jurisdict[ion] other Act o[r] or by the [Act] provides th[at] procedure [in] the nonpa[yment] or sum t[o] the convi[ction] urisdictio[n] so state a part of th[e] within th[e] to me, th[at] to state a absolute

Denma[n], which w[as] proceed[ing] rate-boo[k] the City [of] evidence point of opinio[n] fore, as [I] under[stand] use [I] w[ould] th[e] [Lo]

[illegible]

with the clerk, the Act means exactly what it says, and that an application in writing must be made to the court, and also a copy of the application left with the clerk. We are invited to say that that is not the meaning of the Act, and I am aware that many rules have been construed in this manner, but it has always been my endeavour to give effect to the words of an Act of Parliament rather than to that which other persons may think it ought to have said. I think we should be doing violence to every principle of interpretation, and really setting this rule aside, if we decided in the way we are asked. The right to appeal is a creature of statute, and if the conditions prescribed by the statute are not complied with, then there is no appeal.

DENMAN, J.—I am of the same opinion, upon the same grounds. The appellant has, in my opinion, not complied with the conditions under which alone he has a right to appeal. With respect to the case of *Reg.* v. *The County Court Judge of Bloomsbury* (*ubi sup.*), I will only say that the words of the statute are different, and that the case has therefore no application here. There are many cases in which it has been held that provisions similar to this are conditions precedent to the jurisdiction of the court to hear the appeal, and cannot be waived, as for instance, *Morgan* v. *Edwards* (29 L. J. 108, M. C.). This rule was made by competent authority, and I am of opinion that the words of the statute providing that the appeal shall be made in accordance with the rule are peremptory, and not merely directory.

Solicitors for the appellants, *Burton, Yeates, Hart*, and *Burton*, for *Johnson, Barclay, Johnson*, and *Rogers*, Birmingham.

Solicitors for the respondents, *Wilkins, Blyth*, and *Dutton*, for *Wright, Son*, and *Hollins*, Oldbury.

June 13, 14, *and July* 6, 1887.

(Before Lord COLERIDGE, C.J. and DENMAN, J.)

REG. *v.* THE MAYOR AND CORPORATION OF POOLE. (*a*)

Criminal law—Practice—Indictment—Amendment—Charge of neglect of statutory duty—Omission of words "against the form of the statute, &c."—Judgment non obstante veredicto—9 *Geo.* 4, *c.* 15—11 *Vict. c.* 46—14 *&* 15 *Vict. c.* 100, *ss.* 1, 24, *and* 25.

Highway—Indictment for non-repair—Liability of urban sanitary authority—Highway Act 1835 (5 *&* 6 *Will.* 4, *c.* 50)—*The Public Health Act* 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 144.

Where an indictment charging the neglect of a statutory duty omits to conclude with the words "against the form of the statute," it is bad, and the defendant will be entitled to judgment non obstante veredicto.

Neither the Public Health Act 1875, *nor any of the existing Acts, render an urban sanitary authority indictable at common law for neglecting the duties conferred upon them either as surveyors of the highways or as inhabitants in vestry assembled.*

THESE were two rules obtained on behalf of the Mayor and Corporation of Poole calling upon the prosecutors of two indictments, charging them with the non-repair of highways, to sho[w]

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sessions, provides that notice of appeal in writing is to be served on the other party and on the clerk of the court, and it is submitted that there is an important distinction between the 31st section, providing that notice shall be served on the clerk, and the 33rd, providing that the application shall be made to the court, and a copy left with the clerk.

Wills for the appellants.—The rule is merely directory. The 1st sub-section of the 33rd section of the Act provides that any person aggrieved may apply to the court to state a case. Then in the 2nd sub-section there is a collateral provision that rules are to be made directing the time and manner for the making of an application. But this sub-section is rather intended to provide a procedure, where an application has not been made to the court, and the court is not likely in the usual course to sit again for some time, and does not limit the absolute right to apply for a case under the 1st sub-section. In this case the application was made while the court was still sitting, and another application was unnecessary. Secondly, if the 18th rule is mandatory, there was a substantial compliance therewith. The clerk of the court is an officer entitled and bound to receive such notices. *Ex parte Curtis* (*ubi sup.*) is distinguishable, because there the notice was addressed generally to the justices of the liberties of the Cinque Ports. In *Reg.* v. *The Judge of the Bloomsbury County Court* (54 L. T. Rep. N. S. 616; 17 Q. B. Div. 788) it was held that an application to the registrar of the County Court was properly made within the 4th section of the Parliamentary Elections (Returning Officers) Act 1875, which provides that an application to tax the charges of a returning officer at a parliamentary election may be made to the County Court having jurisdiction at the place of nomination for the election. [Lord COLERIDGE, C.J.—There one application only is spoken of. Here the rule states in terms that the application is to be made to some person other than the clerk, and a copy left with the clerk. The rule cannot mean that two papers, an original and a copy, are both to be left with the clerk.] If the notice is in every case to be served on the justices who gave the decision, the person aggrieved would in many cases be deprived by their absence and the impossibility of serving them with notice of his right to appeal. [Lord COLERIDGE, C.J.—If he cannot comply with the law he cannot appeal.] The same point was taken in a special case stated under the 2nd section of 20 & 21 Vict. c. 43, in the case of the *Churchwardens of Potton* v. *Brown* (28 J. P. 408), and there, the court being equally divided, Crompton and Blackburn, JJ. thinking it a condition precedent that the notice should be in writing, while Cockburn, C.J. and Shee, J. were of the contrary opinion, the appeal was heard on its merits. He also cited

Reg. v. *The Justices of Bedfordshire*, 11 A. & E. 134; *Reg.* v. *Eaves*, 21 L. T. Rep. N. S. 829; 39 L. J. 70, M. C.

Young was not called upon to reply.

Lord COLERIDGE, C.J.—I am of opinion that we must decide this preliminary objection in favour of the respondent. The objection taken is that we are not at liberty to go into the merits of the appeal, because the appeal is given by statute, and the conditions precedent prescribed by the statute have not been followed. The 33rd section of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) enacts by the 1st sub-section that "Any person aggrieved, who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the court to state a special case setting forth the facts of the case, and the grounds on which the proceeding is questioned, and if the court decline to state the case may apply to the High Court of Justice for an order requiring the case to be stated." This sub-section therefore gives a general enabling power to an aggrieved party to apply to the court of summary jurisdiction to state a case. Then the 2nd sub-section says that "The application shall be made and case stated within such time and in such manner as may be from time to time directed by rules under this Act." Now, the person who by another provision of the statute is to draw and give effect to the rules is the Lord Chancellor, and in pursuance of that provision Lord Herschell drew up and authenticated a series of rules. They are called the Summary Jurisdiction Rules 1886, and the 18th rule provides that an application to a court of summary jurisdiction, under sect. 33 of the Summary Jurisdiction Act 1879, to state a special case, shall be made in writing, and a copy left with the clerk of the court, and may be made at any time within seven clear days from the date of the proceeding to be questioned, and the case shall be stated within three calendar months after the date of the application, and after the recognisance shall have been entered into. Now, let us see what was done in this case. The case was being heard before a court of summary jurisdiction, and during the hearing of it a point of law was raised by the learned counsel who appeared for the present appellants, and the justices were asked to state a case if they decided against the appellants. In the result they did so decide, and consented to state a case. But the justices had no power to state a case except in accordance with the provisions of the Act of Parliament. There is no doubt that they were perfectly willing to accede to the appellants' request, but the conditions laid down by the statute, and by the rules made in pursuance thereof, were not complied with. The application was made by word of mouth in court, and it cannot be said that that was an application to a court of summary jurisdiction made in writing. What else, then, is there to show that the statute has been complied with? An application in writing was sent to the clerk to the justices—not to the court, nor to the justices of whom the court was composed—and we are asked to say that that is a sufficient compliance with the statute and the rules. Now, these rules are authorised by statute, and, after being laid upon the table of both Houses of Parliament for a specified time, have the same force as a statute, and yet we are invited to say that this 18th rule has been complied with by sending the original, or a copy, to the clerk of the justices. If the document sent to the clerk was the original, then where is the copy? It is manifest that the rule contemplates two documents, and it is not possible that the same document can be

both an original and a copy. Under the earlier Act by which justices were empowered to state a case for the opinion of this court—I mean 20 & 21 Vict. c. 43, s. 3—this point could not have been taken, because it is there provided that the party dissatisfied with the determination of the justice or justices may apply in writing within three days after the same to the said justice or justices, the meaning of the section clearly being that the application is to be made to the same justices who gave the decision against which it is proposed to appeal. In the absence of authority, therefore, I think it is perfectly clear that the notice given in this case is insufficient. Is there, then, any authority to the contrary? The only authority which is said to bear on the point is the case of *Reg.* v. *The Judge of the Bloomsbury County Court* (54 L. T. Rep. N. S. 616; 17 Q. B. Div. 788), decided by my brothers Denman and Wills, and afterwards by the Court of Appeal. In that case the Court of Appeal decided that an application made to the registrar of a County Court, when the judge was not sitting, to tax the charges of a returning officer at a Parliamentary election was properly made to a County Court within the meaning of the 4th section of the Parliamentary Elections (Returning Officers) Act 1875. But the ground on which it was there decided that the Act of Parliament had been complied with was that the judge of a County Court is ambulatory, whereas the registrar is not, but is confined to his particular court, where he is bound to sit, and that he might be deemed to be the court for the purpose of receiving the application in question. But it is to be observed that the words of the Act of Parliament on which the decision in that case depended are very different from those of the Act which we are now discussing. In the present case it is clearly contemplated that there shall be two documents, whereas in the case cited it was not so. If the Act of Parliament interpreted in that case had said that there should be notice to the court, and that a copy should be left with the registrar, I very much doubt whether under those circumstances the Court of Appeal would have held that a single document complied with the statute. It is sufficient for the present purpose to say that they had not to decide, and did not decide any such point. The learned counsel for the appellants also cited to us an obscure case (*The Churchwardens of Potton* v. *Brown*, 28 J. P. 408), in which the Court of Queen's Bench was equally divided in opinion upon a similar point under the earlier Act (20 & 21 Vict. c. 43, s. 2), Crompton and Blackburn, JJ. thinking the condition obligatory, and Cockburn, C.J. and Shee, J. being of a different opinion. It can only be said that in that case the point was not decided. Then there are the cases of *Ex parte Curtis* (37 L. T. Rep. N. S. 533; 3 Q. B. Div. 13); *Reg.* v. *The Justices of Bedfordshire* (11 A. & E. 134); and *Reg* v. *Eaves* (21 L. T. Rep. N. S. 829; 39 L. J. 70, M. C.); and these cases form together a very strong body of authority to show that where an application has to be made, or notice in writing given to the court, service on the clerk to the justices, or on one of two justices, where two have joined in the decision, is insufficient. With those authorities I entirely agree, and I think that where an Act of Parliament says that an application must be made to the court in writing, and a copy left with the clerk, the Act means exactly what it says, and that an application in writing must be made to the court, and also a copy of the application left with the clerk. We are invited to say that that is not the meaning of the Act, and I am aware that many rules have been construed in this manner, but it has always been my endeavour to give effect to the words of an Act of Parliament rather than to that which other persons may think it ought to have said. I think we should be doing violence to every principle of interpretation, and really setting this rule aside, if we decided in the way we are asked. The right to appeal is a creature of statute, and if the conditions prescribed by the statute are not complied with, then there is no appeal.

DENMAN, J.—I am of the same opinion, upon the same grounds. The appellant has, in my opinion, not complied with the conditions under which alone he has a right to appeal. With respect to the case of *Reg.* v. *The County Court Judge of Bloomsbury* (*ubi sup.*), I will only say that the words of the statute are different, and that the case has therefore no application here. There are many cases in which it has been held that provisions similar to this are conditions precedent to the jurisdiction of the court to hear the appeal, and cannot be waived, as for instance, *Morgan* v. *Edwards* (29 L. J. 108, M. C.). This rule was made by competent authority, and I am of opinion that the words of the statute providing that the appeal shall be made in accordance with the rule are peremptory, and not merely directory.

Solicitors for the appellants, *Burton, Yeates, Hart*, and *Burton*, for *Johnson, Barclay, Johnson*, and *Rogers*, Birmingham.

Solicitors for the respondents, *Wilkins, Blyth*, and *Dutton*, for *Wright, Son*, and *Hollins*, Oldbury.

June 13, 14, *and July* 6, 1887.

(Before Lord COLERIDGE, C.J. and DENMAN, J.)

REG. *v.* THE MAYOR AND CORPORATION OF POOLE. (*a*)

Criminal law—Practice—Indictment—Amendment—Charge of neglect of statutory duty—Omission of words "against the form of the statute, &c."—Judgment non obstante veredicto—9 *Geo.* 4, *c.* 15—11 *Vict. c.* 46—14 *&* 15 *Vict. c.* 100, *ss.* 1, 24, *and* 25.

Highway—Indictment for non-repair—Liability of urban sanitary authority—Highway Act 1835 (5 *&* 6 *Will.* 4, *c.* 50)—*The Public Health Act* 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 144.

Where an indictment charging the neglect of a statutory duty omits to conclude with the words "against the form of the statute," it is bad, and the defendant will be entitled to judgment non obstante veredicto.

Neither the Public Health Act 1875, *nor any of the existing Acts, render an urban sanitary authority indictable at common law for neglecting the duties conferred upon them either as surveyors of the highways or as inhabitants in vestry assembled.*

THESE were two rules obtained on behalf of the Mayor and Corporation of Poole calling upon the prosecutors of two indictments, charging them with the non-repair of highways, to show

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cause why the verdicts given for the Crown at the trial before Mathew, J. should not be set aside and a new trial had.

The indictments alleged respectively that two highways were in decay, and that "the mayor, aldermen, and burgesses of the town and county of the town and borough of Poole, acting by the council as the sanitary authority for the urban sanitary district of the said town, county, and district, ought to repair and amend the said common highways being in decay as aforesaid when and so often as it should be necessary."

There was no allegation in the indictments to show that the defendants were liable, nor any statement that the neglect alleged was against the form of the statute or statutes.

The indictments were removed by *certiorari* into the Queen's Bench Division, and tried by Mathew, J. and a special jury at the Dorchester Assizes.

In the course of the trial, Mathew, J. intimated his willingness to make any amendments in the indictments which it was in his power to make.

Verdicts having been found for the Crown, the mayor and corporation of Poole applied for and obtained rules *nisi* calling upon the prosecutors to show cause why the verdicts should not be set aside and new trials had, on the ground that the learned judge at the trial misdirected the jury in the following respects (1) in telling the jury that the defendants, as urban sanitary authority, were indictable for the nonrepair of a public road within their district; (2) in telling the jury that the defendants were liable to be convicted under the indictments in the present case, although such indictments charged a common law liability, not a statutory liability; (3) in omitting to tell the jury that the provisions of the General Inclosure Act (41 Geo. 3, c. 109), s. 9, had not been complied with; and on the ground that the verdict was against the weight of evidence; or why judgment should not be entered for the defendants *non obstante veredicto*, on the ground that the indictments did not, nor did the evidence at the trial, disclose any liability on the part of the defendants.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides as follows:

Sect. 144. Every urban authority shall within their district, exclusively of any other person, execute the office of the surveyor of highways, and have exercise and be subject to all the powers, authorities, duties, and liabilities of surveyors of highways under the law for the time being in force, save so far as such powers, authorities, or duties are or may be inconsistent with the provisions of this Act. Every urban authority shall also have, exercise, and be subject to all the powers, authorities, duties, and liabilities which by the Highway Act 1835, or any Act amending the same, are vested in and given to the inhabitants in vestry assembled of any parish within their district. All ministerial Acts required by any Act of Parliament to be done by or to the surveyor of highways, may be done by or to the surveyor of the urban authority, or by or to such other person as they may appoint.

Sect. 149. All streets being, or which at any time become, highways repairable by the inhabitants at large within any urban district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority. The urban authority shall from time to time cause all such streets to be levelled, paved, metalled, flagged, channelled, altered, and repaired as occasion may require.

The 216th section provides for a highway rate to be levied in certain cases by the urban authority as surveyor of highways, in which cases, by the 217th section, it shall not be necessary for the urban authority to do the following acts, or any of them; to lay such rate before any justices, or obtain their allowance; to annex thereto the signature of such urban authority; to lay the same before the parishioners assembled in vestry; to verify before any justices any accounts kept by them of such highway rates; and all such accounts shall be audited in all respects in the same way as the other accounts of the urban authority.

Lock (with him *Charles*, Q.C.) showed cause against the rules.—By the 144th section of the Public Health Act 1875 (38 & 39 Vict. c. 55) the defendants are made subject to all the liabilities to which, by the Highway Act 1835 or any Act amending the same, the inhabitants of any parish in their district in vestry assembled were liable. Among these liabilities is the liability to indictment for non-repair. As to the form of the indictments, they allege that the defendants are an urban sanitary authority—a creature of statute, and they therefore sufficiently allege that the liability, the neglect of which is charged, is statutory. He cited

Reg. v. *The Inhabitants of St. George's, Hanover-square*, 3 Camp. 222;
Reg. v. *The Inhabitants of the Parish of St. Giles, Cambridge*, 5 M. & S. 260;
R. v. *The Inhabitants of Hatfield*, 4 A. & E. 156.

Alderson Foote (*Pitt Lewis*, Q.C. with him) in support of the rules.—A corporation such as an urban sanitary authority is not indictable. No such corporation has ever been indicted, and it has never been held that an action for misfeasance, much less for nonfeasance, would lie against such a corporation. By the 6th section of the Highway Act 1835 (5 & 6 Will. 4, c. 50) it is provided that the surveyor elected according to that section shall repair the highways in the parish, and by the 20th section there is imposed upon him, if he neglects his duty, a penalty not exceeding 5*l*. The proper remedy, therefore, was for the prosecutors to have gone to the justices and imposed a penalty, and it cannot be said that, where a special penalty is provided, the general words of the 144th section of the Public Health Act 1875 render the urban sanitary authority liable to indictment. In *Young* v. *Davis and another* (2 H. & C. 197), Wills, J., in delivering the judgment of the Exchequer Chamber, says: "Now, this Act of Parliament (5 & 6 Will. 4, c. 50) appears not to have been passed for the purpose of creating a new liability, either in the parish or any other persons, but simply in order to provide machinery whereby the existing duty of the parish to repair may be conveniently fulfilled. With this view it authorises the parish to appoint their surveyor, whose duties it defines by, amongst others, the 6th section. The duty of the parish to the public, enforceable by indictment, not by action, remains. The duty of the surveyor created by the Act is, not to the public, but to the parish which employs him to do for them what they are bound to do; and for the breach of such duty to the parish the Act provides a penalty, not an action, nor an indictment." This is the correct view of the duties and liabilities of the surveyor,

whose duties and liabilities, and not those of the inhabitants of the parish, are transferred to the urban sanitary authority. In *The Loughborough Highway Board* v. *Curzon* (54 L. T. Rep. N. S. 168; 16 Q. B. Div. 565), Wills, J. says: "The cost of the repairs is, as under the Act of 1862, a charge upon the parish, and the expenses of a prosecution might fall upon them if, on their behalf, the liability to repair was denied. Upon them also might equally fall the cost of defending themselves against an indictment. . . . It is worth while mentioning in this connection that we are informed that on the records of the Crown Office, down to the year 1884, there is no instance of an indictment against a highway board, though the records of indictments against parishes number between eighty and ninety." The decision in this case was confirmed by the Court of Appeal (55 L. T. Rep. N. S. 50; 17 Q. B. Div. 344). In *Parsons* v. *The Vestry of St. Matthew, Bethnal Green* (17 L. T. Rep. N. S. 211; L. Rep. 3 C. P. 56), it was held that an action for the nonrepair of a highway will not lie against a vestry appointed under the Metropolis Local Management Act (18 & 19 Vict. c. 120), and in *Gibson* v. *The Corporation of Preston* (22 L. T. Rep. N. S. 293; L. Rep. 5 Q. B. 218) that an action for personal injuries sustained by one of the public owing to the nonrepair of a highway does not lie against a local board of health constituted under the Public Health Act 1848. The defendants in that case were exactly in the same position as in the present case, except that they were under the Act of 1848 instead of the Act of 1875. The case of *Hartnell* v. *The Ryde Commissioners* (4 B. & S. 361) is distinguishable, because in that case there was a special Act providing that the commissioners should be liable to be indicted in the same manner as the inhabitants of the parish were before: (see also *Ohrly* v. *The Ryde Commissioners*, 5 B. & S. 743.) The case of *Kent* v. *The Worthing Local Board* (48 L. T. Rep. N. S. 862; 10 Q. B. Div. 118) was really overruled by the Court of Appeal in *Moore* v. *The Lambeth Waterworks Company* (55 L. T. Rep. N. S. 309; 17 Q. B. Div. 462). Further, the indictment is bad because it does not show under what statute the defendants are bound to repair, and the verdict does not cure the omission. He also cited

Reg. v. *The Inhabitants of Barnard Castle*, 10 L. J. 53, M. C.; 1 Q. B. 246;
Smith v. *The West Derby Local Board*, 38 L. T. Rep. 716 N. S.; 3 C. P. Div. 423.

Cur. adv. vult.

July 6.—The following judgment of the court (written by Denman, J.) was delivered by

LORD COLERIDGE, C.J.—These were two rules calling upon the prosecutors of two indictments to show cause why the verdict for the Crown should not be set aside and a new trial had on the ground of misdirection, and that the verdict was against the weight of evidence, and why judgment should not be entered for the defendants *non obstante veredicto*. The indictments, having been removed by *certiorari*, were tried by Mathew, J. and a special jury at the Dorchester Assizes. The indictments alleged respectively that two highways were in decay, "and that the mayor, aldermen, and burgesses of the town and county of the town and borough of Poole, acting by the council as the sanitary authority for the urban sanitary district of the said town, county, and district, ought to repair and amend the said common highway, being in decay as aforesaid, when and so often as it shall be necessary." There was no allegation in the indictment to show how the defendants were liable, nor any statement as to the neglect alleged being against the form of the statute or statutes. The learned judge at the trial intimated his willingness to make any amendment within his power. As regards the omission of the words "against the form of the statute," it is laid down in Hawkins' Pleas of the Crown, vol. 4, c. 25, s. 116, that "if an offence indicted be only prohibited by statute and not by common law, and the indictment do not conclude *contra formam statuti* it is wholly insufficient and no judgment can be given upon it." This has been decided in several cases; and I think it is applicable to a case like the present when a criminal neglect of duty is charged against a corporation, who in the absence of a statute would clearly not be persons liable to be indicted for the non-repair of a highway. So far from containing anything to cure this defect in the indictment, I find that the statutes relating to the indictment are so worded as to exclude any power to amend this particular defect, or to authorise us to treat it as immaterial. The power of amendment of indictments is very limited. The 9 Geo. 4, c. 15, was confined to the case of variances between the record and any matter in writing or print produced in evidence in misdemeanours. 11 & 12 Vict. c. 46, only carried the power further by applying the same provision to all criminal trials. The statute 14 & 15 Vict. c. 100, s. 1, enumerates the cases in which amendment is to be allowed. They are numerous, but there is no power given to amend by inserting the words "against the form of the statute" in cases where a statutable misdemeanour is proved and the words have been omitted. The 24th section of that same Act seems conclusive against any such power, for it deals with the very words in a manner wholly inconsistent with any such intention; for, again referring to Hawkins, vol. 4, c. 25, s. 117, I find this passage: "If there be more than one statute concerning the same offence, and the first of them was never discontinued, and the latter only continue the former, without making any addition to it, or only qualify the method of proceeding upon it, without altering the substance of its provisions, it seems agreed that it is safe in an indictment on any such statute to conclude *contra formam statuti*, and it has been held that a conclusion *contra formam statutorum* will in such case vitiate the prosecution." With this before him in a statute intended to get rid of all our technical objections to indictments in kindred respects, the draftsman of sect. 24 of 14 & 15 Vict. c. 100, has provided as follows: "No indictment for any offence shall be held insufficient" (amongst other things) "for the insertion of the words 'against the form of the statute' instead of 'against the form of the statutes,' or *vice versâ*." I think it impossible to read this clause without being convinced that the framer of the enactment deliberately abstained from enacting that in a case where the liability to do an act was imposed by statute, and an indictment was preferred for the violation of a duty so imposed, it should be henceforth competent to

the prosecutor to treat the case exactly in the same way in which it would be treated if the neglect alleged were that of a duty imposed by the common law. Then arises the question whether this is a formal defect, apparent on the face of the indictment, an objection to which cannot be taken after the jury are sworn, according to sect. 25 of the same Act. The very authorities referred to in the passages in Hawkins, above cited, were to the effect that the omission to conclude *contra formam statuti* was a fatal objection in arrest of judgment. I do not think that the objection can be considered a formal one any more than the omission of the word "feloniously" would be upon a charge of "arson," or *scienter*, in a case of receiving, which was held to be incurable after verdict by Lord Campbell in the Court of Criminal Appeal in *Reg.* v. *Larkin* (23 L. J. 125, M. C.) only two years after the passing of the statute. The indictment fails to give the defendant notice of the kind of liability with which it is intended to fix him. The cases of *Reg.* v. *Sill* (22 L. J. 41, M. C.) and *Reg.* v. *Larkin* (23 L. J. 125, M. C.) are illustrations of the distinctions between mere formal defects and of defects of which advantage may be taken after verdict. I think sect. 25 of the Act must be construed with reasonable reference to sect. 24, and that for the reasons already given it would be contrary to the intention of the Act to hold that either section was intended to repeal the law as laid down in Hawkins. I therefore think that the defendants are entitled to judgment *non obstante veredicto* on this ground. I am confirmed in my opinion that the above objection is fatal by the consideration that the questions raised by Mr. Foote as to the liability of the defendants are questions of very great nicety, and that if the defendants are liable under the statutes to an indictment at all, it is not unreasonable to require that the circumstances creating their liability should be shown on the face of the indictment in such a way that the court might see whether the indictment does or does not show a legal liability; or at least, that the indictment should inform the defendants whether they are being prosecuted for a common law or a statutory offence. But even assuming that in this case the indictment is sufficient without amendment, or, if not, that an amendment could be, and was, made, I am still of opinion that the defendants are entitled to judgment. The liability of the defendants as urban sanitary authority is created by the 144th sect. of 38 & 39 Vict. c. 55. The first branch of that section makes the urban sanitary authority subject to all the liabilities of surveyors of highways under the law for the time being in force. No authority has been cited to show that a surveyor of highways (against whom it was decided long ago in *Young* v. *Davis* (2 H. & C. 197) that an action will not lie) was ever liable to be indicted for the non-repair of a highway. The only persons liable to be indicted were the inhabitants of the parish, or the other person or persons liable to bear the burden of repair: (see *Loughborough Highway Board* v. *Curzon*, 54 L. T. Rep. N. S. 168; 16 Q. B. Div. 565.) The case of *Gibson* v. *Mayor, &c., of Preston* (L. Rep. 5 Q. B. 218), in which all the authorities were reviewed, is entirely to this effect, and is recognised, though distinguished, in *Kent* v. *Worthing Local Board* (48 L. T. Rep. N. S. 362; 10 Q. B. Div. 118), the only case in which a local board has been held liable to an action for an omission of any of the duties in relation to highways imposed upon them by the Public Health Act. That case, however, was decided wholly upon the difference, or supposed difference, between the mere neglect to repair highways and what the court held to be the doing of an act in such a way as to become a nuisance, a distinction which must be considered doubtful, after the case of *Moore* v. *Lambeth Waterworks Company* (55 L. T. Rep. N. S. 309 17 Q. B. Div. 462) in the Court of Appeal, in which it is spoken of as the only case in which a local board had been held liable for an act of omission, or a mere nonfeasance, and said to be a case only to be supported on grounds quite inapplicable to a case of mere non-repair of a highway. One conclusive reason for holding that a surveyor could not be indicted for the non-repair of a highway is that by the law, existing as long as surveyors were the only persons appointed for the purpose of attending to such matters on behalf of a parish, at all events since 5 & 6 Will. 4, the surveyor could be punished by specific methods provided by statute, so that it sufficiently appeared from the statute regulating their conduct that it was the intention of the Legislature to provide a different punishment for disobedience to the statute from a prosecution by indictment. Sect. 20 of 5 & 6 Will. 4, c. 50, provides that for any neglect of duty for which no particular penalty is by that Act imposed the surveyor shall forfeit 5*l.* Sect. 144 of the Public Health Act 1875 also provides that the urban sanitary authority shall be subject to all the duties and liabilities which by the Highway Act 1835, or any act amending the same, are vested in and given to the inhabitants in vestry assembled. But the liability to an indictment at common law cannot be intended to be a liability which was imposed upon the inhabitants in vestry assembled. No assembly of the vestry was required to constitute such liability, nor was it a liability imposed by the Highway Act or any other Act. It existed wholly independently of the Acts, though the Acts contained certain provisions limiting the cases in which, and the terms upon which, indictments might be successfully preferred in accordance with the provisions of the Acts. There is nothing, as far as I can see, in the 144th section of the Public Health Act 1875, nor in any of the existing Acts, to make the urban sanitary authority liable to a common law indictment for neglecting those duties which they conferred upon them, either as surveyors of the highways or as inhabitants in vestry assembled. If their liability is to be established in the latter capacity, I think it could only be upon an indictment preferred according to the provisions of 5 & 6 Will. 4, c. 50, after the preliminary steps thereby required, and not as persons liable at common law to be indicted as though they were the persons liable for repair in the same sense in which the parish or other persons liable *ratione tenuræ* are liable. Mr. Foote relied upon another point, viz., that the roads in question have not been set out under the Inclosure Acts. But this was a point, as I understand, not raised at the trial, at all events not so insisted upon as that we should be justified in setting aside the verdict. It is a matter which might very easily have been taken as proved in the absence of special attention

being called to it. But for the reasons given above, we are of opinion that the defendants are entitled to judgment *non obstante veredicto*, the indictment not alleging a case of liability in the defendants upon which the jury were warranted in finding any verdict against them, and the statute not creating any such liability, even if the indictment had alleged all the circumstance upon which the prosecution relies.

Solicitors for the prosecutors, *Brownlow* and *Home*, agents for *E. S. Clarke*, Wareham.

Solicitors for the Mayor and Corporation, *Prior, Church* and *Adams*, agents for *Dickinson*, Poole.

Friday, July 15, 1887.

(Before Stephen and Wills, JJ.)

Re The Election Petition from the Knighton Local Government District; Gough (pet.) *v.* Murdoch (resp.). (*a*)

Local board of health election—Illegal practice—Fabricating voting paper—Falsely assuming to act on behalf or as agent of voter—Public Health Act 1875—38 *&* 39 *Vict. c.* 55, *sched.* 2, *part* 1, *r.* 69—47 *&* 48 *Vict. c.* 70, *s.* 36.

The respondent, a candidate at an election for members of a local board of health, called at the house of a voter to whom a voting paper had been sent, and asked her how she intended to vote, and to hand him the voting paper, which she did. He then inquired if she knew how to fill it up, and she replied in the affirmative. The respondent thereupon, without any authority, express or implied from the voter, wrote in pencil the initials of the voter against his own name. The voter objected to his doing so. The respondent left the voting paper with the voter, with her initials so written by him against his own name, but with no other mark upon it. The voter subsequently struck out the initials so written by the respondent, and placed her initials against the names of three other candidates, and signed her own name to the voting paper. It was found that the respondent so pencilled the initials of the voter with the intent of indicating on her behalf that she intended to vote for him, and of inducing and procuring her to vote for him. The respondent was successful at the poll. A petition was lodged against his return, on the ground of illegal practices, (inter alia) of fabricating in whole or in part a voting paper, and of falsely assuming to act in the name or on behalf of a voter.

Held, that the act of the respondent did not amount to a fabrication in whole or in part of the voting paper, nor to falsely assuming to act in the name or on behalf of the voter within the meaning of rule 69 *of sched.* 2, *part* 1, *of the Public Health Act* 1875.

This was a petition under the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), and the Municipal Elections (Corrupt and Illegal Practices) Act 1884 (47 & 48 Vict. c. 70) against the return of the respondent as a member of the Local Board of Health for the Knighton Local Government District, in the county of Radnor, which was tried before the commissioner to whom the trial of the said petition was assigned.

The election was held on the 26th, 30th, and 31st March 1886, when the respondent was declared to be duly elected.

The petition alleged (*inter alia*) that the respondent committed an illegal practice at such election by falsely assuming to act in the names and on behalf of persons entitled to vote at such election, and also that the respondent committed an illegal practice at such election by fabricating in part the voting papers of certain voters at such election.

The facts, so far as they are material to the present case, are as follows:—

Jane Jones was a person entitled to vote as owner at the said election.

The respondent was a candidate for the office of member of the Local Board of Health for the Knighton Government District, in the county of Radnor, at the said election. After her voting paper had been left at her house the respondent called at her house, and asked her for whom she intended to vote. She told him she had not made up her mind. He then asked her if she would allow him to see her voting paper, and she handed the paper to him. He then asked her if she knew how to fill it up, pulling a pencil out of his pocket, and she told him she did know how to fill it up. And thereupon the respondent without any authority, express or implied, from the said Jane Jones so to do, and without taking any steps to ascertain whether he had such authority or not, and without any ground for believing that he had such authority, and in fact against the authority and contrary to the wishes of the voter, and with the intent thereby of indicating on her behalf that she intended to vote for the respondent, and of inducing and procuring her to vote for him, wrongfully wrote in pencil the initials "J. J." of the voter against his own name in the voting paper delivered to her. Upon this the voter said: "You ought not to have done that," to which the respondent replied, "if you will cover it over with ink it will be all right." The respondent left the voting paper with the said Jane Jones with her initials so written by him against his own name thereon, and with no other mark upon it. Three members were to be elected.

The said Jane Jones subsequently caused the initials of her name which had been written on the paper by the respondent against his own name to be struck out by placing two horizontal ink marks through the said initials, and also caused her initials to be written on the said paper against the names of three other candidates, and then signed her own name Jane Jones at the foot of the said paper, and voted for such other three candidates, and did not vote for the respondent.

The commissioner was of opinion, upon these facts, that the respondent was guilty of the illegal practice of falsely assuming to act in the name and on the behalf of a person entitled to vote at such election within the meaning of rule 69, in sched. 2, part 1, of the Public Health Act 1875 (38 & 39 Vict. c. 55).

The questions for the opinion of the court were:

1. Whether or not on the facts stated, the commissioner was right in holding that the respondent did falsely assume to act in the name and on the behalf of the said Jane Jones, being a person entitled to vote at such election within

(*a*) Reported by W. P. Eversley, Esq., Barrister-at-Law.

the meaning of rule 69, sched. 2, part 1, of the Public Health Act 1875 (38 & 39 Vict. c. 55).

2. Whether on the facts stated, the respondent was guilty of the illegal practice of fabricating in part the voting paper of the said Jane Jones within the meaning of the said rule 69, in sched. 2, part 1, of the Public Health Act 1875.

If the court determined either of these questions in the affirmative, the certificate would be that the respondent was not duly elected, and that the election was void. If they determined both these questions in the negative, the certificate would be that the respondent was duly elected.

By 38 & 39 Vict. c. 55, sched. 2, part 1, r. 69:

Any person who fabricates in whole or in part, or alters, defaces, destroys, abstracts, or purloins any voting paper, or personates any person entitled to vote at any election, or falsely assumes to act in the name or on the behalf of any person so entitled to vote, shall be liable to a penalty not exceeding twenty pounds, or, in the discretion of the court, to imprisonment with or without hard labour for any period not exceeding three months.

By 47 & 48 Vict. c. 70, s. 36:

Subject as hereinafter mentioned, the provisions of this Act, and of part 4 of the Municipal Corporation Act 1882, as amended by this Act, shall extend to elections for the offices mentioned in the first column of the first schedule to this Act as if re-enacted herein, and in terms made applicable thereto, and petitions may be presented and tried, any offences prosecuted and punished, and incapacities incurred in reference to each such election accordingly.

First schedule:

Member of local board, as defined by the Public Health Act 1875.

M'Intyre Q.C. (*Lewis Coward* with him) for the respondent.—Two charges have been brought against the respondent under rule 69, of sched. 2, part 1, of the Public Health Act 1875. The first of fabricating the voter's voting paper, and the second of falsely assuming to act on behalf of the voter. Neither is made out against him. He did write her initials against his own name, but it was only to suggest to her how to vote. It was not a voting paper until the voter had signed it. Again, he did not falsely assume to act on her behalf, for what he did was only done in her presence. He may have had no right to do what he did, and it may have been directly opposed to the voter's wishes, but no offence within the Act has been committed. Before the offence of fabrication or the false assumption to act is committed, the voting paper must be an effective voting paper, it must be in such a final form as to be ready to be presented to the presiding officer. The respondent did no more than suggest to the voter how to vote.

Bosanquet, Q.C. (*Weyman* with him) for the petitioner.—The facts show a false assumption on the part of the respondent to act on behalf of the voter. Papers in these cases are sent to voters, and only such can be used at the election. That which the respondent did could only be rightly done by the voter herself, and so was a "falsely assuming" to act for her, and on her behalf. It was not necessary that the act should be final or successful in its result. He also fabricated in part the voting paper, and it is immaterial that the voting paper was not complete and perfect. In the analogous case of personation a man was found guilty of personating another, though when he was asked whether he were the voter admitted he was not. The completion and finality of the act is not necessary.

M'Intyre in reply.

Stephen, J.—I am of opinion that the learned commissioner was not right in finding that the respondent was guilty of the illegal practice of falsely assuming to act in the name and on behalf of the voter. The respondent's act was no doubt improper and unmanly, and might tend to impose upon ignorant voters. Two charges were preferred against the respondent: the first was the falsely assuming to act in the name and on behalf of the voter. His act was like an attempt to obtain a vote by moral violence. He obtained the voter's voting paper and wrote her initials against his own name, intending thereby to tell the voter that she must vote for him. I do not think his act amounts to more than that. The second charge was the fabrication in part of the voter's voting paper. But there must be an element of deceit or fraud to make a fabrication; and there was nothing of the kind in the present case; it was rather impudence than fraud. Then, again, as to the falsely assuming to act on behalf of the voter, that implies agency coupled with deceit. The respondent had rather tried to force himself upon the voter than had acted as her agent, which he could scarcely do in the presence of the person for whom he assumed to act, and who must have known what he was doing. On the whole I am of opinion that the facts fall just short of an offence within the Act.

Wills, J.—I am of the same opinion. Under rule 69, of schedule 2, part 1 of the Public Health Act 1875, I think there may be a fabrication, alteration, and defacing of a voting paper, though it was incomplete and not intended to be an operative vote of the voter, that is, the vote must be fabricated fraudulently in some sort. I do not, however, see before us any evidence of fraud, only of bad manners. The respondent attempted to force a vote for himself, but nothing more. He did intend, on her behalf, that she should indicate her wish to vote for him; and so far I agree with the learned commissioner. But, under the circumstances, I do not see that element of fraud or dishonesty which is implied to my mind in the word "fabrication." Rule 69 of schedule 2 of the Public Health Act 1875, after dealing with acts done on the face of voting papers passes away to a totally different class of offence, namely, personation of voters, and then proceeds to deal with the offence of falsely assuming to act on behalf of a voter. Now, I think it would be a forced construction of the words "falsely assuming to act in the name or on behalf of a voter" to say that the circumstance of the present case, which might have amounted to a "fabrication," amounted to a false assumption to act on behalf of the voter. Falsely assuming so to act means something very different to what was done here. It is falsely assuming to be an agent or to act on behalf of a voter, and acts of a kindred nature. In the case before us there was an attempt on the part of the respondent to extort compliance from the voter with his wishes; but it would be straining the Act to hold that he was falsely assuming to act for her.

Judgment for the respondent.

Solicitors for the petitioner, *Chester, Mayhew, Broome*, and *Griffiths*.

Solicicitors for the respondent, *Pyke* and *Parrott*, for *Green* and *Nixon*, Knighton.

Aug. 6 *and* 8, 1887.

(Before GROVE J. and HUDDLESTON, B.)

CROFTS (app.) *v.* TAYLOR (resp.). (*a*)

Revenue — Excise — Beer — Dilution of — Adding weak beer to strong beer—Customs and Inland Revenue Act 1885—48 *& 49 Vict. c.* 51, *s.* 8.

The appellant was a retail dealer in beer, and had in his cellar a puncheon containing seventy-two gallons of beer purchased of Barclay and Co., and a barrel of small beer purchased of another brewer. Barclay's beer contained 10·30 *of proof spirit, and the other beer contained* 4·62 *of proof spirit. The appellant took nineteen and a half gallons out of Barclay's puncheon, and took eighteen gallons of the small beer and poured them with a gallon of finings into the puncheon of Barclay's beer. The beer in the puncheon then contained* 8·56 *of proof spirit. The appellant was prosecuted for diluting the beer under sect.* 8 (2) *of* 48 *&* 49 *Vict. c.* 51, *which provides that, "a dealer in or retailer of beer shall not adulterate or dilute beer, or add any matter or thing thereto (except finings for the purpose of clarification), and any beer found to be adulterated or diluted, or mixed with any matter or thing (except finings) in the possession of a dealer in or retailer of beer shall be forfeited, and he shall incur a fine of fifty pounds." The appellant was convicted, and appealed by way of a case stated.*

Held, on appeal, that the conviction was right, and that the adding of the weak beer to the strong was a dilution of the latter within the meaning of sub-sect. 2 *of sect.* 8 *of the Customs and Inland Revenue Act* 1885.

THIS was a case stated by James Vaughan, Esq., one of the magistrates of the police courts of the metropolis sitting at Bow-street Police-court within the metropolitan police district.

1. The appellant, Thomas William Crofts, was summoned before the magistrate to answer an information exhibited by the respondent Willmott Taylor, an officer of Inland Revenue, which charged the appellant for that he, being a retailer of beer, did, on the 16th Feb. last, dilute certain beer contrary to the form of the statute 48 & 49 Vict. c. 51, s. 8.

2. The magistrate, after hearing the case, convicted the appellant, and ordered him to pay a fine of 30*l.*, and the appellant being dissatisfied with the magistrates' opinion as being erroneous in point of law, the magistrate stated this case for the opinion of the Queen's Bench Division.

3. The appellant was the licensed occupier of a public-house situated and being No. 40, Bricklane, Bethal Green, and was a retailer of beer.

4. On the 16th Feb. he had in his cellar a puncheon containing seventy-two gallons of beer which he had purchased of Messrs. Barclay and Co., the brewers. He had also in his cellar thirty-six gallons of small beer which he had purchased of Mr. Bishop, a dealer in beer at Haggerston.

The beer which he had purchased of Messrs. Barclay and Co., was of the density of 1013·00, and of the original gravity of 1056·27, and contained 10·30 of proof spirit.

The beer which he had purchased of Mr. Bishop was of the density of 1002·52, and of the original gravity of 1021·79, and contained 4·62 of proof spirit. The difference in gravity is equivalent to four gallons of water.

5. By the Customs and Inland Revenue Act 1885 (48 & 49 Vict. c. 51, s. 4). "Beer" is defined to include any description of beer which contains "more than 2 per cent. of proof spirit."

6. On the said 16th Feb. the appellant took about nineteen and a half gallons of Messrs. Barclay's beer out of the said puncheon which contained seventy-two gallons, and he took eighteen gallons out of a cask of Mr. Bishop's beer and poured the same into the said puncheon of Messrs. Barclay and Co.'s beer, and added thereto one gallon of finings. The two beers mixed in the said puncheon showed on analysis a density of 1010·42, and an original gravity of 1045·84, and proof spirit 8·56.

7. Neither water nor any other matter or thing (except finings for the purpose of clarification allowed by law) was added to the beer, and the effect of mixing the two beers was to lower the strength to the extent above-mentioned.

8. It was contended before the magistrate, on the behalf of the appellant, that what was done in this case was not a dilution of beer, and that the blending or mixing of two beers was not a dilution within the meaning of sect. 8, sub-sect. 2.

9. The respondent contended that the mixing of two beers of different qualities amounted to a dilution of the stronger.

10. The magistrate convicted the appellant, as he was of opinion that the word "dilute," being defined by the Imperial dictionary as to "weaken," "to reduce the strength or standard of," the stronger beer was diluted by adding to it the weaker beer.

The appellant being dissatisfied with the magistrate's determination as being erroneous in point of law, required him to state this case.

The question for the opinion of the court was whether such mixing or blending of beers is a dilution within the meaning of the statute referred to. If the court should be of the opinion that the magistrate was right in so holding, the conviction was to be affirmed. If the magistrate was wrong then the conviction was to be quashed.

By 43 & 44 Vict. c. 20, s. 11:

On and after the first day of October, one thousand eight hundred and eighty, there shall be charged, collected, levied, and paid, for the use of Her Majesty, her heirs and successors, in respect of beer brewed in the United Kingdom, a duty calculated according to the specific gravity of the worts thereof; that is to say, upon every thirty-six gallons of worts of a specific gravity of one thousand and fifty-seven degrees the duty of six shillings and threepence, and so in proportion for any difference in quantity or gravity.

By 48 & 49 Vict. c. 51, s. 4:

(1.) The term "beer" in the Inland Revenue Act 1880, shall be construed to extend to any liquor which is made or sold as a description of beer, or as a substitute for beer, and which, on analysis, shall be found to contain more than two per centum of proof spirit.

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

By sect. 8:

(1.) A brewer of beer for sale shall not adulterate beer, or add any matter or thing thereto (except finings for the purpose of clarification, or other matter or thing sanctioned by the Commissioners of Inland Revenue), before the same is delivered for consumption, and any beer found to be adulterated, or mixed with any other matter or thing (except as aforesaid), in the possession of a brewer of beer for sale shall be forfeited, and the brewer shall incur a fine of fifty pounds.

(2.) A dealer in, or retailer of, beer shall not adulterate or dilute beer, or add any matter or thing thereto (except finings for the purpose of clarification), and any beer found to be adulterated or diluted, or mixed with any other matter or thing (except finings) in the possession of a dealer in, or retailer of, beer shall be forfeited, and he shall incur a fine of fifty pounds.

R. T. Reid, Q.C. (*Poland* with him) for the appellant.—The conviction ought to be quashed. There has been no offence under the Customs and Inland Revenue Act 1885. There is no adulteration here, for adulteration is the introduction of some foreign matter, whereas, in the present instance, beer was added to beer. This case is not within the purview of the Act, which was a money bill, and nothing else; accordingly the section was not intended to regulate relations between the seller and the buyer, but only between the seller and the revenue. Again, even if the section did apply, no offence has been committed under it, for adding beer to beer is not dilution of beer. The effect of adding a weaker to a stronger beer may be to dilute or weaken the strength of a particular beer, but it is not dilution of beer within the Act. If the conviction be maintained, it will be impossible for publicans, or retail dealers of beer, to supply their customers with the familiar mixture known as "half-and-half," for the two liquids are of different strengths.

The *Solicitor-General* (Sir E. Clarke, Q.C.) (*R. S. Wright* with him) for the respondent.—The case is clear, and the contention of the other side would distort the proper construction of the Act and defeat its operation. By this admixture of the thin beer with the strong, he lowered the latter's alcoholic percentage from 10·30 to 8·56. The first sub-section deals with the brewer, the second with the publican or retail dealer. It is admitted that dilution is not the same as adulteration. The only question is, whether the act of the appellant amounted to dilution. Dilution is the rendering weaker or thinner by any other substance, and there is no reason why one strong substance should not be diluted by a kindred but weaker substance.—[GROVE, J.—It seems to me that the intention of the section is that the retailer shall sell the beer in the same state as he receives it from the brewer.] Yes. The magistrate has found as a fact that the strong beer was diluted. The Crown contends that a retail dealer must not dilute strong beer by first making thin beer and adding it to the strong. This Act was not passed merely for the protection of the revenue, but also of the subject. Its terms are too clear to admit of any doubt on the point.

Reid in reply.

Cur. adv. vult.

Aug. 8.—GROVE, J.—I have come to the conclusion that the conviction was right. The question turns mainly on the meaning of sect. 8 of the Customs and Inland Revenue Act 1885. The 1st sub-section deals with brewers, who are not to adulterate or add any matter or thing to their beer. Sub-sect. 2 deals with dealers or retailers of beer, who are forbidden to adulterate, or dilute, or add anything to the beer in their possession. There is a considerable and obvious distinction between these two sub-sections; the first does not prevent brewers from diluting their beer, for brewers who brew different qualities of liquor must in a sense dilute their beers. The 2nd sub-section, however, applies to dealers in beer who are not brewers of beer, but who purchase it ready brewed; and its object in preventing the dilution of beer is that the beer once purchased by the dealer or publican shall remain unaltered, so that customers shall know with what class of beer they are being served. Here the retail dealer did in my judgment dilute the beer, because he put a weaker beer into a stronger, thereby reducing the percentage of proof spirit from 10·30 to 8·56. If that is not dilution, I do not know what is. Johnson defines "dilution" as "a thinning, or weakening, or attenuation by the admixture of other fluids." And, surely, to put a weaker liquid to a stronger when it has the actual effect of reducing the strength of the latter is dilution. In the present case, the appellant in fact added water to the beer; for "small" beer contains more water in proportion to malt and hops than "strong" beer. The object of the Act would be defeated if the addition of small beer to strong were permissible. The construction put forward by the counsel for the appellant would under sect. 4 of the Act render dilution by the dealer most easy and effectual. He might take any liquid, plain water or otherwise, and add two per cent. of alcohol and call it "beer" under the section, and add it to his ordinary beer, and claim that he was doing nothing in contravention of the Act. Another argument was, that this case was not within the Act, as it did not affect the revenue, whereas the Act was passed for the protection of the revenue. But it may touch the revenue indirectly; for if publicans were allowed to make their own mixtures, and weaken the beers received from the brewers, the revenue would be likely to suffer. If the words of an Act of Parliament are clear, I must adopt them; and if doubtful, I must weigh the balance of convenience. I think the meaning of these words is clear, that the retailer must not dilute his beer. The section does not say that the dilution is to be only by water, but there is to be no addition of any other matter or thing. An argument was put forward, that if the contention of the Crown was right, publicans could not sell the mixture of liquors known as "half-and-half." But I do not think that it is a sound one, for the publican or his drawer is merely agent for the customer in mixing the two kinds of liquors for his convenience, and so would be committing no offence. But, even if the construction called for it, we should have to hold it an offence, and the maximum penalty on the publican would be that he would have to use separate glasses, and request his customer himself to mix their contents. I have come to the conclusion that I should be flinching from the words of the Act, and giving them a ridiculous interpretation, if I did not hold the facts of this case to amount to a dilution of the beer in question.

HUDDLESTON, B.—I had a doubt during the argument whether the counsel for the appellant

was not right. One argument was, the Act in question was a money Bill, the object of which was the protection of the revenue, and that what had been done by the appellant did not affect the revenue, and was not within the Act. The other argument was one which occurred to myself, that it would be difficult to work out in practice the strict construction put on the Act by the Crown, which might prevent the retailer from mixing two beers of a different strength for a customer who wished his draught to be weaker than the strong beer with which he had been previously supplied, yet stronger than a mere "small" beer. As regards the first argument, I am satisfied that the court has nothing to do with the object of an Act of Parliament if its words are clear; as regards the second, I am of opinion that sect. 8 refers to beer in large quantities and not in small, such as in glasses. The whole matter turns on the meaning of the word "dilute." I think the Legislature in these two sub-sections of sect. 8 did not intend to prevent brewers from diluting their beer, but did intend to prevent retailers from so doing. "Dilute" according to the dictionaries means "to make thin or weak," "to attenuate." Dr. Johnson, it is true, adds "to attenuate or weaken by the admixture of other fluids, especially water." But the weakening may be by any other thing than water. In the present case Messrs. Barclay's strong beer has been weakened and thinned, and its proof strength reduced from 10·30 to 8·56. That has been found by the case to have been done, and amounts to an offence under the Act. There is no manifest incongruity in this construction of sect. 8. The brewer must necessarily dilute his beers, for he makes strong beers and beers of a weaker quality; so dilution is not a statutory offence on his part. But, on the other hand, when the beer comes into the cellar of the retailer he must not thin or weaken it. The section was passed to protect the public as well as to prevent the revenue from being defrauded. There was a good object for the use of the term "dilute" in the 2nd sub-section; and there is no incongruity between the two parts of the section. Looking at it carefully I have come to the conclusion that the construction put upon it by the court is right, and that the conviction ought to be affirmed.

Appeal dismissed.

Solicitors for the appellant, *Peckham, Maitland,* and *Peckham.*

Solicitor for the respondent, *The Solicitor for the Inland Revenue.*

Monday, July 11, 1887.

(Before Wills and Grantham, JJ.)

Taylor, Garnett, Evans, and Co., *v.* The Overseers of the Poor of Pendleton.(*a*)

Poor rate — Occupation — Advertising hoardings and stations — Agreement creating tenancy — Liability to be rated.

The owner of certain land agreed with the respondents, who were advertising agents, to let and the respondents agreed to take the land as an advertising station at the yearly rent of 45l., the tenancy to commence from the date of completion and of erection, and to remain in force for a period of seven years. This agreement was not under seal.

By another agreement another owner agreed to allow the respondents the privilege of erecting on his land an advertising hoarding in consideration of a yearly rent, and the further privilege of removing the then standing wall and building the hoarding from the street level. The agreement was to remain in force for at least three years from its date, and to be afterwards terminable by twelve months' notice on either side; but if the owner were compelled to give the respondents notice to quit at a date less than twelve months beyond the said term of three years he agreed to refund a portion of the rent.

On both plots of land the respondents erected advertising hoardings on posts firmly fixed in the ground, but in the case of the first hoarding it was used by the owners of the land as one side of a timber shed.

Held, that there was a tenancy created by each of the agreements conferring exclusive occupation, and not a mere privilege or licence, and that the respondents were liable to be rated in respect of such advertising hoardings of which they were the exclusive occupiers.

This was a case stated by justices at general quarter sessions for the county of Lancaster.

Messrs. Taylor, Garnett, Evans, and Co., who carry on business as advertising agents under the style or firm of "The Manchester Guardian Advertising Company," appealed against a rate or assessment made by the overseers of the poor of the township of Pendleton, in the county of Lancaster, and estimated for the year ending Lady Day, 1887, after the rate of 3*s.* 10*d.* in the pound.

The appellants were rated as the occupiers of advertising hoardings and stations.

The following extract from the rate-book showed the particulars of the rate so far as it was necessary to state the same for the purpose of the case:

No.	Name of Occupier.	Name of Owner.	Description of Property.	Situation of Property.	Gross estimated Rental.	Rateable Value.	Rate at 3*s.* 10*d.* in the £.
					£	£ *s.*	£ *s.* *d.*
50	Manchester Guardian Advertising Company.	Hulme Brothers.	Advertising hoarding and station.	Broad-street.	45	40 10	7 15 3
2140	,, ,,	Taylor, Garnett, and Co.	,, ,,	,, ,,	60	54 0	10 7 0

(*a*) Reported by W. P. Eversley, Esq., Barrister-at-Law.

The advertising hoarding and station No. 50, in the rate is referred to as hoarding No. 1. With regard to this hoarding the following facts were proved: Previous to the making of the agreement next mentioned, Messrs. Hulme Brothers, who carry on the business of timber merchants in Pendleton, were possessed of a plot of land in Pendleton, bounded on one side by Broad-street and on another side by Withington-street, which was used by them as a timber yard. Upon this land the appellants were desirous of having an advertising station, and Hulme Brothers were intending to erect a shed for the purpose of storing timber.

On the 21st Feb. 1884 an agreement was entered into between Hulme Brothers and the appellants, as follows:

Memorandum of agreement made and entered into this 21st day of Feb. 1884, between Taylor, Garnett, Evans, and Co., of 3, Cross-street, Manchester, in the county of Lancaster, and Hulme Brothers, of 17, Quay-street, Manchester, whereby Hulme Brothers as aforesaid agree to let, and the said Taylor, Garnett, Evans, and Co., agree to take, the advertising station situate in front of Hulme Brothers' land, Broad-street, Pendleton, at the yearly rent or sum of 45*l*., the said rent to become due and payable on the usual quarter days, and the tenancy to commence from the date of completion of erection and remain in force for a period of seven years. The said Taylor, Garnett, Evans, and Co. to pay all rates and taxes except chief rent (if any) and property tax. The dimensions of the boarding to be twenty-four feet high, and the whole of the frontage and the return to the gateway. Hulme Brothers.

This agreement was not under seal, and was stamped with a 5*s*. stamp. Hoarding No. 1 is the hoarding referred to in the agreement.

In order to carry out the agreement, and also to provide a timber shed for their own purposes, Messrs. Hulme Brothers erected a structure, the frontage of which to Broad-street was 57 feet long, the frontage to the corner between the two streets 8¼ feet long, and the return frontage to Withington-street 19 feet long.

The two sides of the structure fronting Broad-street and the corners between the two streets were supported by large timber posts fixed firmly into the ground immediately behind the wall.

The posts were 24 feet high, the same height as the hoarding, and were 1 foot square throughout. There was an interval of 18 feet between post and post. Strong timber cross-pieces were bolted with iron bolts to the posts, and the planks of the hoarding upon which the advertisements were fixed were strongly nailed on to the timber cross-pieces.

The roof of the shed, which was of felt, came up to the top of the hoarding on the Broad-street side and sloped inwards and downwards from that part of the hoarding into the yard.

The structure was designed and erected for the combined purpose of a drying-shed for timber and an advertising hoarding.

The advertising hoarding and station No. 2140 in the rate is called hoarding No. 2.

With regard to this hoarding the following facts were proved: On the 8th Feb. 1883 the following agreement was made between the appellants and one W. H. Harvey

I hereby agree to allow Messrs. Taylor, Garnett, Evans, and Co., of 3, Cross-street, Manchester, the privilege of erecting an advertising hoarding of the following dimensions or thereabouts—144 feet long, and 25 feet high from the top of the wall, on my land, Broad-street, Pendleton, in consideration of which the said Taylor, Garnett, Evans, and Co., to pay me the yearly rent of 30*l*. I also allow the said Taylor, Garnett, Evans, and Co. the further privilege, if they wish it, of removing the wall now standing and building the hoarding from the street level, making a total height of 32 feet 6 inches. This agreement to remain in force for a term of three years at least absolutely from this date, and to be afterwards terminable by a twelve months' notice on either side. If, however, I am obliged, owing to the land being required for other purposes, to give Taylor, Garnett, Evans, and Co., notice to quit at a date less than twelve months beyond the said term of three years, I agree to refund the sum of twenty pounds to them. W. H. Harvey.

This agreement was not under seal, but stamped with a 5*s*. stamp. After the making of the agreement the appellants took down and removed the wall in the agreement mentioned, and erected a hoarding where the wall formerly stood. The hoarding was erected by the appellants for the purpose of being used as an advertising station.

The hoarding was 122 feet long, and 25 feet high. It was made of planks bolted to a framework of cross timbers. The cross timbers were bolted to and supported by sixteen wooden posts in size 7 inches by 3 inches and 25 feet high above the ground; there were nine cross rails or timbers between each pair of posts, and each cross rail was 4½ inches by 1½ inches thick.

The sixteen wooden posts were fixed 3 feet deep in the ground immediately behind the cross timbers, at equal intervals of 8 feet between post and post.

Each of the posts was fastened by bolts to a backstay, which was carried back from the posts, and was in turn fastened by bolts to a timber post fixed 4 feet deep in the ground. These last-named posts stood out of the ground about 2 feet, and were 16 feet away from the front posts to which the cross rails supporting the planks of the hoarding were fastened.

The space of land between the hoarding and the back posts to which the stays were fixed was waste land, upon which a little rough grass grew.

The Court of Quarter Sessions gave judgment for the appellants in respect of both the hoardings, subject to a special case.

If the court should be of opinion that either of the hoardings was rateable, the judgment of quarter sessions in respect of that hoarding was to be quashed, otherwise to stand.

E. Sutton for the appellants.—The two agreements here set out show that both hoardings are rateable, for each of them creates an exclusive occupation, and does not merely give a licence. The decision in *Reg.* v. *St. Pancras Assessment Committee* (37 L. T. Rep. N. S. 126; 2 Q. B. Div. 281), by which the court below thought they were bound, is distinguishable, for in that case there was no permanency of occupation, and the hoardings were not fixed as in the present case.

J. M. Yates for the respondents.—The court below was right. Rateability does not depend upon exclusive enjoyment, but exclusive occupation:

Smith and Son v. *Lambeth Assessment Committee*, 48 L. T. Rep. N. S. 57; 10 Q. B. Div. 327.

Here only a licence or privilege is conferred.

Sutton, in reply, cited

Cory v. *Bristow*, 32 L. T. Rep. N. S. 797; 33 L. T. Rep. N. S. 624; 36 L. T. Rep. N. S. 594; L. Rep. 10 C. P. 504; 1 C. P. Div. 54; 2 App. Cas. 262;

Electric Telegraph Company v. *Overseers of Salford*, 11 Ex. 181;
Lancashire and Cheshire Telephone Exchange Company v. *Overseers of Manchester*, 51 L. T. Rep. N. S. 160; 52 L. T. Rep. N. S. 793; 13 Q. B. Div. 700; 14 Q. B. Div. 267;
Shaw, Ashton, and Thorpe v. *Salford Union* (May, 1876, not reported).

Wills, J.—The question in this case is, whether Messrs. Taylor, Garnett, Evans, and Co. have an exclusive occupation of the soil which is physically occupied by the posts which support their hoardings, or have a mere licence and no tenancy. On the first agreement, I think the case is very clear. I have no doubt the document gives an exclusive occupation. The agreement provides for letting and taking the advertising station. Those are words appropriate to a demise. No doubt this is not conclusive, it is necessary to look at the whole document, but there is nothing in the context to require us to reject the ordinary meaning of the words, and an advertising station is clearly capable of being the subject of a demise. Then the letting is to be at a yearly rent, which is an expression applicable primarily to a tenancy. It is further provided that the tenancy is to remain in force for a period of seven years. It is true that no tenancy for seven years can be created by a document which is not under seal; still such a document may operate as a demise, and after payment of rent a tenancy from year to year would come into existence. Therefore all the first part of the document is applicable to a demise, and the proper mode of construction is to give the natural meaning to the words used, unless there is some reason, either in the context or in the nature of things, against it. Here there is nothing against it in the context, for, on looking at the next clause, it appears that Messrs. Taylor, Garnett, Evans, and Co. are to pay all rates and taxes and property tax, and it is difficult to see how they could be called upon to pay property tax unless there were a demise; with a licence only they could not be called upon to pay it. This affords a cogent argument that the parties intended the document to operate as a demise. The meaning of the stipulation as to payment of rates seems to be this: that Messrs. Hulme Brothers saw that the overseers would probably increase the rate if the premises became more valuable by reason of Messrs. Taylor, Garnett, Evans, and Co.'s use of them. They desired to avoid bearing that increase of burden; and the mode in which they secured themselves was by demising the "advertising station," and stipulating that the rates should fall on Messrs. Taylor, Garnett, Evans, and Co. Had they not made a demise of the land it would have been impossible to say how much of the rate payable in respect of the premises would have been due in respect of their value as an advertising station, and how much in respect of their value as a drying shed for timber. It is impossible to work out the intentions of the parties without a tenancy. As to the second document, I have entertained some doubts, and I think it is a more ambiguous agreement than the first, but, on the balance of conflicting considerations, I have come to the conclusion that its real effect is to give an exclusive right of occupation. In adopting this view I am not uninfluenced by the decision in *Shaw, Ashton, and Thorpe* v. *Salford Union*, because in that case Blackburn and Quain, JJ., on an agreement more favourable to those who opposed the rate than this agreement is, came to the conclusion that the property was rateable. Generally speaking, it is poor work to take one ambiguous agreement and argue, from the construction which has been put upon it, as to the construction of different words applied to different circumstances; but there are cases where the facts are undistinguishable, and in such cases the construction which has been put upon one agreement may afford a guide to the true construction of another. In the case I have referred to there was more to be said against the rate than there is here. The words used there were more like words intended to confer a licence only than those used in the present case. I think the word "privilege," which is used in this agreement, is not inconsistent with the right to occupy. I have come to the conclusion that, on the proper construction, this agreement also creates a tenancy. For these reasons I am of opinion that both the hoardings are rateable, and therefore, as to both, the appeal ought to be allowed.

Grantham, J.—I am of the same opinion. It seems to me that, both on the authorities and on the facts, Messrs. Taylor, Garnett, Evans, and Co. have a profitable occupation, and ought to pay rates. Speaking for myself, I should say that the second agreement is even stronger in favour of this view than the first, for in the first case the structure was used for a double purpose, as a drying shed for timber and as an advertising station. I have no doubt, however, that the language of the first agreement intended to apply to occupation. As to the second agreement, I am of opinion that it gave an exclusive occupation for a distinct term of three years. The words used are, "the privilege of erecting an advertising hoarding." Those words confer the right to build; it is like taking land to build a house on, where the lessee would pay a ground rent, and would be the occupier of the land. I am of opinion, on the authorities and on the facts, that this second document amounts to a lease for a distinct purpose for a distinct time. In other cases on a less permanent occupation, property has been held rateable. In *Corry* v. *Bristow* (*ubi sup.*) the bulk was only attached by chains to moorings in the bed of the river, and it was held rateable. In *Lancashire Telephone Company* v. *Overseers of Manchester* (*ubi sup.*) the mere fixing of iron bolts in walls or roofs to support the telephone wires rendered the owners of the wires liable to be rated. So in *The Electric Telegraph Company* v. *Overseers of Salford* (*ubi sup.*) the company was held liable to be rated in respect of the telegraph posts and wires. That was a case of wires going over the land, not in the land, but it was held that the telegraph company were using the land. In *Shaw, Aston, and Thorpe* v. *Salford Union*, a distinction was taken between the case of posts being put into the ground to keep up a hoarding where it was held that the hoarding was rateable, and that of a hoarding fastened to the gable end of a building, which was held not to be rateable. In the present case a specific piece of ground is let for the purpose of erecting a building, and there is also a right to pull down a wall standing upon the land.

Order of sessions quashed.

Solicitors for the overseers, *Radford* and *Frankland*, for *Bowden* and *Walker*, Manchester.

Solicitor for Taylor, Garnett, Evans, and Co., *A Lings*, Manchester.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

DIVORCE BUSINESS.

Tuesday, Feb. 22, 1887.

(Before the PRESIDENT.)

HETHERINGTON *v.* HETHERINGTON. (*a*)

Justices—Conviction of husband for aggravated assault on wife—24 & 25 Vict. c. 100, *s.* 43—*Separation order—Presumption of non-access—Subsequent application to discharge order—Statements on oath, by wife, as to her adultery—Admissibility—Refusal to admit evidence, or to discharge order—Appeal—Jurisdiction—20 & 21 Vict. c.* 43—*Matrimonial Causes Act* 1878 (41 *& 42 Vict. c.* 19), *s.* 4.

Any application for the discharge of an order made under sect. 4 *of the Matrimonial Causes Act* 1878 *must be made to the court or magistrates by whom the order was made, and not to the Probate, Divorce, and Admiralty Division of the High Court of Justice.*

A refusal of justices to make an order is in itself an order, and any order under sect. 4 *of the Matrimonial Causes Act* 1878, *or any refusal to vary such order, is appealable to the Probate, Divorce, and Admiralty Division of the High Court of Justice.*

From the date of an order made under sect. 4 *of the Matrimonial Causes Act* 1878, *authorising a wife to live apart from her husband, the presumption of non-access applies, as in cases of judicial separation, and the testimony of the husband and admissions made by the wife as to the paternity of a child born after the separation, at a time sufficiently remote from the last date of cohabitation to remove the contrary presumption of access which prevails in the case of married persons not judicially separated, are admissible in evidence; and it is not competent for the justices to exclude such evidence at the hearing of an application to vary the original order.*

THIS was an application for the discharge of an order made by the justices of the Chester Ward division of the county of Durham, on the 1st Jan. 1883.

William George Hetherington, the present applicant, was, on that date, convicted under 24 & 25 Vict. c. 100, s. 43, by the justices of the said division, of an aggravated assault upon his wife Elizabeth Hetherington, and it was thereupon ordered, under sect. 4 of the Matrimonial Causes Act 1878 (41 & 42 Vict. c. 19), that the said Elizabeth Hetherington should no longer be bound to cohabit with her husband; that she should have the custody of the children of the marriage, and that her husband should allow her 10*s.* a week for the maintenance of herself and the children.

On the 20th Sept. 1886 the respondent was arrested and brought before the magistrates on a warrant for payment of arrears of alimony, and, in cross-examination, the wife on that occasion admitted that she had given birth to a child, of which her husband was not and could not be the father, she not having cohabited with him since the date of the separation order in 1883.

After these admissions, the husband took out a summons to vary the original order, and this summons was heard at Consett Police-court on the 9th and 16th Oct. 1886, when the justices refused to admit the evidence of the applicant, as to non-access, or the admissions made at the previous hearing by the wife, on the ground that neither husband nor wife was competent to give evidence tending to bastardise a child born in wedlock.

The justices, at the request of the husband's solicitor, stated a special case under 20 & 21 Vict. c. 43, for the consideration of the Queen's Bench Division, one of the questions raised being as to the admissibility of the evidence of the husband and wife, and another being whether the bench before whom the summons was heard had jurisdiction, one of the members not being the same who made the original order.

The husband appealed concurrently to this division, under 41 & 42 Vict. c. 19, s. 4.

That appeal was heard on the 18th Jan., and on the 25th Jan. the President intimated that the main question being as to the admissibility of certain evidence, he had decided, out of respect to the Queen's Bench Division, not to proceed further with the hearing of the motion until the special case stated to that division had been either formally abandoned or decided.

In accordance with that intimation, the justices at Consett were applied to, and the recognisances estreated, and as the special case was never set down for hearing, all the proceedings in the Queen's Bench Division were now at an end.

The present motion on behalf of the husband was made under sect. 4 of the Matrimonial Causes Act 1878 (41 & 42 Vict. c. 19), the proviso to which is as follows:

> Provided always, that no order for payment of money by the husband, or for the custody of children by the wife, shall be made in favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned; and that any order for payment of money or for the custody of children may be discharged by the court or magistrate by whom such order was made, upon proof that the wife has, since the making thereof, been guilty of adultery; and provided also, that all orders made under this section shall be subject to appeal to the Probate and Admiralty Division of the High Court of Justice.

Pritchard, for the appellant.—This is a motion that the first order be discharged, on the ground that the wife has, since that date, been guilty of misconduct. The words "the court" mean this court:

> *Ex parte Sharpe*, 10 L. T. Rep. N. S. 458; 33 L. J. 152, M. C. See the judgments of Cockburn, C.J. and Blackburn, J.

The Divorce Act (20 & 21 Vict. c. 85), s. 21, gives jurisdiction as to protection orders. The difficulty which Lord Blackburn pointed out was remedied by the amending Act (27 & 28 Vict. c. 44, s. 1), which says, in substance, that, where a magistrate has died, any person may apply to his successor. That section seems to have met a difficulty which was felt in construing the former Act, and our contention is, that the Matrimonial Causes Act 1878 (41 & 42 Vict. c. 19) ought to be considered in a similar way, and that the words "the court" should be construed to mean the Divorce

(*a*) Reported by H. DURLEY-GRAZEBROOK, Esq., Barrister-at-Law.

Division of the High Court. Sects. 2 and 3 clearly apply to it; and it is submitted, that to read sect. 4 differently is to interrupt the continuity of the Act. Your Lordship pointed out, on Jan. 18, that where a magistrate has died, unless his successor has jurisdiction, or unless the husband has power to come to the Divorce Court, the order made against him would remain in force for ever. Our former appeal was a nullity. Now, as to the other point, that, having exercised the right of appeal to one of two concurrent courts, we are not at liberty to abandon that appeal, and come to the other of those two courts:

Reg. v. *The Justices of Middlesex*, 9 Dowl. 163. See especially judgment of Patteson, J. at pp. 169, 170.

Since the Judicature Acts all the courts are one, and we ought not to be precluded from coming here. We are really not appealing, but coming to ask your Lordship to hear a case, having previously gone to the wrong court. The presumption of access does not arise where the husband and wife are living apart by order of a court of competent jurisdiction:

Taylor on Evidence, 8th edit. 817, 818;
Roscoe's Nisi Prius, p. 954.

A decree of judicial separation is to have the effect of the ancient decree *a mensâ et thoro*:

Parish of St. George v. *Parish of St. Margaret, Westminster*, 1 Salk. 123.

In all the cases in Taylor, the suit was as to the legitimacy of children; here it is not so.

Back.—One question raised by the special case was, whether or not the magistrates had jurisdiction to make an order. Now, because it suits the appellant's argument better, all that is dropped. [The PRESIDENT.—Is it not in my power to deal with it on the former motion?] First, as to this being an entirely new motion. The present application is by way of appeal in 1887 from an order made by the magistrates at Consett in 1883. The correctness or incorrectness of the application depends on whether the words "the court" in the Act mean this court. In sect. 4 the words are "the court or magistrate before whom he (*i.e.*, the husband) was convicted." As the man could not presumably be convicted by this court, those words cannot apply to this court. Since the last hearing a case has been decided by the Court of Appeal, in which a *mandamus* to justices was refused, the applicant having elected to pursue his remedy by appeal to quarter sessions:

Reg. v. *Licensing Justices of Newcastle-upon-Tyne*, 51 J. P. 244.

If it is held to be open to the appellant to go into the merits, the wife's adultery may be taken as admitted. It is submitted, however, that the admissions were obtained in totally different proceedings, and that they are not evidence in this case:

Babbage v. *Babbage and Manning*, L. Rep. 2 P. & D. 222.

The PRESIDENT.—I regret very much that this litigation has reached the pitch that it has, and I hope that the opinion I am about to express upon the main point of the case will, in some way or other, bring the controversy to an end; the point being, whether or not there is evidence upon which the magistrates might have acted to discharge the original order of 1883. It appears that an order was then made equivalent by the Act of Parliament to a judicial separation, and a judicial separation is equivalent to the ancient divorce *a mensâ et thoro*. From the time that the decree was pronounced the parties were forced to live apart, and the husband was bound not to molest his wife in any way, or to resume cohabitation. From that moment the presumptions which exist in the case of married persons as to access and legitimacy of children are reversed, and from that moment, if a child is born more than nine months after the separation, unless it be shown, as a matter of fact, that the husband and wife came together again, it is presumed that such child is illegitimate, and that appears to have been lost sight of altogether when this matter was before the magistrates. If it had not been lost sight of, it probably would have led them to a different decision. That point has been settled long ago in law by the case referred to in Salkeld (*Parish of St. George* v. *Parish of St. Margaret*, 1 Salk. 123). The woman seems to have made certain statements with regard to the birth of her child: that it was born eight weeks before the matter came on for hearing in 1886. Now, upon that point, I think it does, by implication, lead to an inference—a conclusive inference—of the illegitimacy of the child. A woman, though she be a married woman, may prove that a child was born at a particular time, and it must depend on other circumstances whether the child was legitimate or not. Now it was proved that the child was born eight weeks before the hearing in 1886, and there was a legal presumption that any child born after 1883 was illegitimate. The magistrates seem, however, to have been led to think that this was an issue of bastardy, but it was not; it was an issue of adultery. Now let us see what we can make of the proceedings that have been taken. In the first place, an application was made to the magistrates to discharge the order which had been made in 1883. That application was made to other magistrates, because one of the magistrates who had made the original order was dead. They then stated a case, one of the questions therein raised being, whether or not one of the magistrates who made the order of 1883 being dead, they had power to hear the application to discharge that order. As a result of the hearing they refused to discharge that order, and an application was then made to me by way of appeal under sect. 4 of 41 & 42 Vict. c. 19. I said I did not doubt—and I adhere to that opinion—that I have the power to hear an appeal from such an order as was then the subject of consideration before the magistrates; and I may say at once that I am of opinion that I had jurisdiction, by way of appeal, from their refusal to make an order, and that that refusal to make an order is itself an order. But, as a matter of discretion, I did not think it right that, while an appeal was in course of proceeding towards a hearing in the Queen's Bench Division, I should exercise the appellate jurisdiction which I conceived I had, and therefore I let the case, which was undoubtedly by way of appeal, stand over (see 51 J. P. 119) in order that the special case should be disposed of in one way or another. I certainly hoped that I should hear nothing more of the matter. Now it comes back to me in the form

of a substantive application to discharge the order made in 1883, upon the ground that, by the 4th section of the Act, I have power to discharge the original order upon fresh evidence brought before me. I have listened to the argument addressed to me by Mr. Pritchard, and I have come to the conclusion that I have not that power. Undoubtedly the word "court" is used in some sections of this Act as applying plainly to the Divorce Division, and this is sufficiently obvious with regard to the 2nd section, where the Queen's Proctor is spoken of. In sect. 3, which enlarges the power as to variation of settlements possessed by the Divorce Court, under 22 & 23 Vict. c. 61, s. 5, it is also plainly this court that is meant. Now we come to a totally different enactment, and different in its character: and there, where the word "court" occurs in sect. 4, I am of opinion that that must mean "the court or magistrate before whom he was convicted," and by whom it was ordered "that the husband shall pay to the wife such weekly sum as the court or magistrate shall consider within his means." It is conceivable that the Legislature meant by this first subsection to refer to this court, in speaking of what is to be done with reference to the husband's means. That is something which is to be dealt with by the magistrate, and it would be a most unnatural proposition to say that, in directing the magistrate to consider the husband's means, it meant, at the same time, this court also. The whole collocation points to the Legislature meaning some court other than this court. I do not quite know what court the Legislature meant; perhaps it is the quarter sessions. Then I think further light is thrown upon that by the language of the proviso to the 4th section, which says that no order for the payment of money shall be made in favour of a wife proved to have committed adultery, and that any order for payment of money or custody of children may be discharged "by the court or magistrate by whom such order was made." I think that is all governed by the words "by whom;" and I say that the last concluding words of the proviso tend considerably to strengthen that view, for it goes on to say, "Provided also, that all orders made under this section shall be subject to appeal to the Probate and Admiralty Division of the High Court of Justice." I think, therefore, that I have not the power to discharge the order, that that can only be done by the court or magistrate by whom the order was made, but that when that has been done, there is then an appeal to this division, if the court or magistrate make an improper order, or refuse to make any order. The result is that this application must be refused.

Back asked that it should be dismissed with costs.

The PRESIDENT.—I am afraid that it must be so. The applicant must pay the costs in this court.

Solicitors for the appellant, *Pritchard* and *Sons*, agents for *T. W. Welford*, Consett.

Solicitors for the respondent, *T. Cray*, agent for *Dix* and *Warlow*, Newcastle-upon-Tyne.

CROWN CASES RESERVED.

Saturday, Dec. 10. 1887.

(Before Lord COLERIDGE, C.J., POLLOCK, B., MANISTY, HAWKINS, and SMITH, JJ.)

REG. *v.* BECKLEY AND OTHERS. (*a*)

Criminal law—Jurisdiction of justices—Justices of one petty sessional division trying offence committed in another division of same county—9 Geo. 4, c. 43, s. 6.

The jurisdiction of justices to hear charges of indictable offences committed within the county for which they are appointed, and to commit the offenders for trial, is not restricted by 9 Geo. 4, c. 43, s. 6, to offences committed within or near to the petty sessional division in and for which such justices of the peace usually act.

CASE stated by the chairman of the Quarter Sessions for the county of Cambridge as follows:

At a general court of quarter sessions of the peace, held by adjournment before me and other justices of the peace for the county, on Friday, the 21st Oct. 1887, John Beckley, John Norton, William Munns, and William Smith were tried and convicted upon an indictment charging them with conspiracy.

When the defendants were called upon to plead it was objected by counsel for certain of the defendants that the indictment ought to be quashed, as the provisions of the Vexatious Indictments Act (22 & 23 Vict. c. 17), s. 1, which, it was conceded, applied to the offence charged in the indictment, had not been complied with.

The offence with which the defendants were charged was committed at Swaffham Prior, in the county of Cambridge, a place within the Petty Sessional Division of Bottisham, in the said county.

The defendants were arrested at various places not within the county upon a warrant, a copy of which is here set out:

To the constables of the Cambridgeshire constabulary, and to all other peace officers in the said county of Cambridge.—County of Cambridge, to wit.—Whereas information was this day sworn before me, one of Her Majesty's justices of the peace in and for the said county, on the oath of James Harvey, of the parish of Feltwell Downham, in the county of Norfolk, for that George Beckley, *alias* Fatty, of Fenstanton, in the county of Huntington, William Smith, of Bedford, John Norton, *alias* Soney, and William Munns, of Fenstanton, in the county of Huntington, did, at the parish of Swaffham Prior, in the county of Cambridge, on the 16th day of May 1887, unlawfully and wickedly, falsely, and maliciously conspire, combine, confederate, and agree together to cheat and defraud, and did then and thereby cheat and defraud the said James Harvey of certain horses, to wit, two fillies of the value of 40*l.* of the property of the said James Harvey. These are therefore to command you, the said constables of Cambridgeshire to apprehend the said George Beckley, *alias* Fatty, William Smith, John Norton, *alias* Soney, and William Munns, and them bring before me, or such other of Her Majesty's justices of the peace for the county of Cambridge as shall be present at the police-station, Bottisham, to answer the said information, and be further dealt with according to law. Given under my hand and seal this 18th day of May, in the year of our Lord one thousand eight hundred and eighty-seven, at Cambridge, in the county aforesaid.

ELLIOTT SMITH (L.S.)

The justice who signed this warrant resided and usually acted within the Petty Sessional Division of Cambridge, in the said county.

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

The defendants were on the 6th July remanded by a justice of the peace for the county residing within, and usually acting for the said Cambridge division of that county, and ordered by his warrant to be brought up on the 9th July, at the Shire Hall, Chesterton, the place for holding the petty sessions for the division of Cambridge, within the said county, and on the said 9th July the case was partly gone into, and they were further remanded until the 16th July, to the same petty sessional division. On the 16th July, further evidence was given on behalf of the prosecution at the petty sessions, held at Chesterton aforesaid, when it was for the first time objected on behalf of the defendants that the justices sitting at Chesterton had no jurisdiction to hear and determine a case arising within another petty sessional division, viz., at Bottisham, and that the justices were bound to remand the case for hearing at Bottisham, according to the terms of the warrant. The justices overruled the objection, and sitting within the Petty Sessional Division of Cambridge, holden at Chesterton, heard and determined the case, and committed the defendants for trial. Of the justices who so heard and determined the case, one only was a justice who resided within and occasionally acted within the Bottisham Petty Sessional Division.

It was contended on the part of the defendants that by virtue of 9 Geo. 4, c. 43, s. 6, it was not competent for the justices sitting at the Cambridge Petty Sessional Division at Chesterton, to hear or determine, or to send for trial, a case arising within another petty sessional division of the county, and that the justice in remanding the defendants on the 6th July to the Cambridge Division was acting without jurisdiction, and that for these reasons the provisions of the Vexatious Indictments Act had not been complied with; consequently that the indictment ought to be quashed.

The learned chairman overruled the objection, and refused to quash the indictment; but stated the above facts for the opinion of the court, and asked whether he was right in law in so holding.

J. W. Cooper on behalf of the prisoner.—Under 9 Geo. 4, c. 43, s. 6. all matters and things which arise within a petty sessional division must be determined by the justices acting in and for that division; and, therefore, these prisoners having been apprehended out of the county of Cambridgeshire should have been remanded to the petty sessional division in which the offence was committed. This contention is supported by the provisions of 11 & 12 Vict. c. 42, ss. 11 and 12, the first of which provides for the backing of a warrant where the offender is not to be found within the jurisdiction of the justices by whom the warrant was issued, and requires the offender to be taken when apprehended before the justice who issued the warrant, or before some other justices of the place where the offence appears to have been committed, provided that the justices by whom the warrant is backed may take the examinations of witnesses, and proceed in manner thereinafter directed with respect to persons charged with an offence alleged to have been committed in another county. That is to say, order under sect. 22 that the offender be taken before some justices of the peace in and for the place where and near unto the place where the offence is alleged to have been committed. Here the warrant commanded the constable to apprehend the prisoners and take them before the justices at Bottisham, therefore it was the duty of the justices before whom they were brought to have remanded the prisoners to the place near to which the offence was committed, that is to say, the Petty Sessional Division of Bottisham, otherwise the greatest inconvenience might be caused to witnesses. [POLLOCK, B.—Is not that a matter of discretion for the justices? Suppose there was a division much nearer to the spot than Bottisham, which would sit sooner, would it not be much more convenient to remand to that division?] In this particular instance the warrant required them to be brought to Bottisham. [POLLOCK, B.—As I understand it that does not matter, for when the justices have the prisoners before them any defect in their arrest would not render the proceedings before the justices irregular.] Although a justice of the peace has jurisdiction over the whole county, I submit that that jurisdiction must be exercised at the petty sessions for the division in which the offence was committed; and, therefore, this being a matter or thing which has arisen within the Petty Sessional Division of Bottisham, it is a matter or thing which must have been heard and determined at Bottisham.

No one appeared in support of the conviction.

Lord COLERIDGE, C.J.—I am of opinion that in this case the conviction was right and should be affirmed. The objection taken to it is that inasmuch as the offence was committed in a petty sessional division of Cambridgeshire, before the Vexatious Indictments Act could be applied to the case, the person giving his sanction must have been a person habitually exercising the jurisdiction of a justice of the peace within the particular petty sessional division in which the offence was committed. And for the purpose of supporting this objection analogies have been attempted to be drawn from the provisions of an Act of Parliament dealing with cases where offences have taken place in one county and the committal has taken place in another county. This is a case where an offence has been committed within the county of Cambridge. Now, over everything that takes place within the county of Cambridge the justices who heard this case had clearly jurisdiction, and it matters not that an offence takes place within one petty sessional division of the county, if it is not an offence which by law is to be decided by the justices acting habitually within that petty sessional division. There is no such law as requires the offence in this case to be decided by the justices of the division in which it was committed. The case was brought before two magistrates of the county of Cambridge, who had jurisdiction over the offence, and their sanction was given. There is nothing throughout any of the Acts which have been cited to limit the jurisdiction of the justices in any way. This is the first occasion on which, during a long series of years, this point has been taken. But I am glad that it has been taken, in order that it may be laid at rest by the unanimous decision of this court. I am of opinion that there is nothing in the objection, and that the indictment was properly tried, and the convictions must therefore be affirmed.

POLLOCK, B.—I would only add that the objection taken seems to me to suppose that the statute 9 Geo. 4, c. 43, was intended to curtail or limit in some way the powers of justices which run throughout the county. Now, that Act by the preamble makes the 6th section perfectly clear because it begins, "Whereas, by divers Acts now in force it is enacted that certain matters and things, in the same respectively mentioned, shall be transacted and determined within the divisions or limits within which the same shall arise," and it then recites that, "whereas the boundaries of such divisions or limits are in some instances uncertain, and in many have become inconvenient to the inhabitants within the same, from the change or increase of trade or population, or from other causes; and whereas doubts have arisen as to the authority by which such divisions or limits may from time to time be constituted, defined, or altered; and it is expedient that such doubts should be removed, and due provision made for the constituting, defining, and regulating from time to time such divisions or limits." The Legislature therefore make sure by sect. 6 that all matters which, according to that preamble, must be transacted and determined within a particular division of a county, shall be transacted and determined in the newly established divisions at the time of the passing of the Act. It is quite clear that the law is very jealous not to cut down the jurisdiction of magistrates unless there are express words which cut down that jurisdiction. There are no such words in any of the statutes, limiting their jurisdiction in the manner suggested, and it therefore seems to me that there is nothing in this objection.

MANISTY, J.—I am of the same opinion. It seems to me to have been thought that the statute 11 & 12 Vict. c. 42, has something to do with this case. That statute has nothing to do with it, and there is no analogy between the cases there dealt with and the present case. That statute was passed to deal with an offence committed in one county and to enable the prisoner to be brought before the justices in another county; and it is clear that, under that statute, if the justices are satisfied that an offence has been committed in another county, they may commit the prisoner then and there to that other county; but if they are not satisfied that an offence has been committed they may order the prisoner to be brought before the justices of the county in which the offence was committed. There is no statute which provides for the particular case of an offence being committed in one petty sessional division, and the offender being brought before justices having jurisdiction over that offence, but habitually sitting in another petty sessional division.

HAWKINS, J.—Dr. Cooper has failed to raise in my mind a shadow of doubt as to the jurisdiction of these justices, and I am therefore of opinion that the convictions should be affirmed.

SMITH, J.—I agree, and have nothing to add.

Convictions affirmed.

Solicitors for the prisoner, *Ellison* and *Burrows*, Cambridge.

Saturday, Dec. 10, 1887.

(Before Lord COLERIDGE, C.J., POLLOCK, B., MANISTY, HAWKINS, and SMITH, JJ.)

REG. *v.* RANDELL. (*a*)

Criminal law—False pretences—Word competition—Advertisement containing false statement of fact.

The following advertisement was inserted by the prisoner in a newspaper, viz.: "Barnardo.—2l., 1l., 10s., for most words from Barnardo. No single letters to be used. All others in heavy black type from Nuttall's 1886 *Dict. Proceeds to go to Dr. Barnardo's Home for Destitute Children. Alphabetical lists, with* 1s. 3d., *to Rev. A. Brient, Holt, Trowbridge, Wilts, by March 5th. Result 8th."*

No such person as the Rev. A. Brient existed at the address given, and sums of money which certain persons were induced to send in the belief that a bonâ fide competition was indicated by the advertisement, were received and appropriated by the prisoner.

Held, that the advertisement was capable of the construction put upon it in the indictment; that it was intended to convey the impression that there was a person named A. Brient living at Holt, Trowbridge, in the county of Wilts, who was a minister of religion, and that he had instituted a bonâ fide competition, and had made arrangements to present prizes to the successful competitors, and to give the proceeds derived from the entrance fees of competitors, after deducting the prizes, to a charitable institution; and that it was a question for the jury whether the persons who had sent the moneys, with the obtaining which the prisoner was charged, had sent them acting under that impression.

THE prisoner was tried at the Easter Quarter Sessions for the county of Wilts, on the 6th April 1887, on a charge of obtaining money by false pretences.

The evidence showed that the prisoner was a stationer at Bradford-on-Avon, and that he inserted an advertisement in the *Standard* newspaper of the 26th Feb. 1887, in the following terms:

Barnardo.—2l., 1l., 10s. for most words from Barnardo. No single letters to be used. All others in heavy black type from Nuttall's 1886 Dict. Proceeds to go to Dr. Barnardo's Home for Destitute Children. Alphabetical lists, with 1s. 3d., to Rev. A. Brient, Holt, Trowbridge, Wilts, by March 5th. Result 8th.

Three witnesses for the prosecution, named Matthews, Taylor, and Cook, stated that, having read this advertisement, they each made lists of words and sent them, with fifteen pence, either in stamps or postal orders, by post to the address mentioned. They said they were induced to do so not only because prizes were offered which they had a chance of obtaining, but because they believed in the existence of the Rev. A. Brient, and that he had instituted the competition, and would pay the prizes.

It was proved by the prosecution that letters addressed to the "Rev. A. Brient" began to arrive at the Holt Post-office on the 28th Feb., and continued to do so for a week after that date, between sixty or seventy letters in all having been received. No person of the name could be found

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

at Holt, and so the letters were detained at the post-office.

On the 1st March 1887 the prisoner called at the Holt Post-office, and asked if there were any letters addressed to the "Rev. A. Brient," and on hearing there were, he said they belonged to a person at Bradford, who had authorised him to receive them. The letters which had then arrived were given to the prisoner, and by his directions those that came afterwards were given to his errand boy.

It was further proved that on the 10th March 1887 the prisoner paid to a witness named William Henry Sims the sum of 1*l.* 1*s.* 6*d.* in seventeen postal orders of one shilling each, each with three postage-stamps attached, in part discharge of a judgment debt of 3*l.* 10*s.*, for which he had been threatened with a judgment summons in the County Court, and on the same day he paid to a witness named John Edward Jennings the sum of ten shillings—five shillings in stamps and five shillings in similar postal orders, and when arrested on the 16th March there were found in his possession 1*l.* 15*s.* 3*d.* in postal orders, stamps, and cash, all of which the prisoner admitted to be part of the proceeds of the competition, and also a large number of lists of names sent in by the competitors, including those sent by the witnesses for the prosecution. No result of the competition was published on the 8th March, or at all, neither had the witnesses received their money back. It was shown that no such person as the Rev. A. Brient was known at Holt, and the prisoner when interrogated as to his identity and whereabouts stated that he lived at an address in Bath, but on inquiry there no such person could be found.

No witnesses were called for the prisoner, but at the close of the case for the prosecution the prisoner's counsel objected that there was no case to go to the jury, on the ground that no false pretence of any existing fact had been proved, but merely a future promise to pay a certain sum in the event of a competitor being successful.

The learned chairman overruled these objections, and in summing up directed the jury, in the terms of *Reg* v. *Cooper* (36 L. T. Rep. N. S. 671; 2 Q. B. Div. 510), that it was a question for them to decide whether the prisoner intended the prosecutors to put such a construction upon the advertisement as supported the false pretences charged in the indictment, and that if they thought that the prisoner intended persons who read the advertisement to put upon it the construction that there was such a person as the Rev. A. Brient, who was a minister of religion, living at Holt, and that he had instituted a *bonâ fide* word competition, the proceeds of which were to be given to Dr. Barnardo's home, and that such statements were false and made with intent to defraud; that there were sufficient false pretences of existing facts to support the indictment; if the jury considered that the prosecutors had parted with their money upon the faith of these representations.

The jury found the prisoner guilty, and the foregoing case was stated for the opinion of the court upon the question:—Whether on the above facts the prisoner was properly convicted upon the indictment. (*a*)

(*a*) The false pretence alleged in each of the counts of the indictment was: "That there was a person named A. Brient living at Holt, Trowbridge, in the county of Wilts, who was a minister of religion, and that the said A. Brient had instituted a *bonâ fide* competition for the production of the greatest number of words from the letters composing the name 'Barnardo,' and that the said A. Brient had made arrangements to present prizes to the successful competitors of the respective value of two pounds, one pound, and ten shillings, and had further arranged to give the proceeds derived from the entrance fees of competitors, after deducting the said prizes, to a charitable institution known as Dr. Barnardo's Home for destitute children."

No one appeared in support of or against the conviction.

LORD COLERIDGE, C.J.—In this case I am of opinion that the conviction should be affirmed. The false pretence which was made was a pretence of an existing fact by which it was clearly intended to be conveyed that there was such a person as the reverend gentleman whose name was mentioned in the advertisement, and that such gentleman had instituted a word competition the proceeds of which were to be given towards the charity known as Dr. Barnardo's Home for Lost Children. All of which was a pure invention by means of which the prisoner got letters containing money. He got them by a pretence which he knew to be false, and it is well established by the cases that where a person puts forth a false pretence and receives money by means of such pretence he is guilty of obtaining such money by false pretences. In 1877 this court in *Reg.* v. *Cooper* (36 L. T. Rep. N. S. 671; 2 Q. B. Div. 510), a case which is nearly on all fours with the present case, held that where words are used which are fairly and reasonably capable of a construction supporting the pretences charged it is a question for the jury whether the writer intended the prosecutor to put that construction upon them; and therefore I am of opinion that, as here the advertisement was capable of the construction put upon it, the prisoner was rightly convicted.

POLLOCK, B.—I quite agree, and will only call attention to what was said by my brother Lush in the case of *Reg.* v. *Cooper*, namely: "The pretence, in order to justify a conviction, must be of existing facts. It may be made either by words or by acts. It is sufficient if it can be reasonably and naturally inferred from the words, or from the acts, in order to raise a question for the decision of the jury." In the present case the chairman of the quarter sessions seems to have had that case before him, and he so left it to the jury, or at any rate he left it with that sort of direction to the jury.

MANISTY, J.—I am of the same opinion.

HAWKINS, J.—I am of the same opinion. It is quite clear that the words in the advertisement are capable of conveying the construction put upon them by the prosecutor; and it was, therefore, a question for the jury to say whether they were calculated to convey such an impression as the witnesses say was conveyed to their minds. I am therefore of opinion that the conviction must be affirmed.

SMITH, J.—I am of the same opinion.

Conviction affirmed.

Saturday, Dec. 10, 1887.

(Before Lord COLERIDGE, C.J., POLLOCK, B., MANISTY, HAWKINS, and SMITH, JJ.)

REG. *v.* BUCKMASTER. (*a*)

Criminal law—Larceny—Taking invito domino—Bet with welsher—Property in money deposited—Larceny by trick.

Where money is deposited by a person upon making a bet with another, and the person who received the money is charged with stealing it, it is a question for the jury whether, at the time the money was deposited, there was an intention on the part of the receiver not to return such money to the person who made the bet whatever the result of the subject-matter of the bet might be; and if the jury are satisfied that there was such an intention on the part of the receiver, they will be justified in convicting him of larceny. For, although the owner of the money voluntarily parted with its possession, the property in the money did not pass, he having only handed it over on the assumption that the transaction was a bonâ fide bet, and never having intended to part with the property in it, except in the case of his losing the bet.

THIS was a case stated for the opinion of the court by the Chairman of the Court of Quarter Sessions for the county of Berks, which was as follows:

1. At the general quarter sessions for the county of Berks, held on the 27th June 1887 Walter Buckmaster was tried before me upon an indictment, omitting formal parts, which charged that he did on the 9th June 1887 feloniously steal, take, and carry away, certain money of the moneys of John Rymer.

2. It was proved that the prisoner and another man, at about 3 p.m., on the 9th June last, during the Ascot Race Meeting, were the only persons standing upon a platform or stand made to represent "safes," or iron safe chests. The words "Griffiths, the Safe Man," was printed upon it. The stand was outside the course, on a spot on Ascot Heath where carriages were placed, and was not within any betting inclosure or ring.

3. The prisoner, with a book in his hand, was calling out "Two to one against the field," just before a race was about to be run. Rymer went up to him and asked "What price Bird of Freedom?" to which he replied "Seven to one to win." Rymer then deposited five shillings with Buckmaster, who told him that if the horse won he (Rymer) would win thirty-five shillings, and get his own five shillings back. He also deposited another five shillings with Buckmaster, who told him that he would have fifteen shillings back, including his own five shillings, if the horse was first or second. The man who was with Buckmaster, and was acting with him, received the money, and the latter, with whom all the conversation took place, appeared to take down the bet in his book, and gave Rymer a card-ticket with the words "Griffiths, Safe Man" upon it.

4. While the race was being run, the prisoner and the other man were seen by one of the witnesses to walk quietly away. They were followed for about twenty yards, and on the witness at once returning the stand had gone. The horse "Bird of Freedom" won the race, and thereupon Rymer went back to the place where the stand had been and he found that the prisoner and the other man had gone. He waited there for half-an-hour and then left. Much later in the afternoon Rymer saw the prisoner on another part of Ascot Heath, and said, "I want 2*l.* 15*s.* from you." The prisoner said he knew nothing about it. Upon being told by Rymer that he would be detained, he admitted the bet, and said he had not the money, but that he was only the clerk, and could take the prosecutor to the man who had it. He was then taken into custody, and upon him were found card tickets with the words "Griffiths the Safe Man" upon them. It was elicited from Rymer in cross-examination that he would have been satisfied if he did not receive back the same particular coins he had deposited.

5. At the close of the case for the prosecution, on behalf of the prisoner it was submitted that Rymer having parted voluntarily with the money there was no evidence of larceny nor of any taking by prisoner, and none of obtaining by false pretence or trick.

The learned chairman declined to withdraw the case from the jury, but assented to state this case. No evidence at all was called on the part of the prisoner, and a verdict of guilty was returned.

The question for the opinion of the court was, whether there was any evidence to be left to the jury.

Keith-Frith for the prisoner.—In this case the prisoner might perhaps have been convicted of obtaining money by false pretences. But he has not been indicted for false pretences; and, although upon an indictment for false pretences a prisoner can be convicted of larceny, he cannot upon an indictment for larceny be convicted of false pretences. There was no larceny here, because there was no taking *invito domino*. [Lord COLERIDGE, C.J.—Why cannot it be larceny by a trick?] In larceny by trick, although the possession is parted with, the ownership does not pass. But here the prosecutor did intend to part with the ownership of the specific coins he gave the prisoner, and therefore the property in them passed. [HAWKINS, J.—No; the prosecutor merely intended to give the prisoner the coins as a deposit to abide the event of the race.] If that were so, then the person who makes a bet with a Geo. III. sovereign can insist upon that particular coin being returned to him if he wins. [SMITH, J.—Although the whole thing was a sham, do you say that the prosecutor intended to part with his coin?] No; but if the ownership was obtained by means of a trick as well as the possession, the prisoner ought to have been indicted for false pretences. Here the prosecutor said he would have been satisfied had he not got the same coins back; therefore he clearly intended that the property in the particular coins should pass. [HAWKINS, J.—Is not *Rex* v. *Robson* (Rus. & Ry. 413) an authority that the property did not pass under the circumstances?] No; for there the notes were never intended to be changed; they were merely deposited as a stake. Suppose here that Bird of Freedom had lost, the prisoner would have been entitled to keep the 5*s.*, and could not have been indicted for stealing his own property; and, therefore, as the property passed

(*a*) Reported by H. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

there could be no larceny, and the conviction should be quashed.

Lord COLERIDGE, C.J.—I am of opinion that in this case the conviction is right, and should be affirmed. The only question left to us by the learned chairman is, whether there was any evidence that the prisoner had been guilty of larceny to be left to the jury. In my opinion, there was abundant evidence from which the jury might infer that the prisoner was guilty. On behalf of the prisoner it has been argued that there is no doubt that the money was intended to be parted with, and that not only was the possession of the money parted with, but the property in it was also intended to be parted with; and that therefore, as the property was intended to be parted with, there could be no larceny, but only the offence of obtaining money by false pretences; and that, although the prisoner, if he had been indicted for the false pretence, could have been convicted of larceny, the converse does not hold good, and he cannot, upon an indictment for larceny, be convicted of obtaining money by false pretences. To that there seems to me to be two answers: the first, that, supposing there was an intention on the part of the prosecutor to part with the property in the coin, in order to pass the property from him to the prisoner there must have been a contract under which it could pass; for a change of property could only have taken place by virtue of a contract of some sort; and a contract, by the very meaning of the word, must be the bringing together of two minds. Now, here there never was any bringing together of the minds of the prosecutor and the prisoner in the shape of a contract; for, supposing the prosecutor to have intended to have parted with his money, he only intended to do so on the assumption that the prisoner intended to deal honestly with the money; whereas, on the contrary, the prisoner never intended to do that, but, as the evidence shows clearly, intended to do that which the prosecutor never for a moment consented to. No contract ever existed, therefore; and there is high authority that, under such circumstances, the property in the article does not pass. In *Rex* v. *Oliver* (Russ. on Crimes, vol. 2, p. 170), which was a case tried before Wood, B., the prosecutor there had a quantity of bank-notes, which he wanted to change, and the prisoner offered to change them for him. The prosecutor gave him the bank notes, on which the prisoner decamped; and the prosecutor never got any money in return. It was argued that, as the prosecutor clearly intended to pass the property in the bank notes to the prisoner, he could not be convicted of larceny. But Wood, B. held that the case clearly amounted to larceny if the jury believed that the intention of the prisoner was to run away with the notes and never to return with the gold, and that whether the prisoner had at the time the *animus furandi* was the sole point upon which the question turned, for, if the prisoner had at the time the *animus furandi*, all that had been said respecting the property having been parted with by the delivery was without foundation, as the property, in truth, had never been parted with at all. The learned judge further said that "a parting with the property in goods could only be effected by contract, which required the assent of two minds; but that in this case there was not the assent of the mind, either of the prosecutor or of the prisoner, the prosecutor only meaning to part with his notes on the faith of having the gold in return, and the prisoner never meaning to barter, but to steal." It appears to me that that is not only good sense, but very sound law, and it is decisive of the point raised here. I am of opinion, therefore, that there is evidence of larceny here, and that the true view to take of the case is that the property did not pass. The second answer appears to me to be found in the case of *Rex* v. *Robson* (Russ. & Ry. 413), which is even more like this case than the case I have already cited. In *Rex* v. *Robson* the prosecutor was induced by the prisoner's confederates to make a bet with one of them, and to part with a number of bank-notes to another of the confederates, who passed it on to the prisoner to hold as stakeholder. The prosecutor having apparently lost the bet, the money was given by the prisoner to the confederate with whom the bet was made, and he went away. Upon these facts it was held that, where there is a plan to cheat a man of his property under colour of a bet, and he parts with the possession only to deposit the property as a stake with one of the confederates, the taking by such confederates is felonious. The case was tried by Bayley, J., who told the jury that if they thought, when the notes were received, there was a plan and concert between the prisoners that the prosecutor should never have them back, but that they should keep them for themselves, under the false colour and pretence that the bet had been won, he was of opinion that in point of law it was a felonious taking by all. The jury convicted, but the learned judge thought proper, as the case came very near *Rex* v. *Nicholson* (2 East P. C. 669), to submit it to the consideration of the judges, making the distinction between the cases that in *Rex* v. *Robson*, at the time the prisoners took the prosecutor's notes, he parted with the possession only, and not the property; and that the property was only to pass eventually, if the confederate really won the wager; and that the prosecutor expected to have been paid had the confederate guessed wrongly. Ten of the judges considered the case, and held the conviction right, because, at the time of the taking, the prosecutor parted only with the possession of the money. Now the, true view of the case here is exactly like the view which the judges took in that case. In this case the prosecutor deposits money with the prisoner never intending to part with that money, but being told that in a certain event he was to have that money and something more added to it given back to him. The prisoner, on the other hand, took the money never intending to give it back, and decamped with it. It appears to me, therefore, that the possession only of the money was parted with, and that the prosecutor never intended to part with the property in it. No doubt had he had money given back to him, he would not have inquired into the question whether his own 5*s.* came back to him or not. But that does not affect the question whether, when he placed the coins in the prisoner's hands, he intended to pass the property in them to the prisoner. At all events there was plenty of evidence from which the jury could find that such was not his intention; and, in my opinion, the conviction should be affirmed.

POLLOCK, B.—I have nothing to add.

MANISTY, J.—I have very few words to say. I take it on the authorities cited by my Lord that it is settled law that if a man parts with the possession of money, but does not intend to part with the property in it, and the person receiving the money intends at that time to steal the money in a certain event, that there then is larceny. That is the ground on which I think that, as in this case the prosecutor never intended to part with his 5*s.* except in the event which did not occur, and the prisoner never intended to return the money, the prisoner was guilty of larceny.

HAWKINS, J.—The only question for our determination is, whether there was any evidence to go to the jury. I am of opinion that there was abundant evidence. I think the evidence pointed to this, that the whole of the prisoner's conduct pointed to an original and preconcerted plan of the prisoner to obtain possession of, and keep the money of, the prosecutor; and that the prosecutor never intended on such terms to part with the property in his 5*s.* I think, therefore, that there was abundant evidence of larceny in this case, and that the conviction should be affirmed.

SMITH, J.—I think that it is clear the prosecutor never intended to part with the property in the 5*s.* except on condition that a *bonâ fide* bet was made. I think also that there is evidence that at the time the prosecutor handed the 5*s.* to the prisoner, the prisoner intended to keep possession of the money, whether Bird of Freedom lost or won. He therefore obtained the possession of the prosecutor's money by means of a preconcerted and premeditated fraud; in other words, by a trick. There was, therefore, abundant evidence of larceny, and, in my opinion, the conviction should be affirmed.

Conviction affirmed.

Solicitor for the prisoner, *C. Bassett.*

HOUSE OF LORDS.

July 11, 18, 19, *and Aug.* 5, 1887.

(Before Lords WATSON, BRAMWELL, FITZGERALD, and MACNAGHTEN.)

BENTLEY *v.* VILMONT. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Sale of goods—Contract induced by false pretences—Conviction of fraudulent purchaser—Revesting of property—Sale to bonâ fide purchaser—Stat. 24 *&* 25 *Vict. c.* 96, *s.* 100.

By 24 *&* 25 *Vict. c.* 96, *s.* 100, "*If any person guilty of any such felony or misdemeanour as is mentioned in this Act . . . shall be indicted for such offence by or on behalf of the owner of the property. . , . and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section the court before whom any person shall be tried for any such felony or misdemeanour shall have power to award, from time to time, writs of restitution for the said property, or to order the restitution thereof in a summary manner.*"

The Act includes the misdemeanour of obtaining goods by false pretences.

Held (*affirming the judgment of the court below*), *that where a contract for the sale of goods has been induced by false pretences, and the original owner prosecutes the fraudulent purchaser to conviction, the property in the goods revests in him from the date of the conviction, and he may recover them from the person in whose possession they are, even if he be a bonâ fide purchaser for value in market overt without notice of the fraud.*

Moyce *v.* Newington (39 *L. T. Rep. N. S.* 535; 4 *Q. B. Div.* 32) *overruled.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lindley and Lopes, L.JJ.), reported in 56 L. T. Rep. N. S. 318, and 18 Q. B. Div. 322, who had reversed a judgment of Denman, J. upon an interpleader issue.

It appeared that in March 1885 Messrs. Galpin and Crochard, who carried on business at Amiens, in France, entered into a contract for the sale of certain goods to one Hodder, in England.

Messrs. Galpin and Crochard were induced to enter into the contract by false pretences on the part of Hodder and a person named Klein.

The goods were sent to Hodder, who pledged them with one Dobree, who stored them in the shop or warehouse of a person named Starbuck, in the city of London.

Starbuck exposed the goods for sale in his shop, and the defendant Bentley purchased them in the ordinary course of business, and Dobree instructed Starbuck to hold them to Bentley's order.

The fraud having been discovered, Hodder and Klein were indicted and convicted of having obtained the goods by false pretences. An order for the restitution of the goods was applied for at the trial, but was refused.

Messrs. Galpin and Crochard having claimed the goods from Starbuck, the latter interpleaded, and an issue was directed to try the right to the goods, Vilmont, the trustee in liquidation of Galpin and Crochard, who had become insolvent, being plaintiff in the issue, and Bentley the defendant.

The issue was tried before Denman, J., without a jury, and he held, on the authority of *Moyce* v. *Newington* (39 L. T. Rep. N. S. 535; 4 Q. B. Div. Div. 32), that under the Act of 24 & 25 Vict. c. 96, s. 100, in a case of obtaining goods by false pretences, the property of the original owner of the goods does not, on his prosecuting and obtaining a conviction of the thief, revest as against the purchaser for value without notice of the fraud, and that consequently the plaintiff was not entitled to the goods; but his decision was reversed on appeal as above mentioned.

The *Attorney-General* (Sir R. Webster, Q.C.), *Jelf*, Q.C., and *Attenborough* appeared for the appellant.

Charles, Q.C. and *C. W. Mathews* for the respondent.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Aug. 5.—Their Lordships gave judgment as follows:

Lord WATSON.—My Lords: In this case I have come, with very great reluctance, to the conclu-

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

sion that the judgment of the Court of Appeal ought not to be disturbed. The respondent parted with his goods under a voluntary contract of sale, which had the effect of vesting the property of the goods in the purchasers, Klein and Co. It now appears that the sale was induced by fraud, a circumstance which gives the seller the option, either of adhering to his bargain or of rescinding it, in a question with the fraudulent purchaser. The individual partners trading, or professing to trade, under the firm of Klein and Co. have been convicted at the respondent's instance of the statutory misdemeanour of obtaining the goods sold to them by fraudulent pretences. Before the prosecution was instituted, and before he had any notice that the goods had been fraudulently obtained, the appellant purchased them in good faith for an adequate price, paid the purchase money, and obtained delivery. In these circumstances, the respondent sues the appellant, under sect. 100 of the Act 24 & 25 Vict. c. 96, for restitution of the goods which still remained in the possession of the appellant at the time when this action was raised. I do not think that, apart from statute law, a *bonâ fide* purchaser from one who has acquired the property of the goods by a contract of sale tainted with fraud stands in precisely the same relation to the original owner as a purchaser of stolen goods without notice of the theft in market overt. In the latter case the original owner and the purchaser in open market are to this extent *in pari casû*, that neither has done aught to mislead the other; while in the former case the original owner has intentionally given his fraudulent vendee an *ex facie* absolute and valid title to the goods, upon which purchasers without notice of the fraud are entitled to rely. I have great difficulty in supposing that the Legislature, as an incentive to the prosecution of crime, deliberately intended, in the case where the property has been passed by the act of the original owner, to deprive the honest purchaser both of his goods and of his money; but I have been unable to put a reasonable construction upon the language of sect. 100 which will avoid that inequitable result. Sect. 100 enacts that if any person guilty of any felony or misdemeanour in "stealing" or in "obtaining" a chattel or other property shall be indicted of such offence, by or on behalf of the "owner of the property," and convicted thereof, "in such case the property shall be restored to the owner or his representative." That enactment enables an owner who has brought himself within the provisions of the clause to sue for recovery of his property. It has been settled by a long series of authorities under successive statutory enactments, of which 24 & 25 Vict. c. 96, s. 100, is the last, that the former owner of goods which were stolen from him, upon his prosecuting the thief to conviction, becomes entitled to recover the goods from a *bonâ fide* purchaser who has paid a full price in open market. To my mind these authorities are not reconcilable with any construction of the clause which does not attach to the expression "owner of the property" the same meaning as if it had been "the original owner of the property," or which does not attach the same meaning to the words "the property shall be restored to the owner" as if they had run thus: "The property shall revest in and shall be restored to the original owner." These expressions must, in my opinion, have the same force, and must be similarly construed in the case of conviction for fraudulently obtaining goods as in the case of conviction for theft. The language of the clause leaves no room for making any distinction between goods obtained by fraudulent pretences without the property passing and goods obtained by the same means under a voidable contract of sale; and it is for these reasons that I am constrained to hold that the respondent must prevail. Upon two recent authorities cited at the bar I have these observations to make. In *Lindsay* v. *Cundy* one Blenkarn had been convicted of obtaining goods from the prosecutor by false pretences; but the defendants had purchased the goods from Blenkarn and had resold them before his conviction. The judges of the Queen's Bench were of opinion (34 L. T. Rep. N. S. 314; 1 Q. B. Div. 348) that there was a voidable contract of sale which passed the property of the goods to Blenkarn, and they gave judgment for the defendant on the authority of *Horwood* v. *Smith* (2 T. R. 750), in respect that the statute did not revest the property in the prosecutor until conviction, and that his statutory title did not relate back to the date of the original fraud. Blackburn, J. treated the case of purchase of stolen property from a thief in market overt as on all fours with that of purchase from a seller who has a title of property under a contract voidable on the ground of his own fraud. His Lordship said: "When did the plaintiff's property begin, that is to say, begin after the time the defendants had got the goods, in this case? Not till after the conviction of the party guilty of the fraud, because before that time the property had been altered by a *bonâ fide* purchase from a person who held it under a voidable but not void contract. Altering these few words, everything in the judgment of Buller, J. (*i.e.*, in *Horwood* v. *Smith*) is applicable to this case." A different view was taken of the true character of the original transaction both in the Court of Appeal and in this House (36 L. T. Rep. N. S. 345; 2 Q. B Div. 96; and 38 L. T. Rep. N. S. 573; 3 App. Cas. 459.) It was held that there was no contract, and that the property did not pass; and upon that footing, the sale to them not having been in market overt, the defendants were made liable for the conversion of the goods before conviction. No observations were made, either by the Lords Justices or by the noble and learned Lords who decided the case here, upon the effect of the Act of 1861; and their judgments do not impair the authority of the views expressed upon that point in the Court of Queen's Bench. The later case of *Moyce* v. *Newington* (39 L. T. Rep. N. S. 535; 4 Q. B. Div. 32) would, if well decided, be conclusive in favour of the appellant. I think the defendant in that case did commit a legal wrong in taking the sheep *brevi manu* out of the possession of the plaintiff before he had obtained the conviction of his fraudulent vendee. The point decided was that sect. 100 does not give the original owner who parted with his property under a contract of sale induced by fraud the right to demand restitution from a *bonâ fide* purchaser who is in possession at the time of the conviction. I regret having to dissent from that decision; but I cannot say that I have any hesitation in dissenting from the reasons assigned

for it by Cockburn, C.J., which appear to me to be derived from an entire misapprehension of what was decided by the Court of Exchequer in *Horwood* v. *Smith*, and by the Court of Queen's Bench in *Lindsay* v. *Cundy*. I am therefore of opinion that the order appealed from ought to be affirmed and the appeal dismissed with costs, and I move accordingly.

Lord BRAMWELL.—My Lords: I agree in the reasoning and conclusion of my noble and learned friend, Lord Watson. I agree also in his regret that our decision must be as it is, and in his remark that he does not think the Legislature could have so intended. It is manifest from the old authorities, *Glanvil*, *Fleta*, *The Mirror*, and others, cited by Mr. Charles, that in the case of stolen goods the plaintiff, in a proceeding by appeal in which he established the theft, was entitled to a restitution of stolen goods, though they had been sold in market overt. That, indeed, changed the property, but that property was restored on the success of the proceeding. It cannot be doubted that the statute of Henry VIII. (21 Hen. 8, c. 11) was intended to have the same effect and consequences. This is shown by the reason of the thing and the authorities, and indeed was admitted by the Attorney-General. If this, then, were a case of stolen goods, the plaintiff's right could not be contested. But it is a case not of stolen goods, but of goods obtained under a contract itself obtained by fraud, and voidable. The question could not arise under the statute of Henry VIII., but it can now. To hold that the cases differ would be to hold that the same words in the same place are to have different meanings as to different things. That cannot be. The authorities are all one way, and against the defendant, except *Moyce* v. *Newington*. That case was wrongly decided on a mistake as to the effect of *Lindsay* v. *Cundy*. The law is, that on conviction the property revests. Until then it is not in the original owner, if it has been sold in market overt or sold by a fraudulent purchaser to a *bonâ fide* purchaser from him.

Lord FITZGERALD.—My Lords: It seems to me unfortunate that we have not the facts before us as to the alleged contract between the claimants (Galpin and Crochard) and Hodder or Hodder and Klein, and as to what was the character of the false pretence by which the alleged bargain was rendered voidable. The only statement we have of the facts is to be collected from the judgment of Denman, J.: "Between January and March 1885 Hodder obtained some goods from Galpin and Crochard, which we must take to have been obtained by false pretences, so that there was an obtaining of them, as far as appears, by some bargain or other, which was a bargain which might have been avoided, but there was an obtaining of them. Between March and May the goods had been pawned by this man Hodder, who had so obtained them, with a person of the name of Dobree, a pawnbroker, and Dobree not, I suppose, having premises of his own to store them in, stored them at the premises of a man named Starbuck." The goods may have been obtained by falsehood on the part of the supposed vendee, which would lead to the conclusion that there never had been any contract of sale. The additional matters of fact are succinctly stated in the report (56 L. T. Rep. N. S. 318; 18 Q. B. Div. 322); but I need not further advert to the particulars, for it seemed agreed by the parties on the argument that your Lordships should dispose of the appeal on the basis that there had been a contract under which the property in the goods in question passed to the vendee (Hodder), but under such circumstances, that the bargain was so vitiated by the false pretences of the vendee as to render it voidable at the option of the vendor. We must, however, go further and assume that the false pretence of Hodder was of some existing material fact false to his knowledge, by which he obtained not only the bargain, but the possession of the goods. Hodder having got possession of the goods (merinoes and cashmeres), pawned them with Dobree, but when exactly, or under what circumstances, does not appear, and Dobree sent them to be finished and exposed for sale at the shop of Starbuck, in the city of London, where Bentley, the defendant in the issue, bought them on the 30th May 1885, under circumstances not now impeached, which amounted to a sale in market overt. The appellant does not rest his claim on any other title than the purchase in market overt. Galpin and Crochard elected to avoid the contract. We must take it that they did so, but when or how does not appear, save that on their prosecution Hodder and Klein were committed for trial on the same 30th May, and since tried and convicted in Sept. 1885 of obtaining the goods in question by false pretences. We have had a very able and interesting argument, but I need not follow it through all its details, for it was admitted by counsel for Bentley, looking to the long current of authorities, that if the goods had been stolen from Galpin and Crochard, though purchased by Bentley in market overt, he could not deny that on conviction of the thief the original owners Galpin and Crochard would have been entitled to the restoration of the goods. It seems to me that it was right to make this admission, for when we find a long train of decisions all pointing the same way we ought not to disturb them, even though we should think that it would have been more expedient, if practicable, to give full effect to a sale in market overt. The practice and current of authority has been the same in Ireland as in England, but especially since the decision in *R.* v. *Horan* (Ir. Rep. 6 Com. Law, 293), in which, on a question reserved, ten judges took part and were unanimous. The case before your Lordships is thus reduced to the question whether *Moyce* v. *Newington* (*ubi sup.*) was well decided. If it was well decided, the appellant (Bentley) has established his right to succeed on the issue, for that case is exactly in point. I concur with my noble and learned friends in opinion that *Moyce* v. *Newington* cannot be supported, as it seems to me to rest, not on what the Legislature has expressed, but on what it ought to have said. I am unable to adopt the conclusion of Cockburn, C.J., that the language of the Legislature applies and is obviously intended to apply to cases, and to those only, in which possession has been obtained without the property passing. The Legislature has not said so, and, in my opinion, did not intend to say so. The Legislature seems rather, from the time at which it first made obtaining goods by false pretences a misdemeanour, to have put the misdemeanour and the cognate and closely allied offence of larceny on

the same ground, as to the right of restoration on conviction. I refer (*inter alia*) to the 7 & 8 Geo. 4, c. 29, the title of which is "An Act for consolidating and amending the laws in England relative to larceny and other offences connected therewith." Sect. 53 enacts: "And whereas a failure of justice frequently arises from the subtle distinction between larceny and fraud; for remedy thereof be it enacted that, if any person shall by any false pretence obtain from any other person any chattel, money, or valuable security with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanour: provided always, that if upon the trial of any such person it shall be proved that he obtained the property in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted." And sect. 57 enacts, "And to encourage the prosecution of offenders, be it enacted that, if any person guilty of any such felony or misdemeanour in stealing, taking, obtaining, or converting, &c., any chattel, &c., shall be indicted for any such offence by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative." And again, by the 18 & 19 Vict. c. 126 (the Criminal Justice Act), where a summary jurisdiction is given in certain cases of larceny and false pretences, sect. 8 provides, "It shall be lawful for the justices by whom any person is convicted under this Act to order restitution of the property stolen, taken, or obtained by false pretences in those cases in which the court before whom the person convicted would have been tried but for this Act may be by law authorised to order restitution." The Legislature seems to me in these general statutes, including the 24 & 25 Vict. c. 96, s. 100, to have dealt with and expressed the right to restoration of the goods on the conviction of the offender in the same language and depending on the same event, whether the offence was the felony of larceny or the misdemeanour of false pretences. If we were to adopt the view of Cockburn, C.J. (though it might be desirable to be able to do so), the consequences would probably be more extensive than at first sight appears; *e.g.*, it would seem then difficult in such case to sustain a conviction for obtaining goods by false pretences where the contract was such that as between the vendor and vendee it was not absolutely void, but voidable only at the election of the vendor. I have only to add that by this decision we do not intend to interfere with the principle established in *White* v. *Garden* (10 C. B. 919).

Lord MACNAGHTEN.—My Lords: I agree in the opinions which have been delivered by my noble and learned friends, and I share the regret which has been expressed in being compelled to arrive at this decision.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitor for appellant, *S. J. Attenborough.*
Solicitors for respondent, *Blunt* and *Lawford.*

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, May 25, 1887.

(Before Lord ESHER, M.R. and FRY, L.J.)

THE GUARDIANS OF THE POOR OF THE CROYDON UNION (apps.) *v.* THE GUARDIANS OF THE POOR OF THE REIGATE UNION (resps.). (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION (CROWN SIDE).

Poor law—Settlement—Widowed mother—Pauper child—Divided Parishes Act 1876 (39 *& 40 Vict. c.* 61), *s.* 35.

According to the true construction of sect. 35 *of the Divided Parishes Act* 1876, *a child under the age of sixteen whose father is dead, takes the maiden settlement of its widowed mother, neither the mother nor the child retaining the settlement of the father after his death.*

SPECIAL case stated pursuant to 12 & 13 Vict. c. 45, s. 11, on appeal against an order of removal.

On the 8th May 1886, upon the application of the respondents, two justices of the county of Surrey made an order under sect. 97 of 16 & 17 Vict. c. 97, adjudging the place of the last legal settlement of Edith Scully to be in the hamlet of Penge, in the appellants' union.

Edith Scully, the pauper lunatic, was born about the year 1875, and was under the age of sixteen when the order was made; she was the daughter of Richard Scully (deceased) and his wife Emma Scully.

Emma Scully was born in the parish of Reigate Foreign, in the respondents' union, which was and is her maiden settlement. She never acquired any subsequent settlement in her own right.

Her husband, Richard Scully, whilst resident with her, about the year 1878 acquired a settlement in the hamlet of Penge, in the appellants' union, by renting a tenement and being charged with and paying rates and taxes.

In 1880 Richard Scully left England for Gibraltar, where in 1881 he was joined by his wife, who has resided there ever since.

In 1881 Richard Scully died at Gibraltar.

The appellants contended that the pauper lunatic was not settled in the hamlet of Penge, but took the maiden settlement of her "widowed mother," Emma Scully, viz., that of her birth in the parish of Reigate Foreign, in the respondents' union.

The respondents contended that the pauper lunatic took the settlement of her deceased father, viz., that acquired by him in the hamlet of Penge, in the appellants' union.

The question for the opinion of the court was, Was the order rightly made adjudging the settlement of the pauper lunatic to be in the hamlet of Penge?

It was agreed between the parties that a judgment in conformity with the decision of the court, with costs, might be entered on motion by either party at the quarter sessions for the county of Surrey next, or next but one, after such decision should have been given.

(*a*) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

By sect. 35 of the Divided Parishes Act 1876 (39 & 40 Vict. c. 61):

No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

The Queen's Bench Division (Smith and Grantham, JJ.) quashed the order upon the authority of *Guardians of Maidstone Union* v. *Guardians of Holborn Union* (17 Q. B. Div. 817).

The respondents, the guardians of the Reigate Union, appealed.

A. Charles, Q.C. (with him *Burleigh Muir*), for the appellants, the guardians of the Reigate Union.—At the time of the passing of the 39 & 40 Vict. c. 61, a wife kept her husband's settlement after his death, until she acquired a new one. It is submitted that the exception in sect. 35 was intended to preserve this; and that the section, while sweeping away other derivative settlements, excepted the settlement which a wife has derived from her husband. If so, it follows that the child will take the settlement of the father, as that will then be also the settlement of its widowed mother. The words, "or of its widowed mother as the case may be," can be satisfied by reading "widowed mother" to mean a widowed mother who has acquired a settlement. They cited

Guardians of Liverpool v. *Overseers of Portsea*, 50 L. T. Rep. N. S. 296; 12 Q. B. Div. 308;
Reg. v. *Guardians of Bridgnorth*, 48 L. T. Rep. N. S. 600; 9 Q. B. Div. 765; 11 Q. B. Div. 314.

Bosanquet, Q.C. and *Mead*, for the respondents, the guardians of the Croydon Union, were not called on.

Lord Esher, M.R.—In the first place, I think we must stand by what we ourselves decided in *Reg.* v. *Guardians of Bridgenorth* (*ubi sup.*). That is, that the words "no person" mean the person whose case is under discussion, or, in other words, the person who is or is not to be removed. In the second place, I think that the governing moment of time is the moment of time when the person is to be removed or not; that is, the moment of time when the adjudication is to take place. In the third place, I think that each word is to be read in its ordinary meaning as applied to that person at that moment of time. What conclusion does the application of those principles lead to? The section in question begins: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise." That is the principal enactment, and it sweeps aways derivative settlements. Then the section continues, "except in the case of a wife from her husband." If you are to deal with the case as it stands at the moment of adjudication, that must be read as meaning, except in the case of a person who is a wife at that moment. If she is a wife at the moment that the case has to be decided she is excepted from, if she is not a wife at that moment she is included in, the general enactment that there shall be no derivative settlements. But a woman who has been a wife does not remain a wife after her husband's death; and she is only brought within the exception if she is a wife at the moment of adjudication; otherwise she is within the general rule. Then the section goes on, "and in the case of a child under the age of sixteen, which child shall take the settlement of its father." A child under the age of sixteen, therefore, has a derivative settlement. It takes the settlement of its father, which is a derivative settlement, "or of its widowed mother, as the case may be." That is the case of a child whose father is dead. Dealing with the pauper at the moment of adjudication, those words "as the case may be" mean that if the father is alive at the moment of adjudication the child takes his settlement; if it has no father, but has a widowed mother, it takes hers. What, then, is the settlement of its widowed mother which the child is to take? What is the widowed mother's settlement? It might be either her own or derived from some other person. If she could take a settlement derived from another person, it would be derived from her husband. But the section says that you are not to look at derivative settlements. What is her own settlement? She may have acquired one by continuous residence or in other ways. If she has acquired no settlement independently of her husband, then her settlement is her birth settlement. That is what the special case speaks of as her maiden settlement, and perhaps that is a better expression, because it would include a settlement acquired by her before marriage. If she has acquired none, then her maiden settlement is her birth settlement. We shall adopt the case of *The Guardians of Maidstone Union* v. *The Guardians of Holborn Union* (17 Q. B. Div. 817), which lays down a rule that is wholesome and good and right. What you have to look at, according to that case, is the position of the woman at the time of adjudication; if she is a wife she takes her husband's settlement, if she is a widow she does not. I also adopt the reasoning of Day, J. in *The Guardians of Kingsbridge Union* v. *The Guardians of East Stonehouse* (56 L. T. Rep. N. S. 333; 18 Q. B. Div. 528): "The object of the section appears to be to abolish derivative settlements except where it would cause injustice to do so. Thus it is intended not to separate a wife from her husband during marriage, or children of tender years from their parents, or from their surviving parent, if the father or mother is dead." That seems to me to be the wholesome interpretation of the section, and that is the one I adopt. If the father is alive, the children go with the father; if the father is dead, the children go with the widowed mother. I think that the decisions of the Queen's Bench Division in *The Guardians of Maidstone Union* v. *The Guardians of Holborn Union* (*ubi sup.*) and in the present case are right, and that they are both in accordance with the case of *Reg.* v. *Guardians of Bridgenorth* (*ubi sup.*).

Fry, L.J.—I also think that this appeal must fail. I do not think that the section is easy to interpret; but we can see our way now to an interpretation which, in our view, is the right one. The section begins by saying that, "No person shall be deemed to have derived a settlement from any other person." Pausing there, the object of the Legislature is plain, namely, to sweep away the intricate and difficult inquiries as to derivative settlements. Then there come two exceptions, the first of which is, "except in the case of a wife from her husband." Mr.

Charles says that that means, not "except in the case of a wife," but "except in the case of the settlement of a wife;" that is, that the law as it then stood, under which a widow took her husband's settlement, is retained by virtue of the exception. I do not agree with that view. In the first place, I think that the exception was introduced for the purpose of humanity, and was only intended to prevent the separation of married couples. In the second place, I think that the exception should be read narrowly, so as to avoid intricate inquiries. Now, an inquiry as to the settlement of a living man is easy; but the same inquiry, when the man is dead, necessarily becomes more difficult. I think, therefore, that the exception must be confined to the case of a wife whose husband is living. Then the section goes on to the second exception, "and (except) in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another." I think those last words throw some light upon the question whether a wife retains her husband's settlement after his death. It is expressly provided that the child is to retain the settlement so taken; but nothing is said as to the wife's retaining hers. If the husband is living, the wife goes with him; and as, by the second exception, a child under the age of sixteen is to take the settlement of its father, if living, the result is that, where there are a father and mother and children under sixteen, they all go together. If the mother is dead, the father and children will go together; if the father is dead, the children will go with the widowed mother to her birth settlement, unless she had acquired another settlement before her marriage, in which case they will go to that settlement. That is the humane and reasonable interpretation of this section.

Judgment for guardians of Croydon Union, the respondents in the appeal.

Solicitors for Croydon Union, *West, King, Adams,* and *Co.*

Solicitors for Reigate Union, *Morrisons,* for *G. C. Morrison,* Reigate.

July 13 *and* 14, 1887.

(Before Lord ESHER, M.R., LINDLEY and LOPES, L.JJ.)

ESDAILE *v.* THE ASSESSMENT COMMITTEE OF THE CITY OF LONDON UNION. (*a*)

*Poor rate—Tithes—Statutory payment in lieu of tithes in the city of London—Non-rateability of—*37 *Hen.* 8, *c.* 12—43 *Eliz. c.* 2—44 *&* 45 *Vict. c. cxcvii. ss.* 3, 8, 10.

Under the Act 37 *Hen.* 8, *c.* 12, *which recited that contention, &c., had arisen within the city of London, between the parsons, &c., of the said city and the citizens and inhabitants of the same, for and concerning the payment of tithes, oblations, and other duties within the said city, it was decreed that the citizens and inhabitants should yearly pay their tithes to the parsons, &c., after a fixed yearly rate in respect of their houses, &c.*

And under 44 *&* 45 *Vict. c. cxcvii., which recited that there were disputes as to the payments to be made in respect of tithes in the parish of St. Botolph Without, Aldgate, and it would be beneficial to the inhabitants and owner of the tithes of the parish that all such disputes should be settled, and that there should be paid to the owner a fixed annual sum in lieu and full satisfaction of all tithes and payments within the parish, it was enacted by sect.* 3 *that "all tithes and sums of money in lieu of tithes whatsoever arising or growing due in the said parish . . . shall cease and be extinguished, and the tithe-owner shall . . . accept and receive in lieu and satisfaction of the tithe and sums of money in lieu of tithes so ceasing and extinguished, and to which he would have been entitled if this Act had not been passed, the annual sum of* 6500*l.*, *which shall be levied and collected by the churchwardens on and from the persons by law rateable to poor rates in the said parish, in respect of the houses by law rateable to poor rates . . . and shall be assessed on the annual value of those houses as ascertained by the valuation or assessment for the poor rates for the time being in force, and the said sum of* 6500*l. shall be paid by the churchwardens to the tithe-owner in each and every year.*

Held (affirming the judgment of the Queen's Bench Division), that the tithes, oblations, and other duties within the city of London, paid according to the rate fixed by 37 *Hen.* 8, *c.* 12, *and in respect of which the sum of* 6500*l. was a statutory commutation payable by the above parish under* 44 *&* 45 *Vict. c. cxcvii., were not tithes or a payment in lieu of tithes within the meaning of* 43 *Eliz. c.* 2, *and therefore the said sum of* 6500*l. was not rateable to the relief of the poor of the said parish.*

THIS was an appeal from a judgment of the Queen's Bench Division (Denman and Mathew, JJ.), reported *ante*, p. 356; and at 56 L. T. Rep. N. S. 523.

A case had been stated under 32 & 33 Vict. c. 67, which case is fully set out in the report in the court below, upon which case the Queen's Bench Division gave judgment in favour of Esdaile.

The Assessment Committe appealed.

Sir *E. Clarke* (S.-G.) and *J. Henderson* for the Assessment Committee.

Sir *R. E. Webster* (A. G.) and *Sidney Woolf* for the respondent.

The arguments in the court below were repeated, the following authorities being cited or referred to:

Esdaile v. *Payne*, 52 L. T. Rep. N. S. 530; and 54 L. T. Rep. N. S. 705;
Rex v. *Toms*, 1 Doug. 401;
Reg. v. *Christopherson*, 58 L. T. Rep. N. S. 804; 16 Q. B. Div. 7;
Rex v. *Carlyon*, 3 T. R. 385;
Reg. v. *Shaw*, 12 Q. B. 419;
Rex v. *Boldero*, 4 B. & C. 467;
Lowndes v. *Hone*, 2 Wm. Bl. 1252;
Champneys v. *Buchan*, 4 Drew. 104;
1 Eagle on Tithes, 17, 421;
2 Eagle on Tithes, 442, 464;
Calthrop's Reports, 92 *et seq.*

Lord ESHER, M.R.—In this case we have to consider whether this payment of a specific sum of money, made to the respondents under and by virtue of an Act of Parliament, and to be raised by a rate, is property rateable to the relief of the

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

poor. The question is, whether that payment is *primâ facie* a payment which would be rateable under the statute 43 Eliz. c. 2. I am clearly of opinion that it is not. Having in *Reg.* v. *Christopherson* (*ubi sup.*) decided that a person must be rated with reference to his ability in the parish, and having laid it down that, according to the authorities, the property rateable must be limited to property of a visible and tangible nature, such as is capable of being taken cognisance of and estimated by the overseers, it is obvious that this payment of money, to be raised by a rate, is not property which is *primâ facie* rateable under the statute of Elizabeth. It is said, however, that it is a payment of tithes or a payment in lieu of tithes within the statute of Elizabeth, and is therefore rateable. Now, a tithe rateable as tithe under the statute of Elizabeth was that tithe which was at first received by the clergy of the parish in kind, and it was because the clergyman received it in kind, and because he could distrain for it, that it was considered to be physically in his occupation, for he took it in kind from the land. The tithe in the present case is certainly not such a tithe as that, and whether tithe, that is, a tenth, is the right name for it or not, it is not a tithe rateable under 43 Eliz. c. 2. Is it then brought within the statute by the authorities as something equivalent to a tithe? For if it could be shown, as was said in *Reg.* v. *Christopherson*, that the money payment here was a payment in lieu of tithes, the rector would, according to the authorities, have been rateable in respect thereof; and if the rector had been rateable, the present respondents would be rateable. It is said that it has been made out that this is a payment in lieu of tithes, because the payment is called a tithe in the statute of 37 Hen. 8, c. 12. But surely it is impossible to say that the mere fact of calling it a tithe in a statute shows that this payment is a payment in lieu of tithes proper within the statute of Elizabeth. You must show not merely that it is a payment in lieu of what were called tithes, but a payment in lieu of such tithes as come within the statute of Elizabeth. As to the suggestion that this is a payment in lieu of tithes payable by custom at the time of the passing of 37 Hen. 8, c. 12, in respect of houses in the city of London, though I doubt whether such a custom could be a good one, I can see no evidence of such a custom, or even of a custom that the land on which the houses were built was still to be liable to a payment in lieu of tithes in cases where tithes would have been paid out of the land if productive before the houses had been built upon it. Therefore it is not made out that this payment under 37 Hen. 8, c. 12, is a payment in lieu of tithes payable in respect of land on which houses were built. It was then argued that this was a payment made by the occupiers of houses in lieu of tithes payable, not in respect of the land on which those houses were built, but in respect of land in the parish on which no houses were built. One ought to look very closely at such a proposition, because, if it were true, it would be making people who occupy houses pay money in lieu of those who occupy land profitably upon which no houses are built, and who would be exempt from paying tithes in respect of that land. It would require very strong evidence to satisfy me of that, for anything more unjust can hardly be imagined. To support that proposition it must first be shown that, if there were tithes payable in respect of land profitably used as land in the City at the time of the passing of 37 Hen. 8, c. 12, the payment of those tithes was extinguished by this Act. I can see nothing to induce me to believe that, if they did exist, they were extinguished. Sects. 10, 14, and 17 of 37 Hen. 8, c. 12, are scarcely consistent with that view, and are more consistent with the view that if there was any land occupied for profit—and I cannot say that there was at that time no such land in the city of London—the persons so occupying such land were still, after the passing of that statute, as much liable to the payment of tithes as they were before. Therefore, supposing in the first place that no tithe was payable within the city of London, then this is a new personal imposition, which is not a tithe, or anything in lieu of a tithe, rateable under 43 Eliz. c. 2; or, secondly, if there were tithes proper within the city of London, that is a tithe payable in respect of the profitable use of land, there is nothing to show that such tithes were extinguished. In either case it is not made out that this payment was a payment in lieu of tithes rateable under 43 Eliz. c. 2. Then further, we have this: the statute 37 Hen. 8, c. 12, was in the nature of a private Act of Parliament to determine a dispute between the parishioners and the clergy. It is impossible to say that a recital that there was a dispute as to payment of tithes is proof that tithes were payable. And when it is seen that this Act amounts to an agreement by way of compromise, one is then entitled, if the words will permit of two meanings, to see how it has always been treated by the parties to it on both sides. For 286 years there never has been any attempt until now to rate the person entitled to this payment. Therefore it is conclusive that all parties concerned in this compromise have construed it to mean that the person who received that payment was not rateable to the poor in respect thereof, but was entitled to the full benefit of the payment. These considerations seem to me to show conclusively that this payment cannot be brought within 43 Eliz. c. 2. There are some other considerations which seem to me to point in the same direction. There are sections in the statute of 1881 (44 & 45 Vict. c. cxcvii.) which seem to me to assume that there were even tithes payable within this parish in respect of land which was not built upon. I notice this, because those sections are only wanted on the view that those tithes were payable. Again, the mode of redemption provided in sect. 10 of the Act of 1881 points in the same direction; for when the parties were stipulating for a redemption, the redemption is to be on the footing that the whole of the money and nothing less is payable to the person entitled to the payment, and if it is to be redeemed it is to be on the footing that it is a property which is subject to no reduction, but which is to be replaced by a sum which would yield the former annual amount without any deduction. That supports the view that this payment is a personal payment, originally given for the support of the clergy, and is not a tithe or a payment in lieu of a tithe rateable under 43 Eliz. c. 2. For these reasons I am of opinion that this appeal must be dismissed.

Lindley, L.J.—I am of the same opinion. The question which we have to consider is, whether a

certain annual payment of 6500*l.* made to the respondent under the provisions of the London (City) Tithes (St. Bodolph Without, Aldgate) Act 1881, is or is not rateable to the poor. The object of the Act under which the said sum is payable was not to make this payment liable to poor rate; the object was totally different, namely, to settle certain disputes which had existed between the parishioners and Mr. Esdaile as to sums payable by them to him in respect of what is called tithe for houses in the parish. He and his predecessors in title had been accustomed to receive certain payments in respect of houses which I may call house tithes, under 37 Hen. 8, c. 12, and, so far as we know, there were no other tithes payable in this parish to anybody except what are called tithes payable under that statute. Disputes had arisen respecting these payments, and the Act of 1881 was passed to put an end to all those disputes by fixing a certain annual sum to be paid to Mr. Esdaile by the inhabitants, that sum to be levied by a rate. The object was to substitute a fixed payment which was incapable of being disputed for a payment which gave rise to controversy. That being the object, one is struck with the contention that this statutory payment of 6500*l.* should be rateable to the poor, if that in respect of which it was given never was rateable. That may be the effect of the Act, but, if it is, it seems to me contrary to the intention of the Legislature in passing the Act. Now, the house tithe, under 37 Hen. 8, c. 12, had never been rated to the poor. It is incredible that that payment, whether you call it a tithe or a payment in lieu of tithe, should never have been rated to the poor if by law it was rateable; and the only inference I can draw from that fact is, that for some reason or other it was not considered as coming within the statute of 43 Eliz. c. 2. The owner of this house tithe was not the parson; he was a lay impropriator; and so he could not be reached under the first part of 43 Eliz. c. 2, s. 1. If he could be reached at all, it could only be under the latter part of the section, which treats of occupiers of tithes impropriate and propriation of tithes. One can only account for the fact that this house tithe never was rated on the theory that those words in that statute do not apply. We are asked then to say that this 6500*l.* a year is rateable to the poor, when that for which it was substituted never was rated, because it was not considered as being within 43 Eliz. c. 2. The argument pressed upon us is based on the fact that this house tithe is called a tithe in 37 Hen. 8, c. 12, that the disputes about it are referred to in the preamble of the Act of 1881 as disputes about tithes; and we are therefore asked to say that this house tithe was a tithe or a payment in lieu of tithe, and ought to be held rateable under the statute of Elizabeth. I cannot say so. No one knows what was the real state of the tithe law in the City before 37 Hen. 8, c. 12. I do not know whether tithes were payable in the City or not, and I do not know whether what are called tithes were tithes proper; and so it appears to me that the only inference to be drawn from what we do know is, that for some reason or other those payments were not rateable within 43 Eliz. c. 2. There is nothing in the Act of 1881 which brings them within the statute of Elizabeth, and I think there is something which indicates that they were not intended to be brought within it. Looking at the preamble of the Act of 1881 and the redemption clause, it is clear that this Act was the result of a compromise, and a person who was entitled to receive certain sums not rateable to the poor was to have a fixed annual sum in lieu thereof, nothing being said as to whether it was rateable to the poor or not. It could not have been intended that the fixed sum should be rateable when the other was not. It would be departing from the apparent bargain and taking advantage of some ambiguous expressions in the Act to saddle the statutory payment of 6500*l.* with a liability to a rate. It is impossible to ignore the facts that I have mentioned, and to hold that the new statutory payment is in any way more rateable than the old payment for which it was substituted. The appeal must therefore be dismissed.

Lopes, L.J.—The assessment committee to succeed must make out that these payments under 37 Hen. 8, c. 12, were either tithes within the meaning of 43 Eliz. c. 2, or payments in lieu of such tithes. The statute of Elizabeth is the only statute which deals with the subject-matter of rateability, the other statutes more or less dealing with the machinery of rating. A payment in lieu of tithes, in order to be rateable, must be in lieu of tithes rateable under the statute of Elizabeth. These payments with which we have to deal in the present case are clearly not tithes as understood at common law. At common law tithes are payments on things which grow from year to year, and not upon houses, or rent reserved upon a lease of houses. These payments have none of the attributes of what I may call tithes at common law. Tithes at common law are charges upon the land, and recoverable by distress. These payments are not chargeable on the land recoverable by distress, but are mere personal charges, recoverable by a personal remedy. The next question is, are they payments in lieu of tithes rateable under 43 Eliz. c. 2? To be payments in lieu of tithes the tithes must have existed, and must have been extinguished by the Act of Hen. 8. It is left in the utmost obscurity, and we have no means of knowing whether such tithes ever existed within the city of London. But assuming that they did exist, I am clearly of opinion that they were not extinguished by the Act of Hen. 8. The probability is that the land within the City had been largely built upon, and that tithes had thereby to a great extent been extinguished; and I am inclined to think that there were other lands within the City not built upon, and as to those lands, if tithes existed at all, tithes would have been leviable. It is important to see how this Act of 37 Hen. 8, c. 12, came to be passed. The explanation seems to me to be that, a large portion of the land having become covered with buildings, tithes had been lost to the tithe-owner, and that this Act was passed to give him a statutory payment in respect of houses, not in lieu of tithes; for they had been lost, but called tithes in the Act, leaving tithes on any other land, if there was any such land, leviable as before. That being my view, these payments cannot be considered as payments in lieu of tithes, and I am strongly confirmed in that view by the fact that for nearly 300 years no assessment has ever been attempted to be made in respect to these payments. It would be a breach of

faith that, when the tithe-owners have agreed to take an annual sum of 6500*l.* in lieu of that which was not rateable to the poor, it should be said that this annual sum is rateable. I am therefore of opinion that the appeal should be dismissed. *Appeal dismissed.*

Solicitors for assessment committee, *Baylis* and *Pearce.*

Solicitors for respondents, *Winter* and *Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Nov. 4, 5, *and* 15, 1887.

(Before STIRLING, J.)

BENDELOW *v.* GUARDIANS OF WORTLEY UNION.(*a*)

Nuisance—Small-pox hospital—Interim injunction.

An interim injunction granted restraining a sanitary authority from continuing a small-pox hospital, on the ground that there was an "appreciable injury to the plaintiff's property" within the words used by Cotton, L.J. in Fleet *v.* Metropolitan Asylums Board (2 *Times L. Rep.* 361).

THE plaintiff W. A. Bendelow was the owner of three freehold dwelling-houses, farm buildings, and twenty-one acres of land, in the hamlet of Birley Carr, in the township and parish of Wortley, and the other plaintiffs were his tenants, one of them being a cowkeeper and dairyman.

The rural sanitary authority of the Wortley Union bought an adjoining dwelling-house, and used the same for a small-pox hospital. The cottage was bounded on one side by the plaintiff's land, on another side by the high road, and on the two other sides by open fields. The plaintiff's property was between 130 feet and 160 feet from the hospital.

On the 17th Oct. last the plaintiffs commenced an action, and applied for an interim injunction. Their motion stood over from Nov. 5 in order to enable a medical referee to inspect the place on behalf of both parties and report.

Dr. Murphy, the gentleman chosen for this purpose, reported as follows:

As a result of my inspection, I am satisfied that the small-pox hospital, by reason of its proximity to the above-mentioned houses belonging to or occupied by the plaintiffs, is a danger to persons who are susceptible to small-pox and who are dwelling in these houses, and, further, that the hospital, by reason of its proximity to the Hirst Common-lane, is a danger to persons susceptible to small-pox and who frequent that lane. I am of opinion that by the exercise of precautions which I believe are taken in the management of the hospital, it is possible to prevent danger of infection arising from personal communication; but the danger which exists is that of aërial communications of infection from the aggregation of persons suffering from small-pox in the hospital. In estimating the amount of danger, it is proper to state that this danger is not great, that the danger is one of possibility rather than of probability of small-pox being caused by the hospital. I find, moreover, on inquiry, that very many of the inmates of the houses belonging to or occupied by the plaintiffs have been recently revaccinated, and are therefore presumably insusceptible to attack by small-pox. I should add that I have in this report considered only the danger to the plaintiffs from infection by small-pox, and have not had any regard to any effects upon health caused to the plaintiffs by mental anxiety resulting from the use of the Hirst as a small-pox hospital.

Graham Hastings, Q.C. and *Blakesley*, for the plaintiff, cited

Metropolitan Asylums District v. *Hill*, 6 App. Cas. 193;
Fleet v. *Metropolitan Asylums Board*, 2 Times L. Rep. 362.

Pearson, Q.C. and *Warrington*, for the defendant sanitary authority, argued that in all these cases the question was, what was the amount of danger necessary to cause a nuisance? The cases cited on the other side showed that an injunction would not be granted unless the plaintiffs made out that there was real and substantial danger. In the present case the only risk was from aërial communication, and the judgment of Bowen, L.J. in *Fleet* v. *Metropolitan Asylums Board* showed how little importance could be attached to that.

Graham Hastings, Q.C. in reply.

The following cases were also cited:

Fletcher v. *Bealey*, 52 L. T. Rep. N. S. 541; 28 Ch. Div. 688;
Attorney-General v. *Corporation of Kingston*, 12 L. T. Rep. N. S. 665; 13 W. R. 888;
Salvin v. *North Brancepeth Coal Company*, 31 L. T. Rep. N. S. 154; L. Rep. 9 Ch. 705;
Baines v. *Backer*, Ambler, 158;
Reg. v. *Burnett*, 4 M. & S. 272;
Earl of Ripon v. *Hobart*, 3 My. & K. 169;
Matthews v. *Corporation of Sheffield*, 31 Sol. J. 773.

STIRLING, J.—This case certainly comes close to the line. The first question is, what is the law applicable, and that, after the discussion which it has undergone in recent cases, is tolerably clear. The plaintiffs complain of a building at no great distance from their property as a nuisance, being used as a small-pox hospital. The burden of proof is upon them. They must make out, not merely that patients suffering from infectious disease are gathered together there, but that there is also some injury to the rights of the plaintiffs as owners of the property where they live. Then comes the question, what is the amount of injury which will induce the court to treat this as a nuisance? That is well illustrated by *Fleet* v. *Metropolitan Asylums Board* (2 Times L. Rep. 361). The expression there used is that there must be provable injury to the plaintiffs' property. The plaintiffs must make that out. Has that been made out here? The plaintiffs' property is between 132 feet and 147 feet from the place in question. The house abuts on a road made by the plaintiffs going to and from their houses. There is between the building occupied as a hospital and the plaintiffs' house a wall 13 feet high. Upon the evidence adduced by the plaintiffs I felt considerable doubt, and I suggested that some medical man should go down and report accordingly. Dr. Murphy, nominated by Dr. Buchanan, of the Local Government Board, was sent down accordingly, and reported as follows. [His Lordship then read Dr. Murphy's report given above, and continued as follows:] As regards the last paragraph, there can be no doubt Dr. Murphy exercised a proper discretion in leaving that. What meaning am I to attach to that report? I think it shows that there is a real appreciable danger to persons susceptible to small-pox, though not very great. On the other hand, the nature of the disease is such that if once a person suffers from it, it is

(*a*) Reported by A. PULLING, Esq., Barrister-at-Law.

irreparable in the sense in which that word is used in reference to an injunction. I think the plaintiffs have made out a case of real appreciable injury, though not a great one, and are entitled to an interlocutory injunction to restrain the user of the place so as to be a nuisance to the plaintiffs.

Solicitors: *Carlisle, Unna,* and *Rider; Torr* and *Co.,* for *Dransfield* and *Sons,* Penistone.

QUEEN'S BENCH DIVISION.

Monday, Nov. 7, 1887.

(Before Stephen and Charles, JJ.)

Peake and others v. The Finchley Local Board. (a)

The Public Health Act 1875 (38 & 39 *Vict. c.* 55), *s.* 180, *sub-sect.* 13—*Arbitration—Costs.*

An arbitrator or umpire appointed to determine a dispute under the 179*th and* 180*th sections of the Public Health Act* 1875 (38 & 39 *Vict. c.* 55) *must in his award deal with the costs of and consequent upon the reference, which are placed in his discretion by the* 13*th sub-section of the* 180*th section, and if he fails to do so the court will remit the award to him for the purpose of determining the question of costs.*

This was a motion on the part of Frederick Peake, John Aldwell Nicholson, and Ronald Peake, trustees of a settlement, that an award made by R. C. Driver, Esq., an umpire appointed in accordance with the provisions of the Public Health Act 1875, as to the compensation to be paid under that Act by the Finchley Local Board, in respect of injury done by the board to property of the trustees, be referred back to him to determine the question of the costs of and consequent upon the reference, being one of the matters referred to him under the provisions of the Public Health Act 1875 (38 & 39 Vict. c. 55), s. 180, sub-sect. 13, upon the ground that he had not determined and adjudicated upon the question, or, in the alternative, that the umpire should be ordered to make such further award in respect of the matter of the costs as should be necessary.

It appeared that the Finchley Local Board acting as the sanitary authority for the district of Finchley under the authority of the Public Health Act 1875, and other Acts incorporated therewith, having constructed sewers through certain property of which the above-mentioned trustees were owners, and the parties having failed to agree as to the amount of compensation to be paid for the injury thereby sustained by the trustees, arbitrators and an umpire were duly appointed in accordance with the provisions of the Public Health Act, and the umpire, the arbitrators differing, duly heard the matter, and awarded to the trustees the sum of 1323*l.* as and for the full compensation for the damage and injury sustained, but in his award made no mention of the costs of the reference.

The trustees thereupon moved that the award should be referred back to the umpire to determine the question of the costs of and consequent upon the reference.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides as follows:

Sect. 179. In case of dispute as to the amount of any compensation to be made under the provisions of this Act (except where the mode of determining the same is specially provided for), and in case of any matter which by this Act is authorised or directed to be settled by arbitration, then, unless both parties concur in the appointment of a single arbitrator, each party shall appoint an arbitrator to whom the matter shall be referred.

Sect. 180. With respect to arbitrations under this Act the following regulations shall be observed:

(7.) Where there is more than one arbitrator, the arbitrators shall, before they enter on the reference, appoint by writing under their hands an umpire:

(8.) If the arbitrators fail to make their award within twenty-one days after the last of them was appointed, or within such extended time (if any) as may have been duly appointed by them for that purpose, the matters referred shall be determined by the umpire:

(13.) The costs of and consequent upon the reference shall be in the discretion of the arbitrator or arbitrators, or (in case the matters referred are determined by an umpire) of the umpire.

Wheeler, Q.C. (with him *E. Bartley Dennis*) for the claimants.—The costs being in the discretion of the umpire, and he having failed to make any order as to them in his award, the award must be referred back to him for the purpose of determining the question. An order to that effect was made by the Court in January 1886 in an arbitration of a like character between the trustees of Henning's estate and the Hendon Local Board. It was there ordered on a motion in the same terms as the present, that the award of the umpire should be remitted back to him for his reconsideration and redetermination, and, further, that the costs of the application should be decided by the umpire, and if he gave costs to the applicants, then that the costs of the application should be the claimants', but not otherwise.

Bazalgette for the local board.

The Court remitted the award to the umpire for his reconsideration and redetermination for the purpose of determining the question of the costs of the reference, and also directed that he should deal with the costs of the application to the court.

Solicitors for the claimants, *Peake, Bird, Collins,* and *Peake.*

Solicitors for the Finchley Local Board, *Stevens* and *Co.*

Saturday, Nov. 19, 1887.

(Before Stephen and Charles, JJ.)

Reg. v. Farrant (Mayor of Taunton). (a)

Justice of the peace—Disqualifying interest—Possibility of bias—Advice given by justice to party to proceedings—Justice subpœnaed as witness.

The Mayor of Taunton, chairman of the bench of magistrates, who was a physician, had attended the complainant professionally for injuries received in an assault, which was the subject-matter of a summons. He was subpœnaed on behalf of the prosecution to prove the nature of the injury. He had also advised the complainant, before proceedings were instituted, not to take the matter into court, but to consent to a settlement, and he had conveyed a message from the person charged with the assault to the complainant, tendering an apology and expressing a desire for an amicable settlement. A rule

(a) Reported by Joseph Smith, Esq., Barrister-at-Law.

(a) Reported by F. A. Crailsheim, Esq., Barrister-at-Law.

absolute for a writ of prohibition having been obtained to restrain the mayor from sitting on the bench at the hearing of the summons:

Held (allowing a writ of supersedeas to quash the prohibition), that, it not having been shown that the mayor had either a pecuniary interest in the case, or such a substantial interest, other than pecuniary, as to make it likely that he would have a bias, he was not disqualified from sitting.

Held also, that the fact of his having been subpœnaed as a witness did not disqualify him from sitting.

THIS was an application for a writ of *supersedeas* to set aside a rule absolute for a prohibition to restrain Dr. Farrant, the Mayor of Taunton, from sitting to hear and determine the matter of a certain summons against one Thomas Burch, for assaulting one Robert Mattock.

It appeared that two men named Mattock (the complainant) and Dyer had been assaulted by one Burch on leaving a public-house at Taunton, where they had all been drinking together. Dr. Farrant, the Mayor of Taunton, who is a medical practitioner, was the regular medical attendant of the two men who had been assaulted, and he knew Burch slightly. Dr. Farrant was sent for, and he professionally attended to Mattock's injuries caused by the assault. It was stated in an affidavit, sworn by Mattock, that Dr. Farrant had said to him, while they were discussing the matter, that he (Mattock) ought not to take proceedings against Burch, as, if the matter went to court, it would appear in all the papers; and that on the next day Dr. Farrant had said that he had seen Burch and had recommended him to apologise and to do what was right in the matter. It was also stated in an affidavit by Dyer that Dr. Farrant had begged him not to take legal proceedings, as Burch would throw himself in his and Mattock's hands. A man named Bradbeer also stated on affidavit that Dr. Farrant had told him that the complainants would not succeed before the justices, and had offered to lay him five to one that such would be the result. Dr. Farrant, in his affidavit, expressly denied having said that the complainants would not succeed before the justices, or that he had offered to lay any sum on the result, or that he had made any bet concerning it. Dr. Farrant, as Mayor of Taunton, was chairman of the bench of magistrates. Summonses for assault having been taken out by Mattock and Dyer against Burch, before the cases came on, Dr. Farrant was subpœnaed by the solicitor who appeared for the prosecution in both cases as a witness to prove the nature of the injury. When the case came on, he took his seat on the bench in the ordinary course, but the solicitor for the prosecution protested against his sitting to hear the case, on the grounds that he was subpœnaed as a witness in it, and that he had tried to prevent the matter from being brought into court. Dr. Farrant insisted upon his right to sit, but the case was adjourned. Meanwhile, an order for a rule absolute for a prohibition had been granted by Kekewich, J., upon an *ex parte* application, to prevent Dr. Farrant from sitting and adjudicating upon the summons in question. Dr. Farrant then obtained a rule *nisi* for a writ of *supersedeas* to set aside the prohibition.

Wheeler, Q.C. and *Bartley Dennis* showed cause against the rule.—The mayor is disqualified from sitting as a magistrate on the hearing of this summons, both by reason of his being a material witness and having been subpœnaed on behalf of the prosecution, and by reason of his being interested in the case, he being a friend of the defendant and having tried to keep the case out of court. His conduct has been equivocal, and he has shown bias in favour of the defendant:

Reg. v. *The Justices of Great Yarmouth*, 8 Q. B. Div. 525.

Moreover, that this is a prohibition applied for on behalf of the prosecution is a fact which should be taken into consideration by the court. It is different from the ordinary case where the application is on behalf of the defendant, as a conviction may always be quashed; but if a prisoner is acquitted he cannot be tried again. In order to disqualify a justice from sitting, it is not necessary that he should have a pecuniary interest in the case; if the conduct of the justice has been equivocal, that is a sufficient ground for a prohibition to be granted. It is submitted that bias is the criterion. The following cases were also cited:

Home v. *Earl Camden and others*, 2 H. Blackstone, 535;
Inter Brooks and the Earl of Rivers, Hardress Rep. 503;
Ex parte Medwin and Hurst, 1 Ell. & Bl. 609;
Mayor of Hereford's case, 1 Salkeld's Rep. 395;
Wood v. *The Mayor of London*, 1 Salkeld's Rep. 397;
Dimes v. *Proprietors of the Grand Junction Canal*, 3 H. L. Cas. 759;
Reg. v. *Handsley*, 8 Q. B. Div. 383;
Reg. v. *Recorder of Cambridge*, 8 Ell. & Bl. 637.

Sir *Hen. James*, Q.C. and *Blake Odgers* in support of the rule.—The mayor had no real interest in the case such as would be likely to bias him in favour of either party. He only acted as a friend to both sides. The position of a magistrate is very different from that of a juror. If a prohibition is granted, the magistrate is dispossessed of his office. If a magistrate who has admittedly no pecuniary interest in a case is challenged, it must be brought home to him that bias exists to such an extent as to leave no hope of justice being done, or a fair trial had:

Reg. v. *Alcock; Ex parte Chilton*, 37 L. T. Rep. N. S. 829.

The fact of a justice being a witness is not necessarily a disqualification for adjudicating:

Reg. v. *Tooke*, 48 J. P. 661.

It is submitted that the facts of this case do not warrant a prohibition, and that therefore a writ of *supersedeas* ought to issue.

STEPHEN, J.—The legal principles as to the right of magistrates to hear and adjudicate upon cases, as I understand them, are as follows: The first and most important legal principle is, that no one shall be judge in his own cause; that means, where he has the least pecuniary interest in the matter. That no one shall sit as a judge when he has the smallest pecuniary interest in the subject-matter of the dispute before him is a doctrine that has been carried to great, but not to undue length. For instance, in the case of *Reg.* v. *The Recorder of Cambridge* (8 Ell. & Bl. 637), it was held that an order for costs made by the deputy-recorder was vitiated on the

ground that he had a personal interest in the result, because the costs would have to be levied out of the common fund to which the parish where he was an occupier would contribute. Again, in the case of *Dimes* v. *The Proprietors of the Grand Junction Canal* (3 H. L. Cas. 759), it was held that the Lord Chancellor was disqualified, on the ground of interest, from sitting as a judge in an action brought by a public company in which he had an interest as a shareholder. A person sitting in the capacity of judge certainly should not have any pecuniary interest in the proceedings. That is a well-known principle, but it has no bearing upon this case, because it is not suggested that Dr. Farrant had any such interest in this matter. But the law does not stop there. It goes on to say that, though the judge or magistrate has no pecuniary interest in a cause, he may have another kind of interest in it having substantially the same effect, though not of the same nature; he may be interested otherwise than pecuniarily to such an extent as to bias his judgment, and then he ought not to sit as a judge. I will read this further principle from three cases where the law is well and clearly laid down. In the case of *Reg.* v. *Rand* (L. Rep. 1 Q. B. 230; 35 L. J. 157, M. C.) Blackburn, J., in giving judgment, says: "Wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act; and we are not to be understood to say that where there is a real bias of this sort this court would not interfere; but in the present case there is no ground for doubting that the justices acted perfectly *bonâ fide*." That principle is again found in *Reg.* v. *Meyer and others* (1 Q. B. Div. 173), where Blackburn, J., in giving judgment, says: "In *Reg.* v. *Rand* (*ubi sup.*) we held that there was no ground for quashing the certificate of the justices. The effect of our judgment in that case was, that though pecuniary interest in the subject-matter of dispute, however small, disqualifies the justices, yet the mere possibility of bias did not *ipso facto* avoid the justices' decision; and we thought that, though there was a possibility of bias in that case, yet it was not real. But we expressly excepted a real bias, saying, 'that we must not be understood to say that where there is a real bias this court would not interfere.' In the present case there is such a real bias." Again, in the year 1881, in the case of *Reg.* v. *Handsley and others* (8 Q. B. Div. 383), the same principle is expressed, though in somewhat different words. Cave, J., there said, after discussing the authorities: "Feeling ourselves thus at liberty to exercise our own judgment in the matter, we are of opinion that in cases like the present . . . . it is not enough to show merely that an adjudicating justice is a member of the town council, and, as such, has a pecuniary interest in the result of the complaint or information, or that he is a member of the corporation which is charged with the duty of prosecuting the offence which he sits to adjudicate upon, but that, in order to disqualify the justice, it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter." We adopt the language of those cases, and say that, there being here no question of pecuniary interest, what we have to decide is, whether it has been proved that such a substantial interest exists that it is probable that if Dr. Farrant heard the charges of assault he would be likely to have a real bias in favour of one of the parties. The substance of the case is shortly this: After the assault had been committed, Dr. Farrant was called in to attend one of the two men who were hurt. He was a patient of Dr. Farrant, who treated him for certain injuries, and Dr. Farrant appears to have advised him that the case had better not be brought into court, but that it should be settled quietly, as the parties were respectable men. That advice seems to have been given by him as a friend. Afterwards, Dr. Farrant received a message that Burch was willing to apologise for what had happened, and that he thought the matter could be arranged. Dr. Farrant advised the prosecutor that this course should be adopted. The other side, however, had by this time put the matter into the hands of a solicitor. That is the substance of the case. Now, can it be said that that conduct showed real bias, or was such as would make it likely that Dr. Farrant would not do justice between the parties if the case came before him? I am bound to say that, after having carefully considered the facts as alleged, I cannot see anything of the kind. We cannot say that he is likely to have a bias merely because he suggested a settlement, and advised the complainant not to go into a criminal court. We judges suggested, when this case first came before us, that it ought not to be fought out. Dr. Farrant refused to adopt that suggestion and is determined to assert his rights. Can it be said that we were influenced by any bias in giving this advice? We thought a settlement would save public time. I do not think that Dr. Farrant has done more than we have. But then it is said that it will be necessary to call Dr. Farrant as a witness to give evidence in the case, as to the nature of the injuries and Burch's admission. It may be that this might be a ground for Dr. Farrant to say, as a matter of grace, that he did not intend to sit upon the bench in the case; but it appears to me that to hold, as a matter of law, that because a magistrate or judge is to be called as a witness, that disqualifies him from doing his duty, would be to create a precedent which, to say the least of it, would cause very great inconvenience; as, for instance, if a judge of assize were subpœnaed just before the trial, the effect might be to necessitate a postponement to the next assizes, and it would be in the power of either party, by so doing, to prevent any particular judge or magistrate from sitting. I feel that it would be a very serious thing to lay down that such objections against judges disqualified them from sitting in a case, and it might cause the greatest public inconvenience. It has also been suggested that Dr. Farrant offered to make a bet as to the result of the case if it came to trial, but this was flatly contradicted on affidavit. If he had in fact made a bet, he would be disqualified from sitting by pecuniary interest. If he had seriously offered to bet, although I do not say that it would have disqualified him, I think it would have shown very bad taste on his part; and even though he had not actually made the bet, it would have shown great levity most unbecoming to a person in his position. But that is not proved here. The writ of prohibition must therefore be super-

seded, and the rule *nisi* for a writ of *supersedeas* must be made absolute.

CHARLES, J.—I fully concur in all that has fallen from my learned brother, and I agree in all that he has said, both as regards the law and the facts of this case.

Rule absolute for supersedeas.

Solicitors for the applicant for the prohibition, *Stevens* and *Co.*, for *J. Crawshaw*, Taunton.

Solicitor for the mayor, *R. H. Willcocks*, for *S. B. Cresswell*, Taunton.

Friday, Nov. 18, 1887.

(Before STEPHEN and SMITH, JJ.)

THE GUARDIANS OF THE POOR OF THE AMERSHAM UNION (apps.) *v.* THE GUARDIANS OF THE POOR OF THE CITY OF LONDON UNION (resps.). (*a*)

Poor law—Divided Parishes Act 1876—*Settlement—Child under sixteen—Second marriage of mother—Birth settlement of child—Birth settlement of mother—Derivative settlement*—39 & 40 *Vict. c.* 61, *s.* 35.

An order of justices adjudged the settlement of a pauper lunatic child under sixteen to be within the appellant union. The pauper's father, whose legitimate child she was, was born within the Hemel Hempstead Union, and her mother within the appellant union.

The pauper was born in the parish of St. Mary, Islington.

The pauper's father, who had never acquired a settlement for himself, and had no settlement other than that of his birth, died in May 1883; *his widow married again in Jan.* 1884; *and in the interval between the death of her first husband and her second marriage the mother did not acquire a settlement for herself.*

The pauper became chargeable to the respondent union in April 1887.

Held, that, as at the time when the pauper became chargeable her father was dead, and her mother had married again, the proper settlement of the pauper was her birth settlement, and that therefore the appellants were entitled to judgment.

THIS was an appeal by way of a special case stated under 12 & 13 Vict. c. 45, s. 11, against an order adjudging the legal settlement of a pauper to be in the appellant union.

The facts of the case were as follows:—

Walter Edmonds, the father of the pauper, was born at Boxmoor, in the parish of Hemel Hempstead, in the county of Hertford, and in the Hemel Hempstead Union, on the 5th Feb. 1857.

Sarah Ann Glenister, the mother of the pauper, was born at Lye Green, in the parish of Chesham, in the county of Buckingham, and in the appellant poor law union, on the 1st June 1856.

The said Walter Edmonds and Sarah Ann Glenister were married at the parish church, Chesham, in the appellant union, on or about the 14th Nov. 1875.

The pauper is the legitimate daughter of the said Walter Edmonds and Sarah Ann his wife, and was born on the 10th July 1881, at 57, St. Clement's-street, in the parish of St. Mary, Islington, in the county of Middlesex.

Walter Edmonds, the pauper's father, died on or about the 7th May 1883, leaving his widow Sarah Ann Edmonds and the pauper, and two other children, him surviving. The said Walter Edmonds never acquired a settlement for himself, and had no settlement other than that of his birth.

On the 21st Jan. 1884 Sarah Ann Edmonds, the pauper's mother, being then a widow, married Henry Paine, her present husband, who was born in the county of Kent in or about the year 1858. During the interval between the death of her first husband and her marriage with the said Henry Paine the said Sarah Ann Edwards (now Sarah Ann Paine) did not acquire any settlement for herself.

The appellants contended, first, that when the pauper became chargeable, and at the time of making the said order of removal, the pauper derived a settlement from her father, who was born as before mentioned in the parish of Hemel Hempstead, and that after his death she retained and still retains that settlement; secondly, that if the pauper at the time of making the said order did not take or retain her father's birth settlement, she was legally settled in the parish where she was born, viz., in the parish of St. Mary, Islington, as after the death of her father her mother never had or acquired any but a derivative settlement, and also because her mother was not when the pauper became chargeable, and when the said order was made, a "widowed" mother within the meaning of sect. 35 of 39 & 40 Vict. c. 61, being then the wife of the said Henry Paine.

The respondents, on the other hand, contended that by the said order of the 8th Jan. 1887 the settlement of the pauper was properly adjudged to be in the said parish of Chesham, in the appellant union, because on the death of her father, she being under sixteen years of age, she became entitled to her widowed mother's birth settlement, which she retained notwithstanding that she married again.

The question for the opinion of the court was, whether the pauper was at the time of the making of the order of removal settled in the parish of Chesham in the appellant union. If the court answered that question in the affirmative, the said order was to be confirmed with costs, including the costs of the special case and of and incidental to the hearing and decision of the same, to be paid by the appellants to the respondents. If in the negative, the said order was to be quashed with costs, including the costs of the special case, and of and incidental to the hearing and decision of the same, to be paid by the respondents to the appellants. Judgment in conformity with the decision of the court, and for such costs as the court should adjudge, was to be entered up on the motion of either party at the sessions next or next but one after such decision shall have been given.

By 39 & 40 Vict. c. 61, s. 35:

No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate or otherwise, except in the case of a wife from her husband, and in the case of a child under sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

If any child in this section mentioned shall not have

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

acquired a settlement for itself, or being a female shall not have acquired a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiry into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born.

William Graham for the appellant union.—This order is bad. The proper time at which to inquire into a pauper's settlement is the moment at which he or she becomes chargeable, and at no other. In this case, at the time the pauper in question became chargeable, the only proper and valid settlement she possessed under the provisions of the Divided Parishes Act 1876 was her birth settlement:

Reg. v. *The Guardians of the Poor of Bridgnorth*, 48 L. T. Rep. N. S. 600; 11 Q. B. Div. 314;
Guardians of the Edmonton Union v. *Guardians of the Islington Union*, 15 Q. B. Div. 95;
Guardians of the Kingsbridge Union v. *Guardians of the East Stonehouse Union*, 56 L. T. Rep. N. S. 333; 18 Q. B. Div. 528.

A child under sixteen does not take the settlement of its mother derived from her second marriage:

Guardians of Keynsham Union v. *Guardians of Bedminster Union*, 38 L. T. Rep. N. S. 507; 3 Q. B. Div. 344.

The term "wife" does not include "widow:"

Guardians of the Maidstone Union v. *Guardians of the Holborn Union*, 17 Q. B. Div. 817;
Guardians of the Headington Union v. *Guardians of St. Olave's Union*, 18 Q. B. Div. 298.

The child therefore cannot take the settlement of its mother, because it is a derivative one.

Poland for the respondent union.—The order is right. The cases of *Reg.* v. *Guardians of the Poor of Bridgnorth* (*ubi sup.*) and *Guardians of the Edmonton Union* v. *Guardians of the Islington Union* (*ubi sup*). do not apply, for in the present case the pauper is under sixteen. It is clearly established that a child under sixteen is to have its father's settlement, and on the death of its father the settlement of its widowed mother, unless it be a derivative one:

Guardians of the Croydon Union v. *Guardians of the Reigate Union*, 19 Q. B. Div. 385.

The question here is whether on the marriage of its widowed mother a child loses the settlement he possessed at the time of his mother's second marriage. On the death of the father the child is to take its widowed mother's settlement and retain it; if the widowed mother had died before the child reached sixteen, it would retain her settlement. The child therefore has got the settlement of its widowed mother, and is to retain it. It cannot be that, when a widow marries a man who has no settlement, the children of her first marriage are to be sent to their birth settlement, and the mother to be sent to the settlement she had when she became a widow. The case of *The Guardians of the Keynsham Union* v. *Guardians of the Bedminster Union* (*ubi sup.*) is in my favour. The widowed mother's settlement is not to be lost to her children.

Graham in reply.—The contention of the other side requires the court to look back beyond the moment of time when the pauper is adjudged to be chargeable to some parish or union; but that is contrary to the course of the decisions.

Stephen, J.—This case has been ingeniously argued by the learned counsel on both sides. It may be deemed to be common ground between Mr. Poland and Mr. Graham that the point of time to which the statute must be taken to refer is that at which the child becomes chargeable and its settlement to be adjudicated upon. If we start with this as a definite point, in the result, as Mr. Graham contends, we must consider the status of the child immediately before adjudication—that is, that she had got no settlement at all; in other words, we must take the state of things existing at the time of adjudication upon a pauper's settlement. Let us take that date in the present case—that is, after the second marriage of the child's mother. At that time the child had got no father, for he was dead, and no widowed mother, for she had married. Now under the Act we are debarred from looking for any derivative settlement for her. The only settlement she possessed was her birth settlement, and that was the respondent union. Mr. Poland contended that, though we are to look at the state of things when the order of adjudication is made, we ought to regard what was the settlement of the widowed mother at that time. That is an ingenious way of putting it, but we ought not to suppose that the child as soon as her father was dead took the settlement of her widowed mother; but she must be treated as having no settlement at all until it became chargeable. I am of opinion that our judgment should be for the appellants.

Smith, J.—The question here is, whether the child goes back to her birth settlement, or takes the birth settlement of her mother—that is, whether she is to be sent to the City of London Union or the Amersham Union. This most difficult section has been the subject of inquiry after inquiry; but, if one thing is settled, it is, that it must be construed with reference to the time when the chargeability of the pauper or the necessity of adjudicating upon his settlement arises, and must not be taken with reference to bygone matters. The child's father was dead, and her mother was no longer a widow, but had married again; and the only settlement that the child could take from her parents was the derivative settlement of the again married widow, and that the statute prevents us from investigating; consequently the only valid settlement left was the birth settlement of the child. [His Lordship here read the section.] It seems to me that, if Mr. Poland be right, it might be argued why should not the child take the settlement of her dead father; but that, in my opinion, would not be a true reading of the section. The date of chargeability is the proper time for investigating the settlement of the pauper. The third clause of sect. 35 runs as follows: "If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born." In the present case the only two settlements this pauper child could have must be either its birth settlement or the derivative settlement of its mother. Now I am of opinion that we cannot inquire into this derivative settlement; consequently there is no other settlement which the child could take

except its birth settlement. For these reasons I think this appeal ought to be allowed.

Order quashed.

Solicitors for the appellants, *Allen* and *Edmunds*, for *H. Bedford*, Amersham.

Solicitors for the respondents, *J. Rexworthy* and *Co.*

Nov. 25 *and* 26, 1887.

(Before STEPHEN and CHARLES, JJ.)

JOWETT AND ANOTHER *v.* THE IDLE LOCAL BOARD. (*a*)

Local government—Street—Private alley or court—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 4 *and* 150.

The plaintiffs were owners of a private alley or court, upon which the defendants (the urban sanitary authority) had constructed a sewer and paved a roadway, professing to act under the powers conferred by sect. 150 *of the Public Health Act* 1875. *The said alley or court led from a highway to a mill, and the portion sewered and paved by the defendants was bounded on each side by cottages, or by gardens or yards belonging thereto, and was the only means of access to the said cottages, which were about twenty in number, and to the said mill. The owners and occupiers of the adjoining property were the only persons having rights of road over the said alley or court. The traffic in connection with the mill was very considerable. The plaintiffs having brought an action of trespass against the urban sanitary authority:*

Held (upon a motion for a new trial, allowing the appeal), that, following the decision of the Court of Appeal in The Mayor and Corporation of Portsmouth *v.* Smith (50 *L. T. Rep. N. S.* 308; 13 *Q. B. Div.* 184), *the words in the definition of "street" in sect.* 4 *of the Public Health Act* 1875, *if not inconsistent with the context, must be read into sect.* 150 *of that Act.*

Held also, that the question whether the said alley or court was a street or not, so as to come within the meaning of sect. 150 *of the Public Health Act* 1875, *was a question of law to be decided by the judge at the trial, and not a question for the jury; and that, upon the facts of this case, the alley or court in question was a street within the meaning of sect.* 150 *of the Act.*

Checkheaton Local Board *v.* Burnup (50 *J. P.* 598) *disapproved.*

MOTION for a new trial.

The action was tried at the Leeds Assizes, before Manisty, J. and a common jury. The plaintiffs, the owners of the court or alley, called Union-yard, situate at Thorpe, in the township of Idle, brought an action for trespass against the defendants, the Urban Sanitary Authority for the district of Idle, who had constructed a sewer and paved a roadway in the said Union-yard, on the ground that a notice, addressed to the plaintiffs, requiring them to do the work, had not been complied with. The place in question led from a highway to a mill, the property of a Mr. Turner, and to a number of cottages abutting upon it, and the traffic over it, which was considerable, was principally between the highway and the said mill. The portion paved and sewered by the sanitary authority was bounded on each side by cottages, or by gardens and yards belonging thereto, and was the only means of access for vehicles to property comprising about twenty tenements and the said mill. The owners and occupiers of the adjoining property were the only persons having right of road over Union-yard. The question left by the learned judge to the jury was whether the yard in question was a street within the meaning of the Public Health Act 1875. The jury answered that, taking the whole of the exceptional surroundings of the case into consideration, the case did not come within the meaning of the word "street" as employed in the Improvement Acts. Judgment was therefore entered for the plaintiffs. The defendants now moved that the verdict be set aside, and that judgment be entered for them, on the grounds that Union-yard was a street within the meaning of the Public Health Act 1875, and that there was no evidence to go to the jury that the place was not a street within the meaning of that Act; or for a new trial on the grounds that the verdict was against the weight of evidence, and that the learned judge had misdirected the jury in leaving to them the question.

By sect. 4 of the Public Health Act 1875 it is enacted that,

> In this Act, if not inconsistent with the context, the word "street" shall include any highway (not being a turnpike road), and any public bridge, not being a county bridge, and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not.

By sect. 150 of the same Act it is enacted that,

> Where any street, within any urban district (not being a highway repairable by the inhabitants at large), or the carriage-way, footway, or any other part of such street, is not sewered, levelled, paved, metalled, flagged, channelled, and made good, or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, levelled, paved, metalled, flagged, or channelled, or to be lighted, require them to sewer, level, pave, metal, flag, channel, or make good, or provide proper means for lighting the same within a time to be specified in such notice. . . . If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default.

Forbes, Q.C. (*Wilberforce* with him), for the defendants, in support of the motion.—The sole question in the case was, whether Union-yard was a street within the meaning of the Public Health Act, and that ought to have been decided by the learned judge himself. As a matter of law, it is submitted that it is such a street, because the place comes within the definition of "street" in the interpretation clause of the Public Health Act, which must be read into sect. 150 of that Act:

The Mayor and Corporation of Portsmouth v. *Smith*, 50 L. T. Rep. N. S. 308; 53 L. T. Rep. N. S. 394; 13 Q. B. Div. 184; 10 App. Cas. 364.

The following cases were also cited:

Maude v. *The Baildon Local Board*, 48 L. T. Rep. N. S. 874; 10 Q. B. Div. 394;

Taylor v. *The Corporation of Oldham*, 35 L. T. Rep. N. S. 696; 4 Ch. Div. 395;

Robinson v. *The Barton-Eccles Local Board*, 50 L. T. Rep. N. S. 57; 8 App. Cas. 798;

Midland Railway Company v. *Watton*, 54 L. T. Rep. N. S. 482; 17 Q. B. Div. 30.

(*a*) Reported by F. A. CRAILSHEIM, Esq., Barrister-at-Law.

Tindal Atkinson, Q.C. (*A. P. Longstaffe* with him), for the plaintiffs, in support of the verdict.—Union-yard is not a place to which sect. 150 of the Public Health Act applies, and it is not of such a description as to justify the sanitary authority in doing work in it:

Checkheaton Local Board v. *Burnup*, 50 J. P. 598.

The meaning of the word "street" must be determined having regard to the context, and the place in question is to all intents and purposes merely a private yard. The public have no right to use it, and the evidence showed that in fact it was used almost exclusively by the mill hands and by persons connected with the mill. It is certainly not a street in the ordinary acceptation of the term; until the interference of the defendants, there was nothing but a track across the yard. If it was not a road, and not a street, then the defendants must fall back upon sect. 4 of the Act and call it a square. But in that case the sanitary authority would have no right under sect. 150 to make a street over a portion of that square. The question whether the place is a street or not is a question of fact and not a question of law; if it is of such a description that any reasonable person might have found that it was not a street, then the verdict must stand:

Reg. v. *Shiel and another*, 50 L. T. Rep. N. S. 590.

He also cited

Reg. v. *Fullford*, 33 L. J. 122, M. C.

It is therefore submitted that the verdict and judgment ought to stand.

STEPHEN, J.—I have come to the conclusion that we must in this case exercise the power which we have, under Order XL. of the Rules of Supreme Court 1883, of ordering judgment to be entered for the defendants, on the ground that my brother Manisty ought himself to have decided the question whether Union-yard was a street or not, within the meaning of sect. 150 of the Public Health Act 1875, and not to have left it to the jury. It appears to me that the points in the case are few. The decision in the *Mayor and Corporation of Portsmouth* v. *Smith and others* (50 L. T. Rep. N. S. 308; 53 L. T. Rep. N. S. 394; 13 Q. B. Div. 184; 10 App. Cas. 364) is clear, and the effect of it is that the words in the definition of "street" in the interpretation clause of the Public Health Act 1875 are to be read into sect. 150 of that Act. If this is so, the case of the *Mayor and Corporation of Portsmouth* v. *Smith and others* (*ubi sup.*) overrules *Maude* v. *The Baildon Local Board* (48 L. T. Rep. N. S. 874; 10 Q. B. Div. 394). I must confess that I cannot see how to reconcile the decision of my learned brothers Mathew and Smith, JJ. in the *Checkheaton Local Board* v. *Burnup* (50 J. P. 598, with the law as laid down by the Court of Appeal and the House of Lords in the *Portsmouth* case (*ubi sup.*). With the greatest respect to my learned brothers, I cannot agree with them, and I think their decision is in direct opposition to what was laid down by the Court of Appeal in the *Portsmouth* case (*ubi sup.*), and therefore our opinion is, that the words in the definition of street in sect. 4 of the Public Health Act 1875 must be read into sect. 150. The interpretation clause defines the word "street" as "any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not." The question then is, whether the extended sense of the word "street," as particularised in sect. 4, is or is not inconsistent with the description of this yard; that is, whether any of the words in the definition in sect. 4 accurately describe the place in question, and are not inconsistent with the context. I am of opinion that some of them do accurately describe the place. Mr. Tindal Atkinson admits that the place might be described as a square, and I think that the words court, alley, or passage would also cover it. But then Mr. Tindal Atkinson says that would be so if the question had been one of sanitary works only, in which case he would not have disputed the point; but he says that the board had no right to do road-work in Union-yard, because, according to the finding of the jury, in the particular circumstances of this case, the place was one inconsistent with road-work being done in it by the board. He contends that Union-yard was a place in which it was inappropriate that road-work should be done. But I feel that the effect of that would be to split up the section in a way which was not intended by the Legislature. To use plain language, it is suggested that the board acted in the interests of Mr. Turner, who owned the mill at the end of Union-yard, and I feel myself called upon to admit that it is possible that the board might have acted with a view to private rather than to public interests. That is the danger which the Act preferred to risk rather than the danger of the lack of proper sanitary arrangements. The Act in fact says that private properties are so slightly affected by what is for the public good, that it is expedient to create the board. I do not think that we can turn sect. 150 of the Public Health Act into something like a shifting use, to vary from time to time. In my judgment that is not the proper way to read it, and therefore, under the circumstances of this case, I think that judgment must be entered for the defendants.

CHARLES, J.—I am of the same opinion. It seems to me that the decision of the Court of Appeal in the *Mayor and Corporation of Portsmouth* v. *Smith* (*ubi sup.*) binds us to read into sect. 150 of the Public Health Act the definition of street in sect. 4. It is true that in the House of Lords doubts were thrown out as to whether the definition clause ought to be read into sect. 150; but the House of Lords came to no final decision upon that point, and therefore the decision of the Court of Appeal remains in this respect untouched, namely, that the two sections must be read together. In doing that we have to read into sect. 150 the words "any highway (not being a turnpike road), and any public bridge (not being a county bridge), and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not." Now it seems to me that, upon the admitted facts, my brother Manisty would have been fully justified in holding that Union-yard came within the description of one or other of those places, for it is clear to my mind that some of those words cover this place and accurately describe it. It is used for traffic, although not dedicated to the public. The word "footway," I think, might cover the case of this yard, and I do not think that any question ought to have been left to the jury. In the *Portsmouth* case (*ubi sup.*) the jury were not asked if the place in question was a street within the meaning of the Act; but Lindley, L.J. there left to them the question whether the road, in the popular accept-

ation of the term, was a street. The answer of the jury in this case was that, taking all the exceptional surroundings of the case into account, Union-yard did not come within the meaning of the word "street" as employed in the Improvement Acts. But, in my opinion, that was not a question for the jury, and, in now directing judgment to be entered for the defendants, we are not acting in a manner inconsistent with the verdict. As a mere matter of law the learned judge ought to have entered judgment for the defendants. It is very difficult to follow how the learned judges who decided the case of the *Cheekheaton Local Board* v. *Burnup* (*ubi sup.*) came to the conclusion at which they arrived, in view of what was laid down by the Court of Appeal in the *Portsmouth* case (*ubi sup.*). Smith, J. is in that case reported to have said that a country lane would not be a street within the meaning of sect. 150. I think there is some ambiguity in the report in the Justice of the Peace; but assuming that the judgments of Mathew and Smith, JJ. are correctly reported, to the effect that sect. 150 of the Public Health Act only contemplated expenditure on streets in the ordinary and popular sense of the word, I think such decision is in contradiction to what was held in the *Portsmouth* case (*ubi sup.*). We therefore order judgment to be entered for the defendants.

Judgment for the defendants.

Solicitors for the plaintiffs, *Jaques, Layton*, and *Jaques*, for *Lancaster* and *Wright*, Bradford.

Solicitors for the defendants, *Flower* and *Nussey*, for *Killick, Hutton*, and *Vint*, Bradford.

Tuesday, Nov. 29, 1887.

(Before Wills and Grantham, JJ.)

The Mayor, Aldermen, and Burgesses of Over Darwen v. The Justices of the Peace for the County of Lancaster. (*a*)

Highway authority of borough—County authority—Disturnpiked main road, upon which steam-tramway constructed—Agreement—Expenses of repair—Liability of county authority—Tramways Act 1870 (33 *&* 34 *Vict. c.* 78), *ss.* 28, 29—*Highways and Locomotives (Amendment) Act* 1878 (41 *&* 42 *Vict. c.* 77), *s.* 13—*Blackburn and Over Darwen Tramways Act* 1879 (42 *&* 43 *Vict. c. ccxcv.*), *ss.* 47, 50.

By sect. 13 *of the Highways and Locomotives (Amendment) Act* 1878, *one-half of the expenses incurred by the highway authority in the maintenance of a disturnpiked main road shall be paid by the county authority out of the county rate.*

By sect. 47 *of the Blackburn and Over Darwen Tramways Act* 1879 *it is enacted that, "the company shall maintain and keep in good repair the entire width of any road (exclusive of the footpath or foot pavement) along or across which any of their tramways shall be laid, . . . and if the company at any time fail or neglect so to do, the road authority may cause the necessary repairs to be done, and may in such case recover the reasonable cost of such repairs from the company. Provided that the provisions of this section shall only apply when steam power is used on the tramways. Provided also, that notwithstanding anything in this section contained, the company may, from time to time, enter into and make such contracts or agreements with the road authority of either borough for the repair and maintenance of such road as may be approved by the Board of Trade."*

The road in question was a main road, on which a steam-tramway had been constructed in 1880. *By an agreement, dated the* 1*st May* 1880, *and duly approved by the Board of Trade, made between the highway authority of D. and the tramway company, it was agreed that the company should only be liable in respect of the repair of so much of the said road as lay between the rails and* 3*ft.* 6*in. beyond, and that the corporation should maintain and keep in repair the whole width of the said road, and that the company should pay to the corporation a proportionate part of the expenses so incurred by the corporation.*

The county authority having denied their liability to pay half of the amount expended by the highway authority in the repair and maintenance of the said road:

Held (upon a case stated), that the county authority were liable to pay their contribution, and that the agreement between the highway authority and the company had been legally made under the powers given by the proviso in sect. 47 *of the Blackburn and Over Darwen Tramways Act* 1879.

Special case.

1. The plaintiffs in this action are the Mayor, Aldermen, and Burgesses of the borough of Over Darwen, in the county of Lancaster, and are the highway authority of the said borough, and the said borough is a highway area within the meaning of the Highways and Locomotives (Amendment) Act 1878. The plaintiffs are also the road authority within the meaning of the Tramways Act 1870.

2. The defendants are the Justices of the Peace for the county of Lancaster. The said justices assembled in annual general session pursuant to the provisions of 38 Geo. 3, c. 58, are the county authority as defined by the Highways and Locomotives (Amendment) Act 1878.

3. The parties agreed to concur in stating the facts and circumstances in the form of a special case for the opinion of the High Court of Justice, Queen's Bench Division, in manner hereinafter appearing.

4. The Bolton and Blackburn road, for a total distance of 4 miles 2 furlongs 133 yards, passes through the said borough of Over Darwen, and was formerly a turnpike road, but ceased to be such on the 20th July 1877, and upon the passing of the Highways and Locomotives Act 1878 (41 & 42 Vict. c. 77) became and now is a main road within the meaning of sect. 13 of that Act.

5. Sect. 13 of the Highways and Locomotives (Amendment) Act 1878 enacts that,

For the purposes of this Act, and subject to its provisions, any road which has within the period between the 31st day of December 1870 and the date of the passing of this Act ceased to be a turnpike road, and any road which being at the time of the passing of this Act a turnpike road may afterwards cease to be such, shall be deemed to be a main road, and one half of the expenses incurred from and after the 29th day of September 1878 by the said highway authority in the maintenance of such road, shall as to every part thereof which is within the

(*a*) Reported by F. A. Crailsheim, Esq., Barrister-at-Law

limits of any highway area be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate, on the certificate of the surveyor of the county authority, or of such other person or persons as the county authority may appoint, to the effect that such main road has been maintained to his or their satisfaction.

6. In 1880 a tramway was constructed upon the said road within the said borough by the Blackburn and Over Darwen Tramways Company under the provisions of the Tramways Act 1879. The said tramway runs for a distance of 2 miles 6 furlongs 33 yards over the said road within the said borough. Steam power has always been used upon the said tramway.

7. By sect. 28 of the Tramways Act 1870 (33 & 34 Vict. c. 78) it is enacted that,

The promoters shall at their own expense at all times maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid as lies between the rails of the tramway and (where two tramways are laid by the same promoters in any road at a distance of not more than four feet from each other) the portion of the road between the tramways, and in every case so much of the road as extends eighteen inches beyond the rails of and on each side of any such tramway.

8. By sect. 47 of the Blackburn and Over Darwen Tramways Act 1879 (42 & 43 Vict. c. ccxxv.) it is enacted that,

"The company" [meaning the Blackburn and Over Darwen Tramways Company] shall maintain and keep in good and sufficient repair the entire width of any road (exclusive of the footpath or foot pavement) along or across which any of their tramways shall be laid, to the reasonable satisfaction of the road authorit and in such manner and with such materials as such authority may direct; and if the company at any time fail or neglect so to do, the road authority may cause the necessary repairs to be done, and may in such case recover the reasonable cost of such repairs from the company in any court of competent jurisdiction. The expressions "road" and "road authority" shall have the same meaning as are defined by the Tramways Act 1870. Provided that the provisions of this section shall only apply when steam power is used on the tramways. Provided also, that notwithstanding anything in this section contained, the company may from time to time enter into and make such contracts or agreements with the road authority of either borough [meaning the boroughs of Blackburn and of Over Darwen] respectively for the repair and maintenance of such road as may be approved by the Board of Trade.

9. By sect. 50 of the same Act,

Nothing in this Act, or in any contract, agreement, or arrangement to be made under this Act, shall operate to lessen the liability of the company under sect. 28 of the Tramways Act 1870, with respect to the repair of any road whereon any tramway belonging to them is laid.

10. By sect. 2 of the same Act,

Sect. 3 (interpretation of terms), sect. 19 (local authority may lease and take tolls), and parts II. and III. (including sect. 28) of the Tramways Act 1870, are (except where expressly varied by this Act) incorporated with and form part of this Act.

A print of this Act (42 & 43 Vict. c. ccxxv.) is to be considered as part of this special case.

11. By an agreement dated the 1st May 1880, and made between the plaintiffs of the one part and the Blackburn and Over Darwen Tramways Company of the other part, for the considerations therein mentioned, it was agreed (*inter alia*) as follows:

Clause 1. That in lieu of maintaining in repair the entire width of the roadway along which the company's tramways may be laid as provided by the 47th section of the Blackburn and Over Darwen Tramways Act 1879, the company [meaning the Blackburn and Over Darwen Tramways Company] shall only be liable in respect of the repair of so much of the said roadway as lies between the rails of the said tramways and three feet six inches beyond or on the outer side of such rails, and where two tramways are laid in any road, also the space between the two tramways.

By clause 2 of the said agreement the company were bound to lay down their authorised tramways with a four-foot gauge, and to pave with setts the width of the roadway in respect of the repairs to which the company were liable as aforesaid. By clause 3 it was provided that,

After the company shall have effectually paved the said road way in accordance with the provisions of the last preceding clause of this agreement, the corporation shall within their district thenceforth during the continuance of this agreement maintain and keep in repair the whole width of the said roadway with such materials and in such manner as the said corporation may determine, and the company shall from time to time and as and when required by the said corporation pay to the said corporation a proportionate part of the expenses which may have been incurred by the said corporation in repairing the said roadway as aforesaid, such proportionate part of such expenses to be ascertained and determined by the borough surveyor.

A copy of the said agreement is annexed to and forms part of this special case.

12. The average width of the said roadway is 28 feet 6 inches, out of which the company under the foregoing agreement repair 11 feet.

13. The said agreement was duly approved by the Board of Trade, and the said road for such distance as the said tramways extend over it within the said borough of Over Darwen has already been repaired, and the expense thereof apportioned between the plaintiffs and the tramways company, in accordance with the terms of the said agreement. No notice of such agreement having been made was given to the defendants by the plaintiffs or by the tramways company.

14. For the purposes of this case it is admitted that the said road has been and is satisfactorily maintained within the said borough, and that the said agreement of the 1st May 1880 is a subsisting agreement as between the parties thereto. It is also agreed that no objection shall be taken to an order for payment as hereinafter mentioned upon the ground that no formal certificate of satisfactory maintenance of the said road has been in fact given by the surveyor or other persons appointed by the defendants.

15. The plaintiffs as such highway authority as aforesaid have for the year ending the 31st March 1886 expended in the maintenance of the portion of the said main road extending from the Colliers' Arms to the Golden Cup Inn, within the said borough of Over Darwen, upon which the said tramway is laid, 180*l.* 14*s.* 5*d.*, and in the maintenance of the residue of the said main road extending from the Colliers' Arms to Cadshaw Bridge, within the said borough, 246*l.* 17*s.* 1*d.*, making together the sum of 427*l.* 11*s.* 6*d.*

16. The plaintiffs as such highway authority as aforesaid have, under sect. 13 of the Highways and Locomotives Amendment Act 1878, demanded from the defendants as such county authority as aforesaid the sum of 213*l.* 15*s.* 9*d.*, being one-half of the said sum of 427*l.* 11*s.* 6*d.* The defendants as such county authority as aforesaid admit their liability in respect of one-half of the said sum of 246*l.* 17*s.* 1*d.*, and they have accordingly paid the

sum of 123*l.* 8*s.* 6½*d.*, but they deny their liability to pay one-half or any other proportion of the said sum of 180*l.* 14*s.* 5*d.*

The question for the opinion of this honourable court was, whether the said county authority, under the circumstances above stated, were liable, by virtue of the Acts above referred to or otherwise, to pay out of the said county rate one-half of the said sum of 180*l.* 14*s.* 5*d.*, or any part thereof. In case the court should be of opinion that the said county authority was so liable, judgment with costs was to be entered for the plaintiffs, otherwise for the defendants with costs.

Henn Collins, Q.C. (the Hon. *W. H. Cross* with him) for the plaintiffs.—It is submitted that, upon the proper construction of the statutes, provided the highway authority deduct the contribution paid to them by the tramway company towards the maintenance and repair of the road (which they have done in the present case), they are entitled to demand the county authority to pay half of the balance of such expenditure, and the county authority are bound to pay it. The agreement made between the corporation and the tramway company was authorised by the Blackburn and Over Darwen Tramways Act 1879; sect. 47 coupled with sect. 50 gives power in express terms to make the contract here made. The corporation would seem to have been anxious to have a steam tramway laid along the road in question; this would no doubt form part of the consideration for the agreement.

Gainsford Bruce, Q.C. (*G. A. R. Fitzgerald* with him) for the defendants.—The meaning of the proviso in sect. 47 of the private Tramways Act is that, although the tramway company is primarily bound to repair the entire width of the road, it may be more convenient for them that the corporation should do the repairs, in which case, a bargain having been made to that effect, the company would be bound to refund the amount so expended to the corporation. It cannot have been the intention of the Legislature that the tramway company should be able at any time to get rid of the statutory liability of repairing the whole width of the road by making such a contract as this with the corporation; that would be unreasonable. A legal obligation cannot be got rid of by a contract. Sect. 28 of the General Tramways Act 1870 imposes a general liability which cannot be escaped by the company. Moreover, the county authority were not parties to, nor had they any notice of, the agreement entered into by the highway authority, and therefore they ought not to be bound by it.

Henn Collins, Q.C. was not called upon to reply.

Wills, J.—I am of opinion in this case that our judgment must be for the plaintiffs. The question upon the special case which we have to determine depends entirely upon the provisions of the Blackburn and Over Darwen Tramways Act 1879. Under the General Tramways Act of 1870 the scheme was that the company should maintain and keep in repair so much of the road as lay between the rails, and a certain distance beyond the rails on each side of the tramway. There was also a provision that, in case of the abandonment of the enterprise, the company should restore the road to its original condition, and clear away all the metalling material or rubbish occasioned by the work. The Act went on in the next clause (sect. 29) to make it competent for the company to make any bargain they chose with the road authority with respect to the maintenance and keeping in repair of the roadway, and also with respect to the proportion to be paid by either of them of the expense of such maintenance and keeping in repair. The Act gave the company the fullest power to make such arrangements, unhampered with the necessity of procuring the consent of the Board of Trade. Then the local Act provides a separate set of provisions only to come into operation when steam power is used on the tramways. In that event, *primâ facie* the company is to bear the expense of maintaining and keeping in good repair the whole width of the roadway. Then the Act goes on to say—not as in the general Act which gave the company power to make any bargain they liked with the road authority—that "the company may from time to time enter into and make such contracts or agreements with the road authority of either borough respectively, for the repair and maintenance of such road, as may be approved by the Board of Trade." The introduction of the Board of Trade looks as if something were contemplated by the Legislature beyond the protection merely of the contracting parties. One does not see why there should be any necessity for protecting the corporation of Over Darwen beyond any other corporation. But these special powers are undoubtedly given with that restriction. What was actually meant by the Legislature might be still open to doubt, were it not for sect. 50 of the local Act, which provides that nothing shall operate to lessen the liability of the tramway company under sect. 28 of the Tramways Act 1870, with respect to the repair of any road whereon any tramway belonging to them is laid. That section seems to dispose of the question raised by this case. The meaning of sect. 50 is that the company and the road authority may make any bargain they choose, subject to the approval of the Board of Trade, for the division between themselves of the liability of maintaining and repairing the road, provided that the obligation of the company imposed by sect. 28 of the general Act is not reduced. Mr. Gainsford Bruce's argument on behalf of the contention of the defendants obliges him to say that sect. 50 of the local Act applies only to that part of sect. 28 of the general Act which relates to the abandonment by the tramway company of their undertaking, and that the provision as to agreements relates only to the method of discharging the liability of the company. To read the Act in that way is certainly to strain the language used very much, and I can see nothing to warrant us in so reading it. It might turn out that the repair of the road might be a very great burden where steam tramways are used, and I think it reasonable to say that if that is the case, both parties should be protected to lighten the burden of repair laid on the company by the general Act, in case the road authority should be willing to consent to the agreement to that effect. For these reasons I am of opinion that the contract made between the Blackburn and Over Darwen Tramways Company and the Over Darwen highway authority was within the powers given to the contracting parties by the Legislature, and therefore we must give effect to it. Judgment

will therefore be entered for the plaintiffs for the amount claimed.

GRANTHAM, J.—I am of the same opinion. I admit that I am unable quite to fathom the case, because I cannot understand what the consideration was for the agreement entered into by the road authority with the company. By this agreement the corporation give up the right which they have of requiring the company to undertake the repair of the whole width of the road, and they lighten the burden cast upon the company. The agreement purports to be made "in consideration of the above-mentioned corporation allowing the company to use steam power to move their carriages when constructed within the said borough." I fail to see where the benefit to the corporation is. The corporation allows the company to use steam tramways, and, over and above that, allows the company to forego half of the liability laid upon it by the Act. I must confess that I fail to find any consideration for this indulgence, and, as far as I can see, the corporation has given up its rights for nothing. That the corporation had some object in view in allowing this one must suppose, but the agreement is a very one-sided one as far as I can see. That is the difficulty I feel, but nevertheless I do not see how I can decide against the plaintiffs' claim. The language of the Highways and Locomotives (Amendment) Act 1878 is plain. Sect. 13 of that Act, in dealing with disturnpiked main roads, says that one-half of the expenses incurred by the highway authority in the maintenance of such roads shall be paid to the highway authority by the county authority of the county in which such roads may be situate. By the agreement that has been entered into, the corporation of Darwen defrays out of the rates the necessary expenditure of part of the repair of the road in question. If such expenditure is incurred with the sanction of the Board of Trade, I do not see how any breach of the statutes is committed. The Board of Trade has given its sanction to the agreement, and the language of the Acts is clear. The agreement is made under statutory power, and therefore I am of opinion that the county authority must pay the portion of the expenses of repairing the road demanded of them by the plaintiffs.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Pritchard, Englefield,* and *Co.*, for *C. Costeker*, Darwen.

Solicitors for the defendants, *Ridsdale* and *Son*, for *Wilson* and *Hulton*, Preston.

Dec. 9 *and* 13, 1887.

(Before POLLOCK, B. and HAWKINS, J.)

REG. *v.* VESTRY OF ST. MARYLEBONE AND HYDE; *Ex parte* BERNERS. (a)

Artisans and Labourers' Dwellings Act 1868—*Houses unfit for human habitation—Order for structural alteration—Charging order—Period when liability of owner determined—Interesse termini*—31 *&* 32 *Vict. c.* 130, *ss.* 3, 4, 5, 6, 7, 9, 14, *and* 25.

One Berners was the owner in fee of certain houses in the defendant parish, which the medical officer of health of the parish reported under the Artisans and Labourers' Dwellings Act 1868 (31 *&* 32 *Vict. c.* 130) *to be in a state unfit for human habitation. The report was dated the* 8*th July* 1886. *At this date one Hyde had the residue of an unexpired lease, terminating on the* 29*th Sept.* 1886, *and was the assignee of a reversionary lease for twenty-one years taking its commencement on the* 29*th Sept.* 1886. *On the* 15*th July the surveyor to whom the medical officer's report was referred reported that the houses ought to be demolished, and on the* 20*th Sept. the vestry clerk of the defendant parish gave notice to Hyde's agents that the vestry intended to take the report into consideration at their meeting on the* 23*rd Sept. Hyde attended on the* 23*rd Sept., and an application was then made on behalf of Berners to have the matter postponed to the* 30*th Sept., which was acceded to. On the* 14*th Oct. the vestry made an order for the total demolition of the houses. Hyde appealed to the Court of Quarter Sessions, and his appeal was heard on the* 27*th Jan.* 1887, *and the Court varied the order of the vestry by inserting "structural alteration" in the place of total demolition. Berners took no part in the appeal. Hyde did structurally alter the houses at a cost of* 486*l.* 9*s.* 1*d.*; *and on the* 20*th July* 1887 *he obtained from the vestry an order charging the inheritance with an annual payment of* 29*l.* 3*s.* 9*d. for a term of thirty years in consideration of the expenditure incurred by him in structurally altering the houses. Berners applied for a writ of certiorari to bring up this order to be quashed, on the ground that Hyde was not the "owner" of the houses within the Artisans and Labourers' Act* 1868, (*a*) *inasmuch as he was not at the time that the report was made to the vestry of the bad condition of the premises possessed of a term of years of which twenty years were unexpired, as only three months of his original lease had to run, and his interest in the new term of twenty-one years from the* 29*th Sept.* 1886 *was only an interesse termini, and did not amount to a lease, as his title was incomplete;* (*b*) *that the proper time for ascertaining the liability to demolish or structurally alter his premises was the date of the order for their demolition or structural alteration, which in Hyde's case was the* 14*th Oct.* 1886, *and on that date he did not possess a term of years of which twenty-one years were unexpired.*

Held, that the proper time for determining the liability of the owner was the date of the report to the vestry of the defective condition of his premises.

Held consequently, that at the time such report was made Hyde was the owner within the statute, he being then lessee of a term of which twenty-one years were unexpired, and though his interest in the second term of years was only an interesse termini, yet such interest was a holding within the Act; and that the notice to demolish was rightly served on him, and the subsequent proceedings on the notice were regular.

THIS was an application of one Captain Berners, who was the owner in fee in reversion of certain houses (Nos. 49 to 55) in Union-street, Middlesex Hospital, in the defendant parish of St. Marylebone, for a writ of *certiorari* to bring up a certain order of the vestry of the said parish charging the inheritance of the said premises with an annual charge of 29*l.* 3*s.* 9*d.* for a term of thirty years, in respect of a sum of 486*l.* 9*s.* 1*d.* laid out

(a) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

in the structural alterations by one Hyde, who was lessee of the houses in question.

The application was made before Pollock, B. at chambers, who referred it to the Divisional Court.

The facts are sufficiently stated above, and all the material reports, notices, and orders will be found set out in the judgment of Hawkins, J.

By 31 & 32 Vict. c. 130, s. 5:

If in any place to which this Act applies the officer of health find than any premises therein are in a condition or state dangerous to health so as to be unfit for human habitation, he shall report the same in manner hereinafter provided to the local authority.

By sect. 6:

Every report made under this Act by the officer of health shall be made in writing, and delivered to the clerk of the local authority, and the local authority shall refer such report to a surveyor or engineer, who shall thereupon consider the report so furnished to him, and report to the local authority what is the cause of the evil so reported on and the remedy thereof, and, if such evil is occasioned by defects in any premises, whether the same can be remedied by structural alterations and improvements or otherwise, or whether such premises, or any or what part thereof, ought to be demolished.

By sect. 7:

Upon receipt of the report of the surveyor and engineer, the local authority shall cause copies of both the reports to be given to the owner, with notice of the time and place appointed by the local authority for the consideration thereof, and such owner shall be at liberty to attend and to state his objections (if any) to such reports, or either of them, including therein any objection that the necessary works ought to be done by or at the expense of some other person or persons, or at the expense of the parish or district in which the premises are situate; and on such objections the local authority shall make an order in writing, signed by the clerk of such local authority, which shall be subject to appeal in manner hereinafter mentioned.

By sect. 9:

Any person aggrieved by any order of the local authority, or his agent, may appeal against the same to the Court of Quarter Sessions held next after the making of the said order, but the appellant shall not be heard in support of the appeal unless within one calendar month after the making of the order appealed against he give to the clerk of the local authority notice in writing stating his intention to appeal, together with a statement in writing of the grounds of appeal, and shall, within two days after giving such notice, enter into a recognisance before some justice of the peace, with sufficient securities, conditioned to try such appeal at the said court, and to abide the order of and pay such costs as may be awarded by the court or any adjournment thereof; and the court, upon the appearing of the parties, or upon their making default, shall have full power and jurisdiction to make such order and give such directions as, under the circumstances, shall seem just, and may, according to its discretion, award such costs to the party appealing or appealed against as they think proper, and the determination of the court in or concerning the premises shall be conclusive and binding on all persons to all intents and purposes whatsoever.

By sect. 25:

Where any owner has completed any works required to be executed by a local authority in pursuance of this Act, he may, on the completion thereof, apply to the local authority for a charging order on the premises on which the works have been executed an annuity as compensation to the owner for the expenditure incurred by him in executing such works, and shall produce to the local authority the certificate of their surveyor or engineer that the works have been executed to his satisfaction, and also the accounts and vouchers for such works, and the local authority, when satisfied that the owner has duly executed such works, shall make a charging order accordingly.

The annuity charged shall be a sum of six pounds for every 100*l.* of such expenditure, and so in proportion for any less sum, to commence from the date of the order, and to be payable for a term of thirty years to the owner named in such order, his executors, administrators, or assigns.

Peile for the freeholder.—The charging order made by the defendant vestry was made without jurisdiction, and ought to be quashed by this court. The order is bad because Hyde, the person who obtained it, was not entitled to it. The question in the case is, whether Hyde was an "owner" within the Artisans and Labourers' Dwellings Act 1868, of certain houses in the parish of the defendant vestry, so as to be entitled to a charging order upon them to recoup himself the expenditure incurred by him in executing certain structural alterations required by the vestry, as the local authority, under the said Act, to be done upon them. Hyde, it is submitted on behalf of the freeholder, was not such an owner as to entitle him to obtain this charging order upon the inheritance. First, under the interpretation or definition clause of the Act (sect. 3), the least interest that a person must have to constitute him an owner must be a term of years of which twenty-one years are unexpired. Now, Hyde was not, on the 8th July 1886, when the notice was served on him that these houses were in such a defective state as to be unfit for human habitation, owner of or lessee for a term of years of which twenty-one years were unexpired. His interest in the houses was of the following description. There was vested in him, as assignee, the remainder of a term of ninety-six years, commencing on the 29th Sept. 1790 and expiring on the 29th Sept. 1886; consequently, he had less than three months' interest left in that term. He was also assignee of a reversionary lease of twenty-one years, granted by the predecessor in title of the present freeholder, commencing on the 29th Sept. 1886. This reversionary lease did not begin till after the end of the then existing lease. Now, such lease in reversion did not entitle him, without entry, to the rents and profits; it conferred no estate, but only what is termed an *interesse termini*:

Doe v. *Walker*, 5 B. & C. 111.

He might have possessed the right to have the term at a future time by entry when that period arose; but his interest under the second lease was not a concurrent, but successive estate, and it is immaterial that the two estates were in one and the same lessee:

Doe d. Pulteney v. *Cavan*, 5 T. R. 567.

The effect of this was, that Hyde was lessee for only three months, and had but an *interesse termini* for twenty-one years, which is not an estate or holding making him thereby an owner within the Act. Secondly, but on the assumption that it is held that the reversionary lease for twenty-one years was a "holding" within the Act so as to make Hyde an owner in respect of it, he was not an owner at the time when the vestry ordered the work on the premises in question to be executed. The order for their demolition was made by the vestry on the 14th Oct. 1886, and at that time his interest in them was not for a term of years of which twenty-one years were unexpired. Under this Act the proper date to look at for the purpose of fixing the liability of the owner is the date of the order of the local authority to the owner directing the particular work to be

executed. In the nature of things, and on the ground of convenience, that is the proper date. The date of the notice of the local authority that the premises are in a defective condition is not the fixing point, for it may happen that the notice may be based on an erroneous view of the state of the premises; and many things may occur in the interval between the serving of the notice and the making of the order to execute work upon them to change the ownership. The present case is illustrative of that very possibility, for here there was an alteration of ownership between the two dates—that is, the date of the notice of the defective condition of the houses and the date of the order for their demolition. The latter date, the 14th Oct. 1886, was the moment of time at which liability accrued. Hyde's subsequent appeal and the variation of the order by the Court of Quarter Sessions do not affect the question. Hyde then was not an owner in default. *Reg.* v. *The Swindon Local Board* (4 Q. B. Div. 305; s. c. 40 L. T. Rep. N. S. 424), which was a decision on the Public Health Act 1875, a cognate Act to the one under consideration, is conclusive on the point as to which is the proper date for fixing the liability of an owner for works executed under the Act. The order was bad as against Hyde, for he was not liable to make the alteration at all; and so he had no right to the charging order against the freeholder. Hyde chose to assume a liability, but he cannot properly seek to shift its burden on to the freeholder.

Channell, Q.C. (*English Harrison* with him) for Hyde.—As to the first point: Hyde was "owner" within the meaning of the Artisans and Labourers' Dwellings Act 1868. The word "owner" includes all lessees; and the expression "holding" in the definition clause would include an *interesse termini*. Accordingly, even at the date of the notice of the defective condition of these houses Hyde had a sufficiency of interest to constitute him an owner. As to the second point: The proper time for fixing the liability of the owner is either the date of the report of the sanitary officer to the local authority condemning the structures, or the date of the service of the notice of the local authority on the owner of the defective condition of the structures. If so, all subsequent proceedings were regular, and the charging order was made with jurisdiction by the vestry, as Hyde on either date was an "owner" within the Act.

Poland for the vestry.—It is important for the vestry to know to whom to look for the money. The foundation of the whole of the proceedings leading up to the charging order is the report of the medical officer of health of the local authority, and the report of his survey by the surveyor appointed to examine the premises. The proper time, then, for fixing the liability of the owner would be the date of the report of the medical officer and of the surveyor.

Peile in reply.

Cur. adv. vult.

Dec. 13.—POLLOCK, B.—This was a motion made for a *certiorari* to bring up a charging order made by the Vestry of St. Marylebone under the statute which is called "An Act to provide better dwellings for artisans and labourers;" that is the Act of 1868. The person against whom it was made was the person who was alleged to be the owner for the time being of the premises in question. The present application was made not by the person against whom the order was made, but by a person named Berners, who was the freeholder, and against whom this order might have been properly made. The question before us is, whether Hyde, against whom the order is made, was the owner of the premises within the purview of the statute. Now the facts were these. At the time when the notice was given that these premises were in bad order, and must be demolished in July 1886, Hyde had an unexpired lease for a long term of years beginning in Michaelmas 1790 and expiring in Michaelmas 1886. In respect of that lease alone he would not have held a sufficient term so as to be considered as the owner. But it so happened that he was the assignee of a reversionary lease for twenty-one years which would take its commencement in Michaelmas 1886. The question is, whether, under these circumstances, he is within the statute. Now, the statute, in the interpretation clause (sect. 3), says: "The expression 'owner,' in addition to the definition given by the Lands Clauses Act, shall include all lessees and mortgagees of any premises required to be dealt with under this Act, except persons holding or entitled to the rents and profits of such premises for a term of years of which twenty-one years do not remain unexpired." If therefore the two periods of time, namely, the period of time up to Michaelmas 1886 and the lease for twenty-one years and the above words make Hyde the owner, then he was properly the owner within the statute. It was argued before us by Mr. Peile from a conveyancing point of view that, although he was the lessee under the first lease, he had only got what conveyancers call an *interesse termini*. It seems to me that the words of this statute, namely, that a person may not only hold but be entitled to the rents and profits, mean whether he has such interest in the premises as to make him the owner for the time being of the premises for a term of years of which twenty-one years remain unexpired. Therefore, so far as that legal objection is concerned, it seems to me this order is perfectly right. Now comes the next and perhaps the most important point. It is one of general application, and certainly is worthy of being well considered. It is this: It was said that, although Hyde was the owner (assuming our construction of the statute is right) at the time the order was served upon him, which was in July 1886, that he had ceased to be the owner before any order was made. Now the facts upon that part of the case are these. In July 1884 notice was given to him within the terms of the statute. Upon the 23rd Sept. Mr. Hyde attended, and Captain Berners also. Captain Berners then asked for an adjournment, which was granted, and on the 14th Oct. an order was made for the demolition of the premises, as unfit for human habitation. That is the order practically that is appealed against, because the order of sessions varied that by making an order that certain improvements should be made instead of the premises being demolished. Therefore it stands in this way, that when the notice was served in July 1886 undoubtedly upon the construction we put upon the statute Mr. Hyde was the owner, but inasmuch as the lease had run out under which he then held in Michaelmas 1886, when October came, when the order was made, he had ceased to be an owner;

and the question is whether the owner at the time of the notice is to be taken as the person liable, or the owner at the time when the order is actually made. Now, the scheme of the whole Act seems to my mind to answer this question. The Act contemplates the finding of a person who for the purposes of the Act shall be an owner of the premises. That is settled by the interpretation clause to which I have already alluded. Then the Act goes on to say by sect. 5 that the officer of health is to return a report of the condition of the premises wherever they are found to be so dilapidated that it is necessary to destroy them or to have them repaired, and that report is to be referred to a surveyor, and then the local authority may upon that prepare a plan and specifications of what is required; and then the clerk of the parochial authority by sect. 8 is to give notice to the owner of the plan of required works having been prepared. Then by sect. 9, if that owner feels himself to be aggrieved, he may appeal to the quarter sessions. Now it was pointed out, and I think successfully, by Mr. Channell, that in the first place it could not be intended that, if the owner for the time being assigned his property, or if his interest in it expired, that therefore the local authority should commence new proceedings against the person who became owner at a subsequent date, who might or might not be acquainted with the condition of the premises, and a variety of circumstances. That certainly would be most inconvenient, and contrary, I should say, to the spirit of the Act, which was intended in the first instance to enforce liability upon the person in whose hands, if I may use the expression, the premises have been allowed to become so dilapidated as to require to be demolished. Under the present circumstances that is not the case. The case here is, that the interest in the premises owned by Hyde, though not assigned by him, was not an expiring one. Mr. Channell, however, pointed out with great force that, when the statute *ex concessis* is dealing with an interest which is dwindling in its character, and diminishing from day to day and from week to week, it is impossible to suppose that the statute would intend a person to get rid of his liability by between the date of the notice and the order saying his time had run out by effluxion, and his liability had been diminished, or been entirely demolished by that effluxion of time. Therefore, it seems to me, it is quite clear, when the whole spirit of the Act and the language of it throughout is looked at, the person to be fixed is the owner at the time when the notice of the defective condition of the premises is served. Now, there was one authority which would be very much in point if the circumstances were the same in this case, and that is a case decided some years ago (in the year 1879): *Reg* v. *The Swindon Local Board* (*ubi sup.*). That was a case in which the question arose, not with respect to who was liable to do the work under a similar Act, namely, the Public Health Act 1875, whether it was the owner at the time the notice was given, or whether it was the owner at a later period when the works were actually done; but it was a question, where there had been a notice given, and a default by the then owner to do the work, who was the person against whom the expenses could be recovered which had been incurred by the urban authority, who, under the powers of the statute, had done the work in question. It was held then that such expenses could not be recovered from anyone who was the owner of the premises at the time when the notice was given, but had ceased to be the owner before the completion of the acts. Under the Public Health Act 1875 it is quite clear, although the ownership, *quoad* the liability, is to be affixed at some particular period, namely, when the premises are out of repair, the payment from time to time of the expenses incurred, which are fixed by yearly payments, was intended by the Act to be distributed over many years, and therefore intended to be borne, not by the person who is the owner at the time the notice is given, but by the person who is the owner from year to year as the debt is payable. What Cockburn, C.J. says in that case is very clear: "I cannot think it was ever intended by the Legislature that when the owner has parted with his property, and somebody else is in the possession of it, and therefore getting the benefit of the work done, and who ought therefore to pay the expenses incurred, it should be competent for the local authority to follow him up wherever he may be gone, and hold him personally liable." That certainly would be an extrordinary consequence, because, if a man happened to be owner at the time, then sold the property and went abroad, he would be saddled with the payment, and not the person who was owner of the premises from time to time that the debt became payable; the charge being intended to be a charge upon the premises. Therefore, although we perfectly agree with that case, it seems to us to indicate that the spirit of the Legislature is in favour of the view we are now taking, and is in no way an authority in favour of Mr. Peile's view as presented to us. In the result therefore this application must be dismissed, and with costs.

Hawkins, J.—I am of the same opinion. The question argued before us is, whether the court should grant a writ of *certiorari* to bring up a charging order made by the vestry of St. Marylebone to be quashed. Now, although my brother Pollock has stated the facts at length, it is necessary that I should refer to them in order to explain what I have to say upon the matter. First, let us see how the case stands. For many years before Michaelmas 1886 the premises which are the subject of the orders which have been made were the freehold property of Captain Berners. There was a long lease of them granted, which did not expire until Michaelmas 1886. From Michaelmas 1886 a new lease was granted for twenty-one years, and Hyde we may take it was entitled to the residue of a long term, coupled with a new term which was granted from Michaelmas 1886. In the month of July 1886, when there were about twenty-one years and three months of Hyde's interest unexpired, the premises were found to be in what was deemed to be such a condition that they ought to be pulled down or demolished. I may observe here that there was in Hyde's lease upon which he then held the premises a covenant to repair. I mention that in reference to a matter I shall have to state. Now, the preamble of the Artisans and Labourers' Dwellings Act 1868, passed in July 1868 states, "Whereas it is expedient to make provision for taking down or improving dwellings occupied by

working men and their families which are unfit for human habitation, and for the building and maintenance of better dwellings for such persons instead thereof." The premises being agreed to be in the condition which I have mentioned, proceedings were taken under this Act for the purpose of having the premises either altogether demolished or in some way altered so as to make them fit for human habitation. Now sect. 5 of that Act provides that, if an officer of health finds that any such premises are in a state dangerous to health so as to be unfit for human habitation, he is to make a report to that effect to the local authority. Accordingly, on the 8th July 1886, the medical officer of health for the Vestry of St. Marylebone reported to the vestry, being the local authority, in these terms: "Gentlemen,—Pursuant to the Act 31 & 32 Vict. c. 130, I beg to report that I have made an inspection of certain houses, being Nos. 49-55, Union-street, Middlesex Hospital, and find them to be in such a condition or state as to be dangerous to health, and unfit for human habitation." That is to say, he gave the notice that he was required to give to the local authority under sect. 5. Now, upon receiving that notice the local authority had a duty to perform—they had to refer the medical officer's report to a surveyor. The section under which they were bound to refer it as they did is sect. 6. [His Lordship here read it.] It will be observed by this 6th section the local authority are to put the matter into the hands of their surveyor to get him to report as mentioned in the statute; but up to that time no notice is required to be given to the owner or occupier of the premises with regard to the effect of the report. Now that having been done, this is the report of the surveyor: "The medical officer of health having reported that certain houses situated as above" (that is, Union-street, Middlesex Hospital) "are dangerous to health and unfit for human habitation, the Act 31 & 32 Vict. c. 130, intituled the Artisans and Labourers' Dwellings Act 1868, directs such report to be referred to a surveyor or engineer, which has in due course been referred to me. Pursuant to the above Act, and by the direction of the vestry, I have carefully surveyed these premises, and find that they have no yard space whatever, and are wholly without thorough ventilation; the water-closets, water supply, and dust-bins in close proximity are situated in the basements, which are very dirty and untenanted. As the medical officer has condemned these houses owing to this condition of things, which cannot be remedied by any structural alterations, I am of opinion that the premises ought to be demolished." That is the report that was sent in by the surveyor, dated the 15th July 1886. Now, the 7th section imposes upon the local authority a duty upon the receipt of the surveyor's report of forwarding copies of the report to the owner, with notice of the time and place appointed by the local authority for their consideration. Upon which the owner may attend and state his objections; and the local authority shall make an order in writing subject to appeal. [His Lordship read the section *in extenso*.] That is the section imposing the duty upon the local authority to give a notice to the owner. The question is, who is the owner to whom this notice is to be given. Now, in the interpretation clause I find, "The expression 'owner,' in addition to the definition given by the Lands Clauses Act, shall include all lessees or mortgagees of any premises required to be dealt with under this Act, except persons holding or entitled to the rents and profits of such premises for a term of years of which twenty-one years do not remain unexpired." Now, the first question is, whether or not Hyde, who had at that time the interest in these premises unquestionably for a period of upwards of twenty-one years as lessee, is to be deemed to be the owner, and whether the notice which was served upon him was rightly so served. I am of opinion it was. The objection made to the service upon Hyde, treating him as owner, was this, that he had only an *interesse termini* so far as regards the new lease, which was to commence at Michaelmas 1886; but I do not think that that makes any difference at all—that he had a mere *interesse termini*. According to this he was a lessee of the premises. It is quite true that his title in all respects might not have been completed before entry. That may be so, but I am quite satisfied in my own mind the Legislature, in using this expression "owner," intended at all events to comprise, and I think they have comprised and included, persons standing in the position of Hyde, who beyond all question was entitled to three months of the old lease then unexpired, and who was entitled at all events to perfect his title to the new lease by entry so soon as the old lease had expired. I am clearly of opinion the object of the Legislature was that a man in that position was intended to be the owner, and I think that objection fails. I have no more to say about that; and that brings me now to the question whether this notice was properly served, and I think it was; and then to the question whether proper proceedings were taken upon it so as to make this charging order valid. Now, the vestry having had the report made to them upon the 20th Sept., the vestry clerk made this report. It is addressed to Messrs. Bray and Webb, 6, Warwick-court, High Holborn, who, I understand, were acting for Hyde: "Gentlemen, the vestry are informed that you act as agents to the lessees of the premises Nos. 49, 50, 51, 52, 53, 54, and 55, Union-street, Middlesex Hospital, referred to in the accompanying reports of the medical officer of health and the surveyor made in pursuance of the Artisans and Labourers' Dwellings Act 1868 (31 & 32 Vict. c. 130), and I have been directed by the vestry to forward such reports to you, and to give notice that the vestry will take the same into consideration on Thursday next, the 23rd Sept. inst., at twelve o'clock noon. I beg to inform you that you are at liberty, pursuant to the above Act, to attend the meeting of the vestry as appointed, and to state your objections (if any) to the accompanying reports, or either of them, previous to the vestry making an order respecting the premises therein referred to under the said Act." Hyde, or his representatives attended, and what is more, on the 23rd Sept. an application was made on behalf of Berners, the freeholder of the premises, to postpone this meeting until the 30th Sept., in order that he might attend. Accordingly the vestry postponed the matter until the 30th Sept. Now, the first term of Hyde expired on the 29th Sept. If Berners had been in attendance on the 23rd, and the report had then been considered, as it would have been if he had been there in accordance

with the notice, Hyde would clearly then have been the owner of the premises (that is, if I am right in my construction of the interpretation clause), and the order might have been made treating him as the owner; but when the 30th Sept. arrived, it was quite clear he had ceased to be the owner, because at that time he had twenty-one years' interest in the premises short of one day, and therefore at that moment he was not the owner of the premises within the meaning of the interpretation clause. The question is, whether or not Hyde was the proper person to serve, and against whom the proceedings ought to be continued. I am of opinion he was. In order to determine that, I must look to see what the object of the Legislature was. It was to call upon the person who was the owner at the time the defective construction of these premises was discovered and reported upon. It was the owner, then, who was to receive these notices, and there will not be found throughout the whole Act anything indicating that after a change of ownership new notices were to be served, or fresh proceedings taken; but all along the Act treats the proceedings upon the first notice as a mere continuance of the proceedings at the time the notice was served, when the premises were in a condition which required them to be demolished, or structurally altered. I am, therefore, of opinion that the notice was properly served on him. Now, when the matter came on for consideration on the 30th Sept., Berners was represented and so was Hyde; and I do not find upon the affidavits that I have read that any objection was then made to these proceedings. The objections to the order were stated, and Hyde made a statement objecting to it, on the ground that it was not necessary to pull down the houses in question, and that a structural alteration made in them would render them fit for the purpose for which they were required to be made fit. But the vestry, after taking the objections into consideration, made on the 14th Oct. the following order: "It is ordered by the vestry of the said parish of St. Marylebone that the above-mentioned premises" (stating them) "in the said parish be totally demolished, taken down, and removed, and you, the said owner, are hereby required to demolish, take down, and remove the same accordingly." That was the order which was made, and addressed to and served upon Hyde; and he was treated to all intents and purposes as the owner of the premises, not the owner perhaps at the time this particular order was made, but the owner of the premises when the proceedings were first of all taken. Now, it is quite certain that, at that time, there was no objection made to this order by Berners. If he had then sought himself to interpose on the ground that he was the owner, and was ready to do these repairs himself, and to take upon himself the whole of the repairs, I think there is to be found a provision in the Act that would have entitled him to do so, and have given him the option before anybody else of doing them, and that is sect. 14, which says, "within three calendar months after the service on the owner by the clerk of the local authority . . . the person so served with the order of the local authority shall, each of them, signify in writing to the clerk of the local authority, whether he is willing to effect the works required to be executed, and where two or more persons shall so signify, the right of effecting the works shall be given first to the person whose ownership is first or earliest in title." However, it is sufficient to say that Berners made no objection. I have said that Hyde was dissatisfied with the order to pull down, and he determined to appeal to the quarter sessions, as he had a right to do. That is expressly provided by the 9th section. [His Lordship here read it.] In the earlier part of that section it is enacted that "any person aggrieved by any order of the local authority, or his agent, may appeal." Therefore, if Berners felt himself aggrieved by the order to demolish, he had the power to appeal, just as Hyde had. He did not appeal; Hyde did, and with the result that the quarter sessions, having heard his appeal, made on the 22nd Jan., the following order: "The court order and determine that the order of the vestry shall be varied, and this court doth order that the said houses and premises shall be improved, but not demolished, by making similar structural alterations and repairs in each of the said houses and premises as have already been carried out by the appellant in the house and premises, being No. 55, Union-street, one of such houses included in the said order." This particular house, No. 55, had been repaired and put into condition and altered by Hyde before the appeal came on, for the purpose of satisfying the Court of Quarter Sessions and the vestry, that that which he wished done could be done without any demolition of the premises at all. The court, taking that fact into consideration, made the alteration in the order, varying it in the way required, viz., by ordering "that the said houses and premises shall be improved, but not demolished, by making similar structural alterations and repairs in each of the said houses and premises as have already been carried out by the appellant in the house and premises, being No. 55, Union-street," and it orders the vestry of Marylebone to give notice of the order forthwith, and so on. Berners, as I have said, was no party to the appeal, but within three days of the making of the order he was made acquainted with it, as is set forth in the affidavits. Hyde's solicitor wrote on the 28th Jan. 1887 to Berner's solicitors, a letter in the following terms (omitting the formal parts): "49 to 55, Union-street. I think it only courteous to inform you that on Saturday last, on the appeal against the order of the Marylebone vestry coming on for hearing at Westminster Sessions, the counsel for the vestry consented to the vestry's order for demolition being varied by directing that the houses be reconstructed in the same way as has been done at No. 55. The works will be carried out forthwith, and my client will then apply for a charging order under the Act of 1868." If Berners or his solicitors meant then to dispute the validity of a charging order which might thereafter be applied for, and meant to say that Hyde was not the owner, and had no right to comply with the orders because they ought not to have been made upon him, and that he ought not to incur any expense, and if any were incurred it would be incurred at his risk, that sort of communication ought to have been made to him. But it was not, and no notice of the letter was taken at all. Upon the faith of these proceedings being as regular as I think they were,

Hyde proceeded to do this work of alteration, and he had proceeded a long way with his work before the month of May 1887, when Berners' solicitors wrote to Hyde's solicitor on the 4th May 1887, asking him to instruct Hyde's builder to finish the remaining house, which had not been so structurally altered as to comply with the order in the same way as those already done. Hyde is here treated by Berners' solicitors as the owner; and the structural alterations both of the finished houses and the remaining house were done at his expense alone in compliance with the Act of Parliament; and without objection on the part of Berners. Hyde afterwards, having regard to the provisions of the Act, and with a view of paying himself back some part of that which was at all events due for the alterations required by law of these premises, made an application to the vestry of the parish of Marylebone for a charging order. That was an application he was entitled to make under sect. 25, which is as follows: [His Lordship here read it.] Accordingly, on the 28th July, the works being complete, he obtained an order to charge the inheritance and premises mentioned in the schedule with the payment to Hyde of 29*l.* 3*s.* 9*d.*, payable yearly upon the 4th Aug. for the term of thirty years, being in consideration of the expenditure of 486*l.* 9*s.* 1*d.* incurred by him in respect of the said premises. I must say that I think the applicant is not entitled under the circumstances to ask to have that order set aside. In the first place, I am quite satisfied, as I have already said, that, according to the true construction of the Act of Parliament, when the notice was first of all served, in the month of July 1886, Hyde was within the meaning of the Act the owner, and the proceedings were properly taken as against him. The adjournment to the 30th Sept. 1886, when he was no longer strictly speaking owner, was an adjournment simply for the purpose of suiting the convenience of Berners. Berners appeared before the vestry; he had the opportunity of making every objection he thought fit, and of disputing the right of Hyde to be treated as the owner. I find no suggestion that he did so. Hyde was treated as the owner; he appealed against the order for demolition, and got it varied to an order for structural alteration; he gave notice of that to Berners, who never objected to it. He was told that the works would be proceeded with; he never objected to it, or even cautioned Hyde that that would be at his peril. Hyde went on with the works, and in the month of May, when they were nearly completed, the letter I have read was written by his solicitors requesting that the last house should be finished in the same way that the others were, he having previously to that, as I have pointed out, in the letter of the 25th Jan. 1887, been told that when the works were completed a charging order would be applied for in accordance with the provisions of the Act; and now he asks that this order should be brought up to be quashed as being null and void. This is a matter of considerable importance no doubt, and if we were bound in point of law to quash this charging order, of course we should do so; but my brother Pollock and I agree that we are not bound so to decide. The objection that Hyde was not the owner has altogether failed. As regards the objection that he had ceased to be the owner since the first notice was given, that also fails, because I think the proceedings were properly completed against him, against whom they were properly commenced. As to the case which has been cited, and to which my brother Pollock has referred, I quite agree in all the observations my learned brother has made upon it; but I think there is a section in the Public Health Act 1875, under which that order was made, which renders the owner who makes default liable, that is, the owner at the time when the money becomes due by reason of the work having been executed. However I do not desire to say more upon that case. I am quite satisfied that practically it has nothing whatever to do with the present question. In my opinion the order for a *certiorari* ought to be refused, and with costs.

Order refused.

Solicitors: for the applicant, *Saxton* and *Morgan*; for Hyde, *A. C. Cronin*; or the vestry, *Clarkson, Greenwell*, and *Wyles*.

Saturday, Jan. 14, 1888.

(Before MATHEW and SMITH, JJ.)

KYLE (app.) v. BARBOR (resp.). (*a*)

Local authority—Delegation of the right to prosecute—Power of local authority to delegate prosecution to police—Public Health Act 1875, *s.* 259.

A local board acting under an Act which embodied the provisions of sect. 259 *of the Public Health Act* 1875, *passed a resolution that "in pursuance of the power vested in the board by sect.* 259 *of the Public Health Act* 1875 *the superintendent and the sergeants of the county police, for the time being acting within the district, be authorised as officers of the board to institute and prosecute all such proceedings as may be necessary under the specified clauses of the Local Act.*

In an information preferred by the superintendent of police against the appellant for an offence under the Act:

Held, that the local board had no power under sect. 259 *of the Public Health Act* 1875 *to delegate the prosecution to the police, who are not officers of the board, nor under their control.*

CASE stated by justices of the peace for the county of Devon under an order of the Queen's Bench Division of the High Court.

1. Upon the hearing of a certain information preferred by Douglas Barbor, superintendent of police, in that behalf duly authorised as an officer of the Local Board of Health for the urban sanitary district of Torquay, by virtue of a certain authority in writing bearing date the 6th Aug. 1886 (hereinafter called the respondent) against Tom Kyle (hereinafter called the appellant), in and by which information it was alleged that on the 16th day of January 1887, such day being a Sunday, he Tom Kyle did form part of a procession, accompanied by instrumental music, in the streets known as Upton-road and Union-street, within the urban sanitary district of Torquay, in the said county, contrary to the Torquay Harbour and District Act 1886, s. 38.

We convicted the appellant of the said offence, and adjudged him to forfeit and pay the sum of 9*s.*, and also to pay the further sum of 11*s.* for costs, forthwith, and in default of payment it was

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

adjudged that the sums due under such adjudication should be levied by distress and sale of the goods of the said appellant, and in default of sufficient distress such appellant should be imprisoned for the space of fourteen days.

2. It was proved that the said appellant did so form part of a procession accompanied by instrumental music, to wit, a concertina, on the said 16th day of January, such day being a Sunday, within the limits of the said Torquay urban sanitary district.

3. That the following is a copy of the said authority, under which the said information was preferred by the respondent against the appellant, and which was produced at the hearing and put in as evidence.

With reference to sect. 5 of the Torquay Harbour and District Act 1886, and the report of the Roads Committee, dated the 5th instant, it was resolved that in pursuance of the power vested in this board by the 259th section of the Public Health Act 1875, the superintendent and the sergeant or sergeants of the county police for the time being acting within the district of Torquay be authorised as officers of the board, to institute and prosecute, from time to time, all such proceedings as may be necessary against any person or persons offending against, or committing any of the offences mentioned in the 29th, 32nd, 33rd, 34th, 35th, 36th, 38th, 39th, 40th, 42nd, and 44th sections of the Torquay Harbour and District Act 1886.

4. That such authority of the said local board of health for the urban sanitary district of Torquay was specially given to the said respondent, as an officer of the board, in pursuance of the 259th section of the Public Health Act 1875, such section being as follows:

Any local authority may appear before any court or in any legal proceeding by their clerk or by any officer or member authorised generally or in respect of any special proceeding by resolution of such authority, and their clerk or any officer or member so authorised shall be at liberty to institute and carry on any proceeding which the local authority is authorised to institute and carry on under this Act.

5. That by schedule 1, "Rules as to Meetings and Proceedings," paragraph 10 of the same Public Health Act 1875, a copy of any such resolution as aforesaid is receivable in evidence.

6. That sect. 38 of the Torquay Harbour and District Act 1886, under which proceedings as aforesaid were taken against the appellant, is as follows:

Police Regulations.

No procession shall take place on a Sunday in any street or public place in the district, accompanied by any instrumental music, fireworks, discharge of cannons or firearms, or other disturbing noise, provided that the foregoing prohibition shall not apply to any of Her Majesty's Naval, Military, or Volunteer Forces.

7. That by sect. 113 all offences against this Act (the Torquay Harbour and District Act 1886) may be prosecuted and penalties recovered and applied in manner provided by sects. 251 and 254 of the Public Health Act 1875, as if such offences were offences against the Public Health Act 1875.

8. That by sect. 5 of the same Torquay Harbour and District Act 1886 it is enacted as follows:

This Act shall be executed by the board with the powers, duties, and indemnities conferred and imposed by and according to the provisions of the Public Health Acts, and those Acts shall, in relation to the board and the several objects and purposes of this Act, be read and construed as if the purposes and provisions of this Act were purposes and provisions of those Acts so far as the same shall be applicable thereto, and except so far as any provisions of those Acts are expressly varied or otherwise provided for by this Act.

9. That by the said 254th section of the Public Health Act 1875, as embodied in the said 113th sect. of the Torquay Harbour and District Act 1886, one-half of the penalty shall go to the informer and the remainder to the local authority of the district, but that if the local authority are the informers they shall be entitled to the whole penalty recovered.

10. That by the latter part of the 189th section of the Public Health Act 1875 authority is given to the local authority to also appoint such assistants and other officers and servants as may be necessary and proper for the efficient execution of the Public Health Act.

On the part of the appellant it was contended as follows:

That the superintendent of police at Torquay was not a competent person to lay the said information, sect. 5 of the said Torquay Harbour and District Act 1886 requiring that such Act should be executed by the board, otherwise the local board of health for the urban sanitary district of Torquay, of which urban authority he, the respondent, was not a member or an officer.

That the copy resolution produced by the superintendent of police was not a sufficient authority for him to lay the information, inasmuch as the said resolution gave him no such authority by name.

That as no separate police force for the district of Torquay existed, the police as there stationed being a portion of the county constabulary, under the orders of the chief constable of the county, were in no way accountable to the local authority.

That sect. 259 of the Public Health Act 1875 did not form part of the Torquay Harbour and District Act 1886, as by sect. 113 of the latter Act the only sections of the Public Health Act 1875 embodied in the Harbour and District Act are sects. 251 and 254, and that if it had been intended that sect. 259 of the Public Health Act 1875 should apply it would have been specifically referred to in the said Harbour Act.

That as the 38th section of the Harbour Act was of so stringent a nature and only of local application, the local board should itself determine as to any specific prosecution to be instituted, and that only after such a determination could such a prosecution be undertaken.

The questions of law upon which the case is now stated for the opinion of the High Court, agreeably with the order of the said court, are:

(1) Whether by reason of specific mention being made of sects. 251 and 254 of the Public Health Act 1875 in the 113th section of the Torquay Harbour and District Act 1886, as those under which offences may be prosecuted and recovered and applied, sects. 253 and 259 of the same Public Health Act are provisions coming within the exception contained in the latter part of sect. 5 of the Torquay Harbour and District Act 1886, as provisions expressly varied, or otherwise provided for, and consequently not within the operation of the said Harbour and District Act.

(2) Whether the local board's general authority to the superintendent of police of the Torquay district under the 259th section of the Public Health Act 1875 to institute and prosecute from time to time all such proceedings as may be neces-

sary against persons offending against or committing any of the offences mentioned in the (*inter alia*) 38th section of the said Harbour Act is sufficient and good in law.

(3) Whether in view of sects. 189 and 259 of the Public Heath Act 1875, and the Acts incorporated, and the consequent duties invested in such superintendent of police, for the purposes named in paragraphs 11 and 12, prior to the passing of the Torquay Harbour and District Act 1886, he, the respondent, as such superintendent, was or was not at the time of the further authority of the 6th Aug. 1886, in relation to this particular matter *de facto* an officer of the said local authority.

(4) Whether or not, under the terms of such authority, the respondent, as such superintendent of police, was thereby also constituted an officer of the said local authority.

If the court should be of the opinion that the said conviction was legally and properly made, then the said conviction is to stand, but if the court shall be of opinion otherwise, then the said information is to be dismissed.

Horne Payne, Q.C. and *Duke* for the appellant. —By sect. 253 of the Public Health Act 1875, proceedings for the recovery of any penalties under the Act cannot be taken by any person other than the party aggrieved, or by the local authority of the district, without the consent in writing of the Attorney-General. Here the respondent, who is suing for these penalties, is not the person aggrieved. Sect. 259 of the Act empowers the local authority to prosecute by their clerk, or by one of their officers under their own control, but it does not give the power to delegate the prosecution to a police superintendent who is not under their control. Hence the resolution of the 6th Aug. 1886 did not give the respondent the right to bring this information against the appellant.

The respondent did not appear.

MATHEW, J.—It is clear, to my mind, that this conviction must be quashed. The justices have misinterpreted sect. 259 of the Public Health Act 1875. They thought that under that section they could delegate the right to prosecute to the police, but they were clearly wrong in that.

SMITH, J.—I am of the same opinion.

Conviction quashed.

Solicitors for the appellant, *Ranger* and *Burton*, for *Square, Bridgman*, and *Bond*, Plymouth.

Saturday, Jan. 14, 1888.

(Before MATHEW and SMITH, JJ.)

NEWTON (app.) *v.* MONKCOM (resp.). (*a*)

Conviction for selling unsound meat — Under-bailiff—Person "to whom the same belongs"— Public Health Act 1875, *ss.* 116, 117.

The appellant was an under-bailiff on the estate of N., a large landowner, and it was his duty to receive instructions from, and obey the orders of, the head bailiff. Two cows belonging to N. were slaughtered, as they were affected by disease; the appellant was not present when the cows were slaughtered, but on the same day he was told by the head bailiff to send the meat to Portsmouth, and to go there himself to meet it. The appellant went to Portsmouth on the following day, and saw a butcher named B., and on the next day, the head bailiff, having been told that the meat had not been sent off, directed the appellant to take the meat to P. railway station and consign it to the butcher. The transit of the meat to the P. station was superintended by the appellant, who took charge of it. It was then sent by train in the appellant's own name to the butcher at Portsmouth, the appellant sending a telegram to the butcher, "Two carcases of meat addressed to you; make best of it." The butcher replied that the meat, which was then lying at Portsmouth railway-station, was no use to him. The appellant then sent a telegram to the station-master: "Ask consignee to do the best he can. If he can't dispose of it, ask him to bury it, and charge sender expenses." The meat was seized while lying at the station, and condemned as unsound.

Upon these facts the appellant was convicted, under the 117*th section of the Public Health Act* 1875, *of exposing unsound meat for sale, as being the person "to whom the same belonged."*

Held, quashing the conviction, that there was no evidence whatever upon the facts, to show that the appellant was the person "to whom the meat belonged" within the meaning of the 117*th section of the Act.*

THIS was an appeal tried before me, the undersigned, George Deedes Warry, Esq., Recorder of Portsmouth, at the Easter Quarter Sessions holden in and for the borough of Portsmouth, on the 31st March, and by adjournment in April 1887, against a conviction made on the 12th Jan. by three justices of the peace for the said borough, whereby the appellant, the said James Bonsted Newton, was convicted, under sects. 116 and 117 of the Public Health Act 1875, for that on the 30th Oct. 1886, certain meat, to wit, ten pieces of meat were found by the above-named respondent, William Monkcom, inspector of nuisances to the urban sanitary authority in and for the said borough, deposited in a certain place, to wit, at the Portsmouth Town railway station, in the parish of Portsea, in the said borough, for the purpose of sale, and intended for the food of man, and such meat appearing to the said George William Monkcom, as such inspector of nuisances as aforesaid, upon inspection and examination to be unfit for the food of man, he did seize and carry away the same, in order to have the same dealt with by a justice, and the said meat so seized as aforesaid afterwards appearing to Edward Kent Parson, Esq., one of Her Majesty's justices of the peace in and for the said borough, to be unfit for the food of man, he did condemn the same, and did order the same to be destroyed, and for that the above-named appellant, the said J. B. Newton, was the person to whom the same belonged. And it was adjudged that the said J. B. Newton, for his said offence, should forfeit and pay to the clerk of the said court, the sum of 10*l.* for each of the said ten pieces of meat, making together the sum of 100*l.* as a penalty; and also to pay the said G. W. Monkcom the sum of 9*l.* 3*s.* 4*d.* for costs, and in default of payment, it was adjudged that the sums due under the said adjudication should be levied by distress and sale of the above-named appellant's goods, and in default of sufficient distress, that the said appel-

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

lant should be imprisoned for the space of three months. Upon the hearing of the said appeal I confirmed the said conviction, subject to the following

CASE.

1. The appellant was, in the month of Oct. 1886, one of several under-bailiffs in the employ of William Nicholson, Esq., of Basing Park, near Petersfield, in the county of Southampton, who is a large landowner in the said county, farming some 4000 acres, and has several under-bailiffs employed upon his farms. The head bailiff to the said William Nicholson is, and was, in the month of Oct. 1886, and for upwards of twenty years previously, one Joseph Hudspith, and it was the duty of the appellant to receive instructions from, and obey the orders of, the said head bailiff.

2. On the 24th Aug. 1886, the said head bailiff purchased for the said William Nicholson, at Chichester, eighty-seven cows, which were forthwith removed to Basing Park, and there divided into three or four lots: three cows of one lot being separated, and put with fourteen home-bred ones, in Bromfield Farm. About a fortnight after the eighty-seven cows arrived from Chichester, an outbreak of pleuro-pneumonia broke out amongst the cattle at Basing Park, and fifty-nine of those were obliged to be slaughtered.

3. On Thursday, the 28th Oct. 1886, two of the said three cows were slaughtered by order of the said Joseph Hudspith by a man named Albert Hansford, under the direction of an under-bailiff named Charles Asted, at one of the farms called Church Farm, belonging to the said William Nicholson. The two carcases were divided into ten pieces by the said Albert Hansford in an unskilful manner, he not being a professional butcher, and were hung up in a stable on the said farm. The appellant was not present at the time when the cows were slaughtered. The third cow had been previously slaughtered owing to its being what is termed in agricultural language a "waster," and was buried.

4. The said Joseph Hudspith, on the said 28th day of Oct., told Asted to tell the appellant to send the meat to Portsmouth to meet him, the appellant, who was going to Portsmouth to meet it there. These orders were given on Thursday, the 28th Oct. The appellant accordingly went to Portsmouth on the 29th Oct., and saw a certain butcher named Batchelor, who had not previously received any dead meat from the said William Nicholson's farms. By a mistake the meat did not go to Portsmouth on Friday, the 29th.

5. On Saturday, the 30th Oct., the said Joseph Hudspith, having been informed that the meat had not started on the previous day, the appellant was directed by Hudspith to take it to Petersfield station, and consign it to Batchelor. Accordingly the meat was put into a cart and conveyed a distance of six miles to Petersfield railway-station.

The transit from Petersfield was superintended by the appellant, who then took charge of the meat. When it arrived at Petersfield station, it was sent by passenger train, in the appellant's own name, to Batchelor at Portsmouth, the said train starting at about 11 o'clock in the morning.

The following is a copy of way bill accompanying the said meat:

London and South-Western Railway.
Way bill for miscellaneous traffic by passenger train from Petersfield to Portsmouth.
30th day of Oct. 1886.
Departure 9.30 o'clock train.

Sender.	Number and description of packages.	Consignee, Destination.
Newton	Four sides beef, bag.	Batchelor, 112, Fratton-street.

6. The appellant then telegraphed to the said Batchelor as follows:

Petersfield Railway Station, 11.15.
Received here, 11.35.
Mr. Batchelor, Fratton-street, Portsmouth.
Two carcases of beef by 11 train addressed to you, make best of it. JAMES B. NEWTON.

On the afternoon of the same day, appellant received a telegram from the said Batchelor as follows:

Portsmouth Railway Station, 12.40.
Received here, 12.49.
Mr. Newton, Bordeam, Petersfield.
Beef no use to me, I could not find customer. Come yourself. At station not fit to look at, too dirty.
BATCHELOR.

7. On the same afternoon, namely, Saturday, the 30th Oct., the station-master at Petersfield, one Chandler, handed the appellant the following telegram, which had been previously received by the station-master at Petersfield from the station-master at Portsmouth:

From Greenwood, Portsmouth Station. | To Agent, Petersfield Station.
Railway Station, Portsmouth. 1.10 p.m.
Batchelor's meat. Your 9.30 bill this day is refused by consignee. Received too late to be any use to him. Wire me as to disposal quickly.

The appellant thereupon proceeded to Petersfield, and there saw the station-master at Petersfield, the said Mr. Chandler, who, at the appellant's request, then sent the following telegram to the station-master at Portsmouth:

From Chandler, Petersfield. | To Greenwood, Portsmouth Station.
Your telegram Batchelor's meat. Ask consignee to do the best he can with it. If he cannot dispose of it, ask him to bury it, and charge sender expenses.

This telegram was despatched about 3 p.m. on Saturday, Oct. 30. The said telegram was handed to the said Batchelor on the same afternoon.

8. On the same afternoon the said Batchelor, after inspecting the said meat, and after the receipt of the telegram, had an interview with one Jones, a butcher, and proposed that he should buy the said meat. The said Jones consented to buy it, provided that it should be passed by the sanitary officer. The said Batchelor and Jones then communicated with the respondent, who is the sanitary inspector for Portsmouth, who thereupon proceeded to the railway-station and inspected the said meat, and found it to be unfit for food, and seized it accordingly.

9. On its arrival at Portsmouth the said meat had been put, first on a trolly, and then into the pound which is used for the deposit of meat, fish, and other food, and on that same afternoon was seized by the respondent, as the inspector of nuisances, as above mentioned. On the 1st Nov. the appellant called on one Bell, who is the chief inspector of nuisances for the borough of Ports-

mouth, and said he had called about some meat which had been seized on the Saturday, and asked whether he should hear anything more about it. Bell replied that was a matter for the committee to determine. The appellant said if anything more was done about the meat he wished the communication to be made to him privately, and left his address.

10. Several witnesses were called on behalf of the respondent, who saw the meat at Portsmouth station, and they all pronounced it unsound, unwholesome, and unfit for the food of man. Under the above circumstances, I held, from the evidence adduced before me, that the said meat was deposited at the Portsmouth railway-station for the purpose of sale, or preparation for sale, and was intended for the food of man. I also held that the said meat was unsound, unwholesome, and unfit for the food of man to the knowledge of the appellant, and within the meaning of the 116th section of the Public Health Act 1875. I also held that the appellant was the person to whom the same belonged, and in whose possession it was at the time when it was so deposited at the Portsmouth railway-station within the meaning of the 117th section of the same Act; but I also held that there was not sufficient evidence before me to show that the appellant actually knew that the two carcases were affected with the disease of pleuro-pneumonia.

The question for the opinion of the court is: Whether, upon the facts above stated, the appellant was properly convicted as hereinbefore set forth. If the court should be of that opinion, then the order of sessions confirming the said conviction is to stand; otherwise the said order is to be quashed.

Lumley Smith, Q.C. and *G. G. Greenwood* for the appellants.—By sect. 117 of the Act three persons are liable—namely, the owner of the meat, the person in whose possession it is found, and the person in whose premises it is found. There was no evidence at all that the appellant was the owner, or the person to whom the meat belonged; in fact, it was quite clear that Mr. Nicholson was the owner. There are two distinct offences pointed out by the section:

White v. *Redfern*, 41 L. T. Rep. N. S. 524; 5 Q. B. Div. 15; 49 L. J. 19, M. C.;

The meat must be deposited for sale at the moment of seizure, which was not so in the present case:

Vinter v. *Hind*, 48 L. T. Rep. N. S. 359; 10 Q. B. Div. 63; 52 L. J. 93, M. C.

Sir *E. Clarke* (S.-G.), *Bullen*, and *Temple Cooke* for the respondent.—The person "to whom the meat belongs" means the person who has the control or possession of the meat for the purpose of sale. The person who takes upon himself to give directions in his own name is the person liable, and here Newton gave all the orders and directions as to the disposal of the meat. [SMITH, J.—If you had convicted the appellant as being the person in possession of the meat, you would have been all right.] The man in whose possession it was was Batchelor, an innocent person. Here these are the findings: the meat was unsound, and known to be so by the sender, so every part of the section is fulfilled. The actual person who was criminal in the matter was before the court, and was properly convicted.

MATHEW, J.—I think our judgment here must be for the appellant. From the facts of the case there was nothing to warrant the finding of the justices. It seems to me as clear as the day that there was no evidence whatever to justify the conclusion that the meat "belonged" to the appellant. There is no doubt whatever as to the condition of the meat, but all the facts of the case are quite consistent with the entire innocence of the appellant as to the charge on which he was convicted. In order to sustain this conviction it was necessary to show that the appellant was the owner of the meat, and as there was no such evidence I think this conviction must be quashed.

SMITH, J.—I am of the same opinion. It seems to me that two classes of persons may be convicted under sect. 117, namely, the person to whom the meat belonged, and the person in whose possession or on whose premises it was found. In this case the under-bailiff has been found to be the person to whom it "belonged," and the question is, whether there was any evidence on which the learned recorder could find that the under-bailiff was the person to whom the meat belonged. In my opinion there was no evidence; there was no evidence whatever that the meat belonged to the under-bailiff, and therefore this conviction against the under-bailiff cannot be supported.

Conviction quashed.

Solicitors for the appellant, *Soames, Edwards, and Jones*, for *Soames* and *Caparn*, Petersfield.

Solicitor for the respondent, *Mills*, for *Feltham*, Portsea.

Wednesday, Jan. 18, 1888.

(Before HAWKINS and GRANTHAM, JJ.)

NICHOLSON (app.) *v.* BOOTH AND NAYLOR (resps.).(*a*)

Criminal law—Assault—Common assault—Conviction—Complaint by or on behalf of the party aggrieved—Condition precedent—24 & 25 Vict. c. 100, *s.* 42.

A complaint by or on behalf of a person aggrieved by a common assault or battery is a necessary condition precedent to give justices jurisdiction to summarily convict the offender under 24 & 25 Vict. c. 100, *s.* 42.

A police-constable who takes a charge of common assault from the person assaulted is not, on the failure of the complainant personally to prefer the charge before the justices, a party who can prefer the complaint on behalf of the person aggrieved.

THIS was a case stated by justices under 42 & 43 Vict. c. 49.

The material facts were as follows:—

1. At a petty session, holden at the borough of Bolton on the 26th Sept. 1887, Richard Nicholson (the appellant) was charged with having, on the 24th Sept., unlawfully assaulted and beaten one George Naylor (the respondent), of the said borough, contrary to the statute in such case made and provided.

2. The appellant was, on the 24th Sept. 1887, apprehended by the police and taken to the police-office, and there charged by the res-

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

pondent with assault in the presence and hearing of the appellant. On the following day the appellant was released from custody on entering into a recognisance conditioned to appear before the justices on the 26th Sept. to answer the charge. On the morning of that day the respondent George Naylor did not appear before the justices, and a complaint was then made to a justice as to the charge of assault by one Peter Booth, on behalf of the respondent, under 24 & 25 Vict. c. 100, s. 42, the said Peter Booth being a sergeant of police to whom such charge had been made by the respondent previously, and such justice thereupon issued a summons against the appellant for such assault. No evidence was given that the respondent requested the said Booth to lay the complaint.

3. Four police-constables were called, and in their evidence deposed to seeing the appellant strike the respondent Naylor with his clenched fist, and that he was seized and taken to the police-station. The evidence of the respondent Booth was as follows:

I am a sergeant in the Bolton Police Force. On Saturday, the 24th Sept. 1887, I was on duty at the police-station. I was in charge of the police-office. In the appellant's presence the respondent Naylor gave his name, and said that the appellant had struck him several times about the head. I then entered the charge of assault made by the respondent in the charge-book. The appellant said, "I did it; I am very sorry." I produced the charge-book. I laid the complaint for the assault on behalf of the respondent Naylor. The appellant was afterwards bailed out to answer the charge of assaulting Naylor.

4. The appellant's solicitor cross-examined the witnesses on the charge of assault, and made no objection to the justices hearing the charge.

5. The appellant's solicitor contended (*a*) that there was no evidence to show that Naylor intended to prosecute; (*b*) that there was no party aggrieved; (*c*) that the party supposed to be aggrieved did not authorise the issuing of the summons.

6. The justices overruled the appellant's solicitor's objections, and found the appellant guilty of the charge of assault, and adjudged him to be imprisoned for one calendar month with hard labour.

The question for the opinion of the court was, whether the appellant was properly convicted.

By 24 & 25 Vict. c. 100, s. 42:

Where any person shall unlawfully assault or beat any other person, two justices of the peace, upon complaint by or on behalf of the party aggrieved, may hear and determine such offence, and the offender shall, upon conviction thereof before them, at the discretion of the justices, either be committed to the common gaol or house of correction, there to be imprisoned with or without hard labour for any term not exceeding two months, or else shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs (if ordered), the sum of five pounds.

By sect. 43:

When any person shall be charged before two justices of the peace with an assault or battery upon any male child whose age shall not in the opinion of such justices exceed fourteen years, or upon any female, either upon the complaint of the party aggrieved or otherwise, the said justices, if the assault or battery is of such an aggravated nature that it cannot in their opinion be sufficiently punished under the provisions hereinbefore contained as to assaults and batteries, may proceed to hear and determine the same in a summary way, and if the same be proved, may convict the person accused; and every such offender shall be liable to be imprisoned . . . with or without hard labour, for any period not exceeding six months, or to pay a fine not exceeding . . . twenty pounds.

By sect. 45:

If any person against whom any such complaint as in either of the last three preceding sections mentioned shall have been preferred by or on behalf of the party aggrieved . . . having been convicted, shall have paid the whole amount adjudged to be paid, or suffered the imprisonment or imprisonment with hard labour awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause.

By 9 Geo. 4, c. 31, s. 27:

Whereas it is expedient that a summary power of punishing persons for common assaults and batteries should be provided under the limitations hereinafter mentioned, be it therefore enacted that where any person shall unlawfully assault or beat any other person, it shall be lawful for two justices of the peace, upon complaint of the party aggrieved, to hear and determine such offence, and the offender upon conviction thereof before them shall forfeit and pay such fine as shall ppear to them to be meet, not exceeding . . . five pounds. . . . and if such fine . . . shall not be paid . . . it shall be lawful for them to commit the offender to the common gaol or house of correction, there to be imprisoned for any term not exceeding two calendar months.

Tickell for the appellant. — This conviction should be quashed on the ground that the justices who convicted the appellant of the assault and sentenced him to a month's imprisonment had no jurisdiction to entertain the charge preferred against him and convict him. The case finds that no complaint of the assault committed by the appellant on the respondent Naylor was made by or on behalf of Naylor. It is clear that the complaint before the justices was made by Booth, the sergeant of police, who originally took down Naylor's complaint and entered it in the charge-book. A complaint by or on behalf of the party aggrieved of an assault is a condition precedent to the jurisdiction of justices to try the offence in a summary way. The reason of this is plain: if a person is convicted of a common assault under sect. 42 of 24 & 25 Vict. c. 100, or of an aggravated assault under sect. 43 of the same Act, and is punished, whether by the payment of a fine or suffering imprisonment, by virtue of sect. 45 such fine or imprisonment operates as a release from liability to all further proceedings, civil or criminal. It may well be that a person who is assaulted and has made a charge against the offender to the police, is desirous of afterwards withdrawing from the charge before the justices in order to preserve his civil right of bringing an action for damages in respect of the assault, which would be destroyed if he proceeded to a criminal conviction:

Reg. v. *Deny*, 20 L. J. 189, M. C.;
Master and Wife v. *Brown*, 34 L. T. Rep. N. S. 254; 1 C. P. Div. 97.

A person aggrieved might no doubt be represented by a solicitor to prefer a charge of assault, because it would be a reasonable assumption that the solicitor was acting on behalf of his client and by his directions. The complaint in sect. 42 means legal complaint. A mere complaint to a policeman is not such; the complaint must be preferred before the justices or their clerk in a legal and formal manner.

No counsel appeared for the respondents.

HAWKINS, J.—I am of opinion that the appellant is entitled to have the conviction against

him quashed, on the ground that it was made without jurisdiction. Sect. 42 of 24 & 25 Vict. c. 100, under which summary proceedings for a common assault are to be taken, provides that if a person shall unlawfully assault another person, two justices of the peace upon complaint by or on behalf of the party aggrieved may hear and determine such offence, and the offender upon conviction may be summarily punished by imprisonment or fine. The jurisdiction to convict for a common assault depends on the language of the statute, and without sect. 42 of the Act in question they could have no power to deal summarily with a common assault. They are given that jurisdiction only on condition of the person aggrieved by the common assault coming before them and making complaint; if he fail to do so their jurisdiction does not exist. There are good reasons for making the personal complaint a condition precedent. A person when assaulted may be so assaulted as to sustain grievous injury entitling him to compensation for his great bodily suffering, or the assault may be accompanied by such insulting conduct as well as bodily suffering that he would be entitled to damages for the insult and contumely offered to him, as well as for the bodily injuries. It is well known that considerable damages are given in actions for assault. It may, therefore, well happen that a person aggrieved by an assault may not desire to have the person assaulting convicted, for the conviction would operate as a bar to his civil remedy. Now, if justices could convict without the complaint of the party aggrieved by an assault, they would have the power to bar the right of the person aggrieved to bring his action for damages. Sects. 44 and 45, when read together with sect. 42, give the prosecutor the option whether he will pursue his civil or criminal remedy. Otherwise the defendant committing the assault would be liable to the double penalty of being convicted and mulcted in damages. The jurisdiction then of the justices must be based on a complaint made by the party aggrieved. No doubt, an application may be made on behalf of the party aggrieved: he may be too ill to attend, or for some other reason may be compelled to send someone to represent him and prefer the charge before the justices. But the mere complaint of the police-constable who takes down the charge is not enough. Suppose the person assaulted does make a charge at the time to a police-constable, he may subsequently choose to withdraw the charge, for he might desire or be advised to reserve his right to the civil remedy. This provision in sect. 42 we find in sect. 27 of 9 Geo. 4, c. 31. The case of *Reg.* v. *Deny* (*ubi sup.*), a decision on the earlier Act, though not absolutely in point for the present case, yet shows that the assent of the party aggrieved to a conviction by the justices is necessary to give them jurisdiction. I think that authority on the subject is not actually needed. If the justices had had in that case jurisdiction to convict, they would have had a right to do so, and the party aggrieved could not have stopped them from so doing. But the words of the Act are plain. Without the Act of Parliament the justices have no power to convict summarily of an assault; whereas by virtue of the Act they can do so, but there is a condition precedent to their jurisdiction, viz., complaint by or on behalf of the person aggrieved. In the present case there was no complaint by the person aggrieved except at the police-station; and the police-constable had no authority to prefer the charge on the following day in the absence of the complainant. I am of opinion that the conviction ought to be quashed.

GRANTHAM, J.—I am of the same opinion. I think the meaning of the statute is, that the complainant must appear before the justices and make his complaint, or delegate some person on his behalf to do so. When the party does not so appear, the justices should treat the matter as though there was no evidence to support the charge and dismiss it. In the present circumstances the conviction ought to be quashed.

Conviction quashed.

Solicitors for the appellant, *Chester, Mayhew, Broome,* and *Griffiths,* for *Matthew Field,* Bolton.

Friday, Jan. 20, 1888.

(Before MATHEW and SMITH, JJ.)

SAUNDERS (app.) *v.* PITFIELD (resp.). (*a*)

Ground Game Act 1880 (*43 & 44 Vict. c.* 47), *s.* 6—"*Spring traps except in rabbit holes*"—"*Person having a right of killing ground game under this Act or otherwise*"—*Tenant with right of shooting.*

A tenant of land who is under his agreement entitled to the game and right of shooting thereon is liable to a penalty, under the 6th section of the Ground Game Act 1880 (*43 & 44 Vict. c.* 47), *for employing spring traps in the open for the purpose of killing ground game.*

THIS was a case stated by justices of the county of Somerset under 20 & 21 Vict. c. 43.

CASE.

Upon the hearing of a certain information preferred by the appellant against the respondent under sect. 6 of the Ground Game Act 1880 (43 & 44 Vict. c. 47), charging the respondent for that he, on the 16th Aug. 1887, at Coombe Ferry in that county, did unlawfully for the purpose of killing ground game employ certain spring traps, the same not being in rabbit holes, in a certain close of land in the occupation of one John Pitfield, contrary to the form of the statute in such case made and provided, we dismissed the information.

The following facts were proved before us:—

The appellant was a game watcher in the employ of the lessee under a deed dated the 7th April 1887, for a term of three years from the 13th April 1887, of the game and of the sole right of shooting over an estate called the Sandhill Estate.

On the 15th Aug. 1887 the appellant found three springs set in a certain close of land at Coombe Ferry forming part of that estate in the occupation of John Pitfield, the father of the respondent.

The spring traps were not set in rabbit holes, but one of such traps was set in the open twelve yards off a wood adjoining the close, and the other two were set in the open close to a bank.

The respondent, on being found examining the springs, claimed a right to set them.

It was proved on behalf of the respondent that the close was in the occupation of the father of

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

the respondent, who was tenant of it from year to year under a parol agreement made by him in the year 1881 with the owner, prior to the above-mentioned lease of the game and right of shooting granted by him, by which the owner did not reserve the game.

The respondent set the traps for the purpose of taking rabbits by the direction of his father the occupier.

It was submitted on behalf of the respondent that the lease of the game and the right of shooting was inoperative during the existence of the prior letting to the respondent's father, and that inasmuch as under such parol letting there was no reservation of the game or of a right of shooting, the respondent's father was entitled to the game and right of shooting on the close during the continuance of his tenancy, and that the 6th section of the Ground Game Act 1880 (43 & 44 Vict. c. 47) did not apply to him; the respondent's solicitor citing the case of *Smith* v. *Hunt* (50 L. T. Rep. N. S. 422) and contending that the expression "or otherwise" in the 6th section was not intended to apply to the case of a tenant who had the game and the right of shooting by virtue of the terms of his holding or in consequence of such game and right not being reserved by the landlord.

The justices dismissed the information, being of opinion that the 6th section of the Ground Game Act did not apply to this case; and held further, that the parol letting of the close without reserving the game in law vested the game and right of sporting on such land in the occupier, and that during the existence of such tenancy the subsequent lease of the game and right of shooting was so far as this close of land was concerned inoperative; and further, that the father of the respondent stood in the same position as the owner of the land as far as the game and rabbits were concerned, and that under the circumstances they were not justified in convicting the respondent of the offence charged in the information.

The questions of law upon which the case was stated for the opinion of the court therefore were:

(1) Whether the respondent acting by the directions and under the authority of his father, an occupier of land, with no reservation of game, who for the purpose of killing ground game employs spring traps on the land otherwise than in rabbit holes, is liable to a penalty under the Ground Game Act 1880 (43 & 44 Vict. c. 47).

(2) Whether the 6th section of the Ground Game Act 1880 renders the tenant who has the right to the game on the land in his occupation vested in him by virtue of the terms in his agreement, or persons acting by his direction, liable to a penalty for employing spring traps on the land occupied by him for the purpose of taking ground game otherwise than in rabbit holes.

If the court should be of opinion that the decision of the justices dismissing the information was wrong, then the court was to remit the case back to them for further consideration; but if otherwise, then their decision was to stand.

The 6th section of the Ground Game Act 1880 (43 & 44 Vict. c. 47) is as follows:

Sect. 6. No person having a right of killing ground game under this Act, or otherwise, shall use any fire-arms for the purpose of killing ground game between the expiration of the first hour after sunset and the commencement of the last hour before sunrise; and no such person shall, for the purpose of killing ground game, employ spring traps, except in rabbit holes, nor employ poison; and any person acting in contravention of this section shall, on summary conviction, be liable to a penalty not exceeding two pounds.

Willis Bund for the appellant.—The respondent is within the plain words of the 6th section of the Act. The justices, in dismissing the information, relied upon the case of *Smith* v. *Hunt* (54 L. T. Rep. N. S. 422), where it was decided that the Act did not apply to an owner of land doing any of the acts prohibited upon his own land, on the ground that the Legislature had no intention of restricting the undoubted rights which landlords possessed before the Act was passed to deal with their land and kill the game thereon in any way they liked. [SMITH, J.—The court only decided in that case that the Act did not apply to owners occupying their own land.] The fact that the occupier in this case had under his agreement a right to the game and the right of shooting does not operate to take him out of the provisions of the Act. [He was stopped by the Court.]

J. A. Thorne for the respondent.—Apart from the Ground Game Act 1880 there can be no question that a tenant of land under a parol agreement in which there was no reservation of the game and the right of shooting was entitled to all the ground and winged game, and also to kill it as he liked, and to set spring traps in the open for that purpose, if he chose to do so. That being so, the object of the Act was not to curtail the rights of the occupier, or to take away any right which he possessed before the Act, but to confer upon him further rights, viz., a concurrent right with the owner of killing the ground game in all cases. The Act, in short, was not for the detriment but for the benefit of the occupier, as is shown by the preamble, which recites that, "it is expedient in the interests of good husbandry and for the better security for the capital and labour invested by the occupiers of land in the cultivation of the soil, that further provision should be made to enable such occupiers to protect their crops from injury and loss by ground game." Then the true scope of the Act is shown by the 1st section, which gives every occupier a right inseparable from his occupation to kill ground game concurrently with any other person entitled to kill it; and all the subsequent sections are framed with a view of regulating the rights of the various parties interested as declared in the 1st section. Throughout the whole of the Act there is nothing to show that the Legislature intended to take away from any occupier, any more than from any landlord, any right which he possessed before the Act. The only section relied on by the appellant as having this effect is the 6th section, it being contended that the occupier in this case comes within the general words "or otherwise." But it has already been decided in *Smith* v. *Hunt* (54 L. T. Rep. N. S. 422) that those words cannot receive their widest interpretation, and do not include owners, although they are clearly persons having a right of killing ground game otherwise than under the Act. The object of the Act, it is pointed out in that case by Mathew, J., was to protect occupiers against landlords inclined to overstock the land with hares and rabbits, and not to restrict pre-existing

rights. Besides, the only object of forbidding the use of spring traps is to prevent the destruction of the winged game, which in this case belongs to the occupier, and therefore no reason exists for enforcing the provision against him. [SMITH, J.—Why should not the object be to prevent the destruction of foxes? I do not at all suggest that it is, but why are we to say that it is not?] That consideration would have equally applied in *Smith* v. *Hunt*. [SMITH, J.—That case only decided that owners of land were not within the Act.] Neither is an occupier on whom the Act conferred no additional right, and on whom the Act had no effect at all, unless it is to be held that he is deprived under this section of a right which he enjoyed before.

MATHEW, J.—In this case the justices have refused to convict the respondent, who in my opinion comes within the words of the 6th section of this statute. The case must therefore be remitted to them with an intimation of our opinion to that effect.

SMITH, J.—I am of the same opinion, and I should like to state my reasons. In *Smith* v. *Hunt* (54 L. T. Rep. N. S. 422) we came to the conclusion that the 6th section did not apply to owners killing the ground game on their own land, because it appeared to us that, while the whole of the rest of the Act was in derogation of the rights of owners, giving the occupiers concurrent rights with them of killing the game, the 6th section was for their benefit to prevent the wholesale destruction of the ground game. It is now said that we must go further, and say that, because the whole of the rest of the Act is in favour of occupiers, the 6th section cannot be read as containing anything prejudicial to them, and that an occupier who has the right of shooting over his land does not come within the section, because if the Act had not been passed he would have had a right to do the acts it prohibits. I do not think that this is so. I think therefore that the case must be sent back to the justices with an intimation of our opinion that they ought to convict the respondent.

Solicitors for the appellant, *Penley* and *Grubbe*, for *Taylor*, Taunton.

Solicitor for the respondent, *W. W. Watkins*, Tiverton.

Supreme Court of Judicature.

COURT OF APPEAL.

Saturday, July 16, 1887.

(Before Lord ESHER, M.R., LINDLEY and LOPES, L.JJ.)

LEA *v.* FACEY. (*a*)

Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 5, 10, 12, 264, 341—*Local Government Acts—Urban sanitary authority—Improvement commissioners—Notice of action.*

The effect of the Public Health Act 1875, *which makes improvement commissioners under local Acts urban sanitary authorities, is to reconstitute them as new bodies under the Act, vesting in them as such new bodies the powers given by the local Acts as well as those given by the Public Health Act; and such commissioners, in subsequently doing any act in the exercise of the powers originally conferred by their local Acts, are acting under the Public Health Act* 1875, *and consequently are entitled in respect of such act to any protection or privilege given by that Act to members of local authorities acting under its provisions.*

A person who is in fact disqualified from being a member of a local authority, but who acts as such in the bonâ fide belief that he is a member, is entitled to notice of action under sect. 264 *of the Public Health Act* 1875.

THIS was an appeal from a judgment of Wills, J. (reported at 17 Q. B. Div. 139).

The action was brought to recover a penalty of 50*l.*, alleged to have been incurred by the defendant under sects. 9 and 15 of the Commissioners Clauses Act 1847, by acting as a member of the Board of Improvement Commissioners for Abergavenny, under certain local Acts, when disqualified from so acting by reason of his being concerned in a contract made by the commissioners under the authority of such Acts.

The defence, among other things, alleged that the defendant had not received a notice of action as required by sect. 264 of the Public Health Act 1875, and also that the plaintiff had not obtained the consent of the Attorney-General to the action as required by the Public Health (Members and Officers) Act 1885.

The facts as they appeared at the trial, before Wills, J. without a jury, were, so far as material to this report, as follows:—

By certain local Acts, with which the Commissioners Clauses Act 1847 was incorporated, a board of improvement commissioners was constituted for the Improvement Act District of Abergavenny, which board became, by virtue of the Public Health Act, the urban sanitary authority within such district. The defendant was a member of such board, and had acted as such by voting for the imposition of an Improvement Act district rate. The rate was headed:

An assessment to a rate for general purposes upon the Improvement Act District of Abergavenny, in the county of Monmouth, made, &c., to pay charges and expenses incurred by the Abergavenny Improvement Commissioners, for the three months ending on the 30th of September 1885, by virtue of the Abergavenny Improvement Acts 1854, 1860, and 1871, and the Towns Improvement Clauses Act 1847, or one or more of the said Acts.

The expenses, to meet which the rate was made, as shown by the estimate prepared previously to the making of it, were some of them expenses authorised to be incurred by the local Acts only; some of them expenses authorised by both the local Acts and the Public Health Act 1875, and some of them expenses authorised by the Public Health Act 1875 only.

It was alleged by the plaintiff that the defendant, when so acting as commissioner, was disqualified by reason of his being the lessee from the commissioners of certain premises, and that he had therefore incurred a penalty under the provisions of sects. 9 and 15 of the Commissioners Clauses Act 1847. It was contended for the defendant that, under the circumstances of the case, there was no disqualification; but it is unnecessary to state the facts with regard to this

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

point, because the judgment of Wills, J., and of the Court of Appeal, proceeded upon the assumption that the penalty had been incurred. The sole question dealt with was, whether the restrictions imposed on actions against members of urban sanitary authorities by the Public Health Act 1875 applied or not to acts done by a member of a board of improvement commissioners, being an urban sanitary authority, in the exercise of the powers of the local Acts. The defendant had not received any notice of action, nor had leave to bring the action been obtained from the Attorney-General.

Wills, J. gave judgment in favour of the defendant, being of opinion that the acts done by the commissioners in the exercise of the powers originally conferred on them by their local Acts were done under the Public Health Act 1875, and that therefore notice of action under sect. 264 of that statute was necessary.

The plaintiff appealed.

The Plaintiff in person.—The improvement commissioners were in existence before the passing of the Public Health Act 1875, and the effect of that statute was only to add to their powers and to their jurisdiction, it did not reconstitute them as a new body, and the powers exercised by them and the acts done by them under their local Acts were not done under the Public Health Act at all. But even assuming that it shall be held that the acts done were done under the Public Health Act, yet the defendant is not entitled to notice under sect. 264. That section enacts that, "A writ or process shall not be sued out against or served on any local authority or any member thereof . . . for anything done, or intended to be done, or omitted to be done, under the provisions of this Act until the expiration of one month after notice in writing has been served on such local authority, or member; . . . and unless such notice is proved, the jury shall find for the defendant." At the time when the plaintiff was elected to the board he had a contract with the board, which disqualified him from being a member; therefore he never has been legally a member of the board, and therefore he is not entitled to the protection of the statute.

R. Cunningham Glen, for the defendant, referred to *Hughes* v. *Buckland* (15 M. & W. 346), and was stopped.

Lord ESHER, M.R.—In this case the action is to recover penalties from the defendant for acting as an improvement commissioner at a time when he had a contract with the board, of which he was a member. The answer given by the defendant is that, assuming he was wrong in so acting, yet the plaintiff cannot in this case recover in the action, because he did not give the notice required by sect. 264 of the Public Health Act 1875. The reply to that is, that the case is not within sect. 264 for two reasons: first, because the defendant was not a member in point of law of the urban sanitary authority of Abergavenny, although he acted as such, and was therefore not entitled to notice under sect. 264; and secondly, because the acts he did, or part of them, were done, not as a member of the urban sanitary authority, but as an improvement commissioner under the local Acts, and that consequently no notice under sect. 264 was necessary. As to the first point the argument is this, that the defendant having a contract with the board could not legally or validly be elected a member of it. I think he could not, because the case is like that of a validly elected member ceasing to be a member directly he takes a contract with the board; but the question is, whether the fact that he is not a validly elected member deprives him of his right to notice of action. Although it may be true that he is not a validly elected member of the board, yet, if he acts as a member under the *bonâ fide* belief that he is a member, he is entitled to the protection of the statute. The case seems to me to come within the principle laid down in *Hughes* v. *Buckland* (*ubi sup.*), in which case the court, construing the similar words of another statute, was of opinion, as Parke, B. expressed it, that "the statute extends protection to all who *bonâ fide* and reasonably believe that they fill the character, and are authorised to act." In this case it is beyond question that the defendant believed himself to be a member of the board, and he is therefore not disentitled to the protection of the statute by reason of that argument. The second question is, whether any notice was necessary; that is to say, whether the acts done by the defendant were done under the Public Health Act, or under the Local Improvement Acts. The authority to do a part of that which the defendant did arises under the Public Health Act, and the authority to do the other part arises under the local Acts. Sect. 10 of the Public Health Act applies to such a case, for it enacts that, where a local Act is in force within the district of an urban authority, conferring on commissioners, trustees, or other persons, powers for purposes the same as or similar to those of this Act, all the powers of such commissioners shall be transferred to the urban authority. Now the powers under the local Acts in this case were similar to the powers given by the Public Health Act, and they are therefore by force of sect. 10 transferred to the urban authority. That this is the meaning is further indicated by other sections of the Act, especially by sect. 12, which deals with the vesting of property in local authorities. I am therefore of opinion that what was done by the defendant was done under the Public Health Act. I therefore come to the conclusion that the defendant acted in matters within the authority of the board under the *bonâ fide* belief that he was a member of the board, and that therefore he is entitled to the protection given him by sect. 264, although he was not legally a member of the board. The appeal must be dismissed.

LINDLEY, L.J.—I am of the same opinion. There is some difficulty in putting all the Acts together; but, having regard to the scheme of the Public Health Act as evidenced especially by sects. 5, 6, and 10, I think Wills, J. was right. He says in his judgment: "I confess, after the best consideration I can give to it, I think it was an act done under the provisions of that Act, because I think, looking at it broadly, that the body of commissioners was altered in its character, status, and attributes by that Act, and that, although no doubt what they did was done in the exercise of powers originally conferred upon them by the local Acts, yet, after the passing of the Public Health Act, and after they became the urban sanitary authority for their district, what they did even in the administration of the local Acts

was done within the meaning of sect. 264 of the Public Health Act." I think that is the true view, and therefore, subject to one point that I will mention, the defendant was entitled to the protection given by sect. 264. But then it was said that the defendant was not so entitled, because he was not legally a member of the board. But that argument is met by the case of *Hughes* v. *Buckland* (*ubi sup.*). The defendant *bonâ fide* believed himself to be a member, and under such belief acted as a member, and is therefore entitled to the protection of the statute.

LOPES, L.J.—I think the defendant was within sect. 264 of the Public Health Act 1875, and was therefore entitled to notice of action. I agree with Wills, J. upon the construction of that Act, especially having regard to sects. 10 and 12, under which the powers and property of a local authority under local Acts are absorbed by the urban authority created by the Public Health Act. A point was made that the defendant was not in fact a member of the board, because he was not qualified to be elected to it, and that therefore he was not within sect. 264. But there is no doubt that he acted as a member under the *bonâ fide* belief that he was a member, and that, according to the authority of *Hughes* v. *Buckland* (*ubi sup.*), is enough to entitle him to the protection of the statute.

Appeal dismissed.

Solicitor for plaintiff, *H. Thomas*, for *L. D. Browne*, Abergavenny.

Solicitors for the defendant, *J. T.* and *G. F. Marshall*, for *Gabb* and *Walford*, Abergavenny.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Monday, Jan. 16, 1888.

(Before MATHEW and SMITH, JJ.)

SEPHTON (app.) *v.* SEPHTON (resp.). (*a*)

Justices of the peace—Practice—Married Women (Maintenance in Case of Desertion) Act 1886 (*49 & 50 Vict. c.* 52), *s.* 2—*Proof of adultery—Rehearing of summons.*

The power given to justices by the 2nd section of the Married Women (Maintenance in Case of Desertion) Act 1886 (*49 & 50 Vict. c.* 52) *to "rehear any such summons at the instance of the husband at any time" is, on the true construction of the Act, confined to the cases mentioned in the 2nd proviso to the 1st section, in which proof is offered that the wife has since the making of the order been guilty of adultery.*

THIS was a case stated by justices of the county of Lancaster sitting as a court of summary jurisdiction at Ormskirk in that county, to obtain the opinion of the court upon the question of law which arose before them as therein stated.

CASE.

The appellant is the husband of the respondent, and there is one child of the marriage.

The respondent having made a complaint under the Married Women (Maintenance in Case of Desertion) Act 1886 (49 & 50 Vict. c. 52), that the appellant being able wholly to maintain her and the said child of the marriage had wilfully refused so to do, and had deserted the respondent, and the appellant having appeared before the justices in petty sessions at the said court of summary jurisdiction pursuant to a summons requiring him to answer the said complaint, and the respondent having also appeared in support of the complaint, and all the evidence tendered by or on behalf of the parties respectively having been fully heard and considered, it was adjudged by an order of the court of summary jurisdiction dated the 1st July 1887 that the complaint was proved to be true, and that the appellant was able wholly to maintain his wife and child and had wilfully refused so to do and had deserted his wife, and it was adjudged and ordered that he should pay to his wife the weekly sum of 7*s.* 6*d.* until the order should be varied or discharged in due course of law.

The summons before mentioned had been applied for, and granted and served in the same manner as summonses were applied for, granted, and served in cases of assault at the time of the passing of the said Married Women (Maintenance in Case of Desertion) Act 1886.

At the next monthly sitting of the court on the 5th Aug., when the same justices as had made the order were sitting with other justices of the same petty sessional division, the appellant, pursuant to previous notice given to the respondent and to the clerk of the court, applied that the summons on which the order had been made should be reheard and the order discharged or varied upon the following grounds:

1. That the appellant had not deserted his wife within the meaning of the Married Women (Maintenance in Case of Desertion) Act 1886 (49 & 50 Vict. c. 52).

2. That the evidence adduced by and on behalf of the respondent on the hearing of the summons was false and contrary to fact.

3. That the decision of the court was against the weight of evidence.

4. That for several months previous to the hearing of the summons the respondent of her own free will and accord lived separate and apart from her husband the appellant, and absolutely refused to cohabit with him, notwithstanding that the appellant was always ready and willing to cohabit with his wife.

It was not stated in the notice, nor proved nor alleged in court, that the means of either of the parties had altered in amount since the making of the original order, or that the respondent had since the making thereof been guilty of adultery; but it was contended on the part of the appellant that the justices had a general power under sect. 2 of the Act to rehear the summons at the instance of the appellant at any time, and to confirm, discharge, or vary any previous order thereon as they might think just.

The justices sitting on the 5th Aug. refused to rehear the summons or to discharge or vary the order or take evidence in support of the application for such rehearing, discharge, or variation, on the ground that they had no general power of rehearing a summons which had been applied for and granted and served (as the summons in this case was) in the same manner as summonses were applied for, granted, and served in cases of assault at the time of the passing of the said Act,

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

and had been duly heard and determined in the presence and hearing of both parties, but that the power to rehear a summons or to discharge or vary an order under the Act was limited to the cases expressly provided for in the Act, namely, upon proof that the means of the husband or wife had been altered in amount since the original order or any subsequent order varying it was made, or upon proof that the wife had since the making of the order been guilty of adultery, or in case the summons had not been served in the manner hereinbefore stated, but had been served in some other manner under the power to give directions in such behalf contained in the said Act, and that none of such circumstances were proved or existed in this case.

The appellant having applied for and the court having stated a case, if the determination was correct in point of law, then the same was to be affirmed and the appeal dismissed; but if it was erroneous in point of law, then it was to be reversed, and the court of summary jurisdiction was to hear the application and rehear the summons.

The Married Women (Maintenance in Case of Desertion) Act 1886 (49 & 50 Vict. c. 52) provides as follows:

Sect. 1. From and after the passing of this Act it shall be lawful for any married woman, who shall have been deserted by her husband, to summon her husband before any two justices in petty sessions, or any stipendiary magistrate, and thereupon such justices or magistrate, if satisfied that the husband, being able wholly or in part to maintain his wife or his wife and family, has wilfully refused or neglected so to do, and has deserted his wife, may order:

(1.) That the husband shall pay to his wife such weekly sum not exceeding two pounds as the justices or magistrate may consider to be in accordance with his means, and with any means the wife may have for her support and the support of her family, and the payment of any sum so ordered shall be enforceable and enforced against the husband in the same manner as the payment of money is enforced under an order of affiliation; and the said justices or magistrate by whom any such order for payment shall be made, or other justices or magistrate sitting in their or his stead, shall have power from time to time to vary the same, on the application of either the husband or wife, upon proof that the means of the husband or wife have been altered in amount since the original order, or any subsequent order varying it shall have been made.

(2.) Provided always, that no order for payment of any such sum by the husband shall be made in favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned, and that any order for payment of any such sum may be discharged by the justices or magistrate by whom such order was made, or other justices or magistrate sitting in their or his stead, upon proof that the wife has since the making thereof been guilty of adultery.

Sect. 2. A summons under this Act shall be applied for and granted and served in the same manner as summonses are now applied for, granted, and served in cases of assault, or in such other manner as the said justices or magistrate shall direct. Provided always, that in such case the said justices or magistrate, or other justices or magistrate sitting in their or his stead, may rehear any such summons at the instance of the husband at any time, and confirm, discharge, or vary any previous order thereon as they or he may think just.

Bower for the appellant.—The justices were wrong in deciding that they had no jurisdiction to rehear the summons except upon proof that the means of the husband or wife had been altered in amount since the original order, or on proof that the wife had, since the making thereof, been guilty of adultery. The first proviso of the 1st section gives the justices power from time to time to vary the order on proof that the means of the husband or wife have been altered since the original order; and the second proviso of the same section gives the justices power to discharge an order made under the Act upon proof that the wife has, since the making thereof, been guilty of adultery. Their powers, therefore, in this respect are complete under the 1st section, and require no additional provision. Besides, the general law of construction prevents a proviso of the 2nd section being read into the 1st section. A proviso always refers to the section to which it is attached and qualifies it, and does not affect any other section unless some other section is specially mentioned therein, which is not the case here. [SMITH, J.—What is the meaning of the words "in such case?"] They refer to the previous part of the section, and mean "in the case of a summons under the Act." [SMITH, J.—If you take out the first part of the 2nd section down to the word "direct," and read the latter part of the section straight on after the 1st section, the sense would appear to run on without a break.] The rules of construction prevent such a method of mixing up the sections. The 1st section is complete in itself, and the proviso to the 2nd section must be read in connection with the 2nd section. [MATHEW, J.—I do not see anything inconsistent in the construction of the Act, if the method suggested by my learned brother is adopted, whereas your construction is beset with difficulties. Do you say that the meaning of the Act is, that the justices are liable to be called on by the husband, as soon as the case is finished, to rehear it without any suggestion that there is any fresh evidence to be brought forward?] The section says they "may rehear any such summons at the instance of the husband at any time." The justices in this case were ready to rehear, but held that they had no jurisdiction. It was never intended that the proviso to the 2nd section should be read as a third proviso to the 1st section.

Macmorran, for the respondent, was not called upon.

MATHEW, J.—I am of opinion that the conclusion at which the justices arrived was correct. I think that, by applying the rule of literal interpretation, we should fail to arrive at the meaning of the Legislature. We must therefore construe the section having regard to the other sections of the Act and their language and the obvious intention of those who framed the Act. The only question, therefore, is as to whether the rules of construction will allow us to read the latter part of the 2nd section of the Act as a third proviso to the 1st section. I have little doubt in my own mind that that is the way in which they stood in the original draft of the Act, but it occurred to someone that a provision ought to be put in as to the mode in which a summons under the Act should be applied for, and the way in which it should be served, and that provision was put in before the third proviso. The words are: "Provided always, that in such case the said justices or magistrate, or other justices or magistrate sitting in his or their stead, may rehear any such summons at the instance of the husband at any time, and confirm, discharge, or vary any previous order thereon

as they or he may think just." I think that the words "in such case" and "such summons" refer to the summons authorised by the 1st section, and to the case described in the 2nd sub-section of the 1st section. I do not see anything else in the Act with which the words "such case" can be identified, except the case put in the 2nd sub-section of the 1st section. The other interpretation suggested is, in my opinion, untenable, if not absurd, because, if the words at the end of the 2nd section applied to the first part of that section, as soon as the hearing of a summons was finished, the justices could be called upon at the instance of the husband to rehear it, without alleging any ground of surprise, or of any other description. I therefore have no hesitation in rejecting that interpretation. It seems to me that the true construction of the Act is that adopted by the justices. They have perhaps given other reasons for their conclusions than those in which I can concur; but I think that their decision was right and must stand.

SMITH, J.—I concur.

Solicitors: For the appellant, *H. L. Riley*, St. Helens; for the respondent, *Hamlin, Grammer, and Hamlin.*

Monday, Nov. 28, 1887.

(Before Lord COLERIDGE, C.J., POLLOCK, B., and HAWKINS, J.)

HUMPHREY (app.) *v.* EARLE (resp.). (*a*)

Parliament—Registration of voters—County vote—Notice of objection—Insufficient statement of place of abode of objector—The Registration Act 1885 (48 *Vict. c.* 15), *s.* 18, *and sched.* 2, *part* 2, *form I, No.* 2.

An objector, who lived in a house in Petersfield churchyard, signed a notice of objection to a voter's name being retained on one of the lists for the Petersfield Division of Hants, "G. C., of Churchyard, on the list of parliamentary voters for the parish of Petersfield."

Held, that the objector's place of abode was not sufficiently described within the meaning of the Registration Act 1885 (48 *Vict. c.* 15), *s.* 18, *and sched.* 2, *part* 2, *form I, No.* 2.

THIS was a case stated by the revising barrister for the Eastern or Petersfield Division of the county of Hants.

The facts stated in the case were, so far as material, as follows:—

At a court held by the revising barrister for the revision of the lists of voters for the Eastern or Petersfield Division of the county of Hants objection was made by George Chapman to the name of William Humphrey being retained on the occupiers' list for Hambledon in that division.

A document purporting to be a duplicate of the notice of objection was produced which had been posted in proper time. In it the place of abode of the objector was described thus: "George Chapman, of Churchyard, on the list of parliamentary voters for the parish of Petersfield."

On behalf of the appellant it was contended that the above notice of objection was bad on the ground that "Churchyard" was an insufficient address of the objector, and the revising barrister was asked, on the authority of *Woollett* v. *Davis* (4 C. B. 115), to quash the objection. The revising barrister, however, held that the notice of objection was good on the authority of *Sheldon* v. *Flatcher* (17 L. J. 34, C. P.) and *Norris* v. *Pilcher* (19 L. T. Rep. N. S. 563; L. Rep. 4 C. P. 417). The objector lives in a house in Petersfield churchyard, and his address as given in the occupiers' list for the parish of Petersfield is "Churchyard, Petersfield."

The names of sixteen other persons, in addition to that of William Humphrey, were objected to under similar circumstances, and the revising barrister accordingly expunged the name of Humphrey and the names of the sixteen other persons from the list of parliamentary voters for the Eastern or Petersfield Division of the county of Hants.

Notice of appeal having been given, the revising barrister ordered the appeals in all the cases to be consolidated, and named Thomas Hughes Earle, the clerk of the peace for the county of Hants, to be the respondent in such appeals.

No evidence was given that any of the persons so objected to had been misled or deceived by the above-mentioned form of notice of objection.

If the court was of opinion that the decision of the revising barrister was wrong the register was to be amended by inserting the name of William Humphrey and the names of the said sixteen other persons.

The 18th section of the Registration Act 1885 (48 Vict. c. 15) provides that the forms and instructions contained in the second and third schedules to the Act shall be used and observed in all cases to which they apply, and shall be substituted in all such cases for the forms, instructions, and directions contained in the schedules to the Parliamentary Registration Act 1843 (6 & 7 Vict. c. 18), the County Voters Registration Act 1865 (28 & 29 Vict. c. 36), the Representation of the People Act 1867 (30 & 31 Vict. c. 102), the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), and the Representation of the People Act 1884 (48 & 49 Vict. c. 3), but a disregard of any form or instruction shall not of itself invalidate any list, notice, or other thing.

The second schedule to the Act contains the "instructions and forms for counties," and Part II., Form (I), No. 2, of the "General Forms" is the form of notice of objection in respect of the occupation franchise to be given to the person objected to. This form is to be signed as follows:

> (Signed) A. B., of [*place of abode*], on the list of parliamentary voters for the parish [*or* township] of .

J. Alderson Foote for the appellant.—The revising barrister was wrong in expunging these names, the place of abode of the objector being insufficiently described in the notice of objection. Form I, No. 2, of Part II. of the second schedule of the Registration Act 1885, which requires the place of abode of the objector to be stated, reproduces, so far as is material to the present case, Form No. 5 of schedule A. to the Parliamentary Registration Act 1843 (6 Vict. c. 18), which has been discussed in several cases.

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

In *Woollett* v. *Davis* (4 C. B. 115) the place of abode of the objector was in a notice of objection described as "The Oaks" (without the addition of any parish, township, or other district) "on the register of voters for the parish of St. W.," the objector's place of abode being described in the list of voters for the parish of St. W. as "St. W.," and his qualifying property as "The Oaks," and it was there held that the description was insufficient, and could not be aided by a reference to the list of voters, so as to show that the place called "The Oaks" was in the parish of St. W., and that the objection was not removed by the finding of the revising barrister that the place referred to was in fact in the parish of St. W. Wilde, C.J., in his judgment in that case, points out the material distinction between county and borough voters for this purpose, which makes the objection one of substance and not of form, viz., that voters for counties, in respect of property qualifications, are not, like voters for boroughs, restricted as to the place of their residence. An objector therefore to a name on a county list of voters may reside anywhere, and it is unreasonable that the party objected to should be compelled to take trouble and to resort to other sources than the notice itself in order to obtain the necessary information as to such place of abode. Whatever therefore may be the case in a borough, where there is a legal necessity for the objector to reside within the borough or within seven miles of it, in the case of a county where the objector may reside anywhere such an address as "of Churchyard" is insufficient, and cannot be supplemented from any other source. The other cases on the point, which the revising barrister followed, are distinguishable. In *Sheldon* v. *Flatcher* (17 L. J. 34, C. P.) the objector to a voter for a borough signed himself as "J. F., of No. 5, Sherborne-street, on the list of voters for the parish of Cheltenham," and it was held that the description of the objector's place of abode, "No. 5, Sherborne-street," meant "Sherborne-street, Cheltenham," and was a sufficient compliance with the requirements of the statute. That, however, was a case of a borough vote, and the objector having a vote for the borough necessarily resided in it, and Sherborne-street therefore sufficiently described his place of abode. In *Norris* v. *Pilcher* (19 L. T. Rep. N. S. 563; L. Rep. 4 C. P. 417) the place of abode of the objector was described as 110, Guildford-street, Russell-street, W.C. There is only one Guildford-street in the western central postal district of London, and the objector lived there, but there is no Russell-street near it. It was therefore held that Russell-street might be rejected as surplusage, and, that having been done, the place of abode was clearly sufficiently described. Then in *Jones* v. *Pritchard* (19 L. T. Rep. N. S. 563; L. Rep. 4 C. P. 417) a notice in which the objector's place of abode was described as "Bonygraig" was held to comply with the statute, but there the revising barrister had decided that the notice was bad in law on the face of it, and all the court said was that it was not bad on the face of it, but that its sufficiency was a question of fact for the revising barrister. "Bonygraig" might have been a hamlet, and a perfectly sufficient address. [HAWKINS, J.—It was a question there whether the description was or was not sufficient to enable the person objected to to find the objector. Here there is no description which could possibly enable anyone to find the objector. He merely says "Churchyard," without specifying any particular churchyard, and the man reading it has no reason to go to Petersfield churchyard rather than to any other.] That is so. A letter addressed "Churchyard" could never have reached the objector. [HAWKINS, J.—Would not that depend on the place where it was posted?] As a matter of law there is nothing to lead him to search at Petersfield rather than elsewhere. In *Adams* v. *Bostock* (45 L. T. Rep. N. S. 443; 8 Q. B. Div. 259) an objector described himself in the notice of objection as "on the list of parliamentary voters for the parish of H.," but omitted to insert his place of abode. He was a solicitor practising at H., was clerk to the magistrates and coroner, and had resided at H. all his life. It was admitted that the insertion of the words "of H." would have sufficiently described the objector's place of abode, and the revising barrister found as a fact that no one had been misled or deceived by the omission, and it was held that under the circumstances the omission was a "mistake" within the meaning of 41 & 42 Vict. c. 26, s. 28, subsect. 2, which the revising barrister had power to amend. In this case, however, nothing was said as to amendment, and the revising barrister did not as a fact amend; and moreover the case is distinguishable on the ground above mentioned that the objection was to a borough vote, and therefore the objector was necessarily resident in the borough.

The respondent did not appear.

Lord COLERIDGE, C.J.—I am of opinion that the revising barrister was wrong in holding that the place of abode of the objector was sufficiently described in this notice of objection. If persons will not comply with the plain provisions of a statute, they cannot be allowed to avail themselves of its benefits. Here I am asked to determine whether an objector has sufficiently described his place of abode by inserting in the notice the words "of Churchyard." Now "Churchyard" is not the residence of the objector. There is, it is true, a churchyard at Petersfield, for which parish the objector is on the list of parliamentary voters, and the objector, it is true, lived in a house in that churchyard, but the notice does not even say "of the churchyard," and there is no reason why the objector should live at Petersfield. I cannot say therefore that his place of abode is sufficiently described without opening the door to a looseness in these matters which it was the very object of the Act of Parliament to prevent. For this reason I think that the decision of the revising barrister must be reversed, and the register amended by inserting the names which were expunged.

POLLOCK, B.—I am of the same opinion. The only description which the objector gives of himself and of his place of abode is "George Chapman, of Churchyard," and then follows, according to the requirements of the form in the schedule appended to the statute, the further words "on the list of parliamentary voters for the parish of Petersfield." But these latter words do not and were never intended to tell the person objected to anything as to the address of the objector. If he were not on some list of voters

for the division, he would not be a person who could have legally made the objection, but he might very well be on the list of voters for the parish of Petersfield, and live anywhere in England, and the words "of Churchyard" might have been meant to apply to some hamlet or place at some distance from Petersfield. The Act of Parliament is distinct and plain both to read and to act upon, and if persons will not give the required notice in the prescribed form, I do not think we are called upon to give them any relief from the consequences of their own carelessness.

HAWKINS, J.—I am of the same opinion. The Act of Parliament requires the name of the objector to be appended to the notice of objection, and also his place of abode, and the name of the parish for which he is on the list of parliamentary voters. In this case the objector has correctly stated his own name and the name of the parish, and he has also put in something which purports to be a description of his place of abode. He described himself as being "of Churchyard," and if he had made out that, in order to be on the list of voters for the parish of Petersfield, he must have been necessarily resident in Petersfield, I should have been of opinion that his place of abode was sufficiently stated. But that is not the case. He need not be resident there, and therefore I think he was bound to say more than he has done. He does not describe his place of abode in the way in which a man living in a house in the churchyard of Petersfield would ordinarily do, and as persons living in any place might be on the list of voters for Petersfield, there is nothing to connect the statement of the qualification to take the objection with the statement as to the place of abode, and the latter cannot be supplemented by the former so as to complete the address. The description of the place of abode is, therefore, in my opinion, insufficient, and the appeal must be allowed.

Appeal allowed.

Solicitors for the appellants, *Lambert, Petch,* and *Shakespear,* for *F. J.* and *J. C. Warner,* Winchester.

Monday, Nov. 28, 1887.

(Before Lord COLERIDGE, C.J., POLLOCK, B., and HAWKINS, J.)

BRIDGES (app.) *v.* MILLER (resp.). (*a*)

Parliament—Registration of voters—Borough vote—Notice of objection—Grounds of objection—Mistake—Revising barrister's power of amendment—Parliamentary and Municipal Registration Act 1878 (41 *&* 42 *Vict. c.* 26), *s.* 28, *sub-sect.* 2.

A notice of objection to a voter, a part of whose qualification to be registered was that he should have resided in the city of Norwich, or within seven miles, for six calendar months previous to the 15*th July in any year, was dated the* 12*th Aug., and stated the ground of objection to be, "That you do not reside at* 12, *Clifton-street, Norwich." The revising barrister having amended the ground by substituting the words, "That you have not resided at* 12, *Clifton-street, Norwich, for six calendar months next preceding the* 15*th day of July last, and that you have not throughout that period resided within the city of Norwich, or seven miles thereof:"*

Held, that the notice of objection was bad, and that the revising barrister had no power to make the amendment, it not being the correction of a mistake within the meaning of the Parliamentary and Municipal Registration Act 1878 (41 *&* 42 *Vict. c.* 26), *s.* 28, *sub-sect.* 2.

THIS was a case stated by the revising barrister for the city of Norwich.

The facts set out in the case were, so far as material, as follows:—

At a revision court, held before the revising barrister for the city of Norwich, to revise the list of persons entitled to be registered as freemen on the freemen's list of parliamentary voters for the parliamentary city of Norwich and the county of the same city, it was proved that William Arthur Wade (hereafter called the objector) duly signed and served a notice of objection to the name of Henry Bridges (hereafter called the appellant) being retained on the freemen's list of voters.

The appellant was entered on the list, and his entry and abode were stated in the list as follows:

Name of Voter.	Place of Abode.
Henry Bridges.	12, Clifton-street.

The notice of objection was as follows:

Notice of objection.—To Mr. Henry Bridges, of 12, Clifton-street, in the hamlet of North Higham, in the city of Norwich, and county of the same city.

I hereby give you notice, that I object to your name being retained in the list of persons entitled as freemen to vote in the election of members for the city of Norwich and county of the same city, on the following grounds, viz., that you do not reside at the above address.—Dated this 12th day of August 1887.

(Signed) WILLIAM ARTHUR WADE, of No. 45, Peacock-street, in the parish of St. Paul, in the city of Norwich, on the list of voters for the parish of St. Paul, in the said city, as a freeman.

The appellant did not for six calendar months next preceding the 15th July 1887 reside at 12, Clifton-street, or within the city of Norwich, or within seven miles thereof, and was therefore not entitled, under the statute 2 & 3 Will. 4, c. 45, s. 32, or otherwise, to have his name on the freemen's list of voters.

It was contended, on behalf of the appellant, that the notice of objection was bad because it did not point to non-residence of the appellant at 12, Clifton-street, during the qualifying period, but only to non-residence at the date of the notice.

On behalf of the objector the revising barrister was then asked to amend the notice of objection so as to raise the objection of non-residence within Norwich or seven miles thereof during the qualifying period.

On behalf of the appellant it was urged that the revising barrister had no power to amend the objection in the manner asked by the objector.

The revising barrister considered that the notice was informal on the grounds urged by the appellant, but that it gave sufficient information to the appellant that objection would be taken that he did not reside in 12, Clifton-street or elsewhere in Norwich, or within seven miles thereof during the qualifying period, and that he had

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

power, under the statute 41 & 42 Vict. c. 26, s. 28, sub-sect. 2, to make the amendment asked, and amended the notice of objection by inserting the following grounds of objection: "That you have not resided at the above address for six calendar months next preceding the 15th day of July last, and that you have not throughout that period resided within the city of Norwich or within seven miles thereof," and allowed the objection and expunged the appellant from the list.

If the court should be of opinion that the notice of objection in its original form was good, or that the revising barrister had power to make the amendment sufficient to raise the objection arising from the above-mentioned facts, the list was to remain as revised; if the court should be of opinion that the notice of objection was bad, and that the revising barrister had not power to make the amendment made, or such other amendment, the name of the appellant was to be restored to the list.

The decisions in the cases of notices of objection against seven other persons in the list of freemen were given by the revising barrister on the same grounds and in the same manner as in the case of the notice of objection against the appellant, and the appeals on all the decisions were consolidated, and the objector having declined to be respondent in the appeal the revising barrister named Henry Blake Miller, the town clerk of the city, as respondent therein.

The 32nd section of 2 Will. 4, c. 45, provides as follows:

Every person who would have been entitled to vote in the election of a member or members to serve in any future parliament for any city or borough not included in the schedule marked A. to this Act annexed (*a*) either as a burgess or freeman, or in the city of London as a freeman and liveryman, if this Act had not been passed, shall be entitled to vote in such election, provided such person shall be duly registered according to the provisions hereinafter contained; but that no such person shall be so registered in any year unless he shall on the last day in July (*b*) in such year be qualified in such manner as would entitle him then to vote if such day were the day of election and this Act had not been passed, nor unless where he shall be a burgess or freeman, or freeman and liveryman of any city or borough, he shall have resided for six calendar months next previous to the last day of July (*b*) in such year within such city or borough, or within seven statute miles from the place where the poll for such city or borough shall heretofore have been taken, &c.

The County Voters Registration Act 1865 (28 Vict. c. 36) provides:

Sect. 7. No person objected to under the provisions of this Act shall be required to give evidence before the revising barrister in support of his right to be registered, otherwise than as such right shall be called in question in such ground or grounds of objection.

The Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26) provides by the 26th section as follows:

The notice required by the 17th and 20th sections of the Parliamentary Registration Act 1843 to be given to persons objected to in boroughs for the purposes of the revision of the lists of voters for a parliamentary borough, and the burgess lists for a municipal borough, whose burgess lists are revised under this Act, shall state specifically the ground or grounds of objection, and sects. 7 and 8 of the County Voters Registration Act 1865 shall extend to such objections.

And by the 28th section:

A revising barrister shall with respect to the lists of voters for a parliamentary borough and the burgess lists for a municipal borough which he is appointed to revise, perform the duties and have the powers following:

(2) He may correct any mistake which is proved to him to have been made in any claim or notice of objection.

Asquith for the appellant. — The ground of objection stated in the notice, viz., that the appellant did not reside at the above address, i.e., at 12, Clifton-street, on the 12th Aug. 1887, is invalid, and the revising barrister had no power to amend it. The appellant's qualification under 2 Will. 4, c. 45, s. 32, was, first, that he was a freeman of the city; and, secondly, that he had resided somewhere within the city or seven miles thereof for six months before the 15th July 1887. Consequently the particular address mentioned in the ground of objection had nothing to do with his qualification. The 26th section of the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26) provides that the grounds of objection shall be stated specifically and the 7th section of the County Voters Registration Act 1865 (28 Vict. c. 36) which, it is provided, is to apply, provides that no person objected to under the provisions of the Act shall be required to give evidence before the revising barrister in support of his right to be registered, otherwise than as such right shall be called in question in such ground or grounds of objection. The grounds of objection, therefore, are to be strictly adhered to, but here the only ground stated is non-residence at the date of the notice of objection, which is not a valid ground of objection at all. As to any other ground of objection the revising barrister had no right or power to hear evidence. Nor again had the revising barrister any right to amend. His power under the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 28, sub-sect. 2, is limited to the correction of mistakes, but what has been done by the revising barrister in this case cannot in any way be called the correction of a mistake. He has in fact taken a ground of objection which has only one meaning, and extracted from it other grounds of objection not contained in the original ground, and in doing so he has exceeded his power, and his decision must therefore be reversed.

R. S. Wright for the respondent. — The only possible objection which could be made to the appellant on the score of residence is that he had not resided in the city or within seven miles thereof for the six months previous to the 15th July, and the revising barrister rightly amended on the ground that, as the notice clearly indicated to the appellant the only possible objection which could be taken against him, the insufficient description of the ground in the notice was a mistake which he had power under the Act to amend. [POLLOCK, B.—Can you assume for this purpose that every man knows the law? May not the voter have thought that the objection was that he was not residing there at the date of the notice?] The amendment was a matter of form. The present statutory form of notice of objection is Form I., No. 2, of the third schedule

(*a*) The city of Norwich is not included in this schedule.

(*b*) Now the 15th day of July by the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 7.

of the Registration Act 1885 (48 Vict. c. 15), the forms contained in the schedules to that Act being substituted for those previously in use, and by the 18th section of the Act a disregard of any form or instruction shall not of itself invalidate any list, notice, or other thing.

Asquith was not called upon to reply.

LORD COLERIDGE, C.J.—I am of opinion that this appeal must be allowed. It was a part of the qualification of the appellant in this case that he should have resided for the six calendar months next previous to the 15th July within the city of Norwich, or within seven miles of the place where the city poll has heretofore been taken, and it was therefore necessary for an objection on the ground of non-residence, in order to be valid, to state that he did not reside for six months previous to the 15th July within the city or seven miles thereof. But the objector does not state this. He simply says that he objects on the ground that the appellant was not residing at 12, Clifton-street, on the 12th Aug. Now, it has been pointed out that the appellant may not have lived at Clifton-street for six months previous to the 15th July, and yet have been perfectly qualified by reason of residence at some other place within the city or the prescribed distance, so that, even if we were to take the ground of objection as being that the appellant had not resided at 12, Clifton-street, for the prescribed six months, it would still be insufficient, and the non-residence, if proved, would not show that the appellant was not entitled to be registered as a voter. But it is said that the revising barrister had power to amend the notice of objection. He may, it is true, amend notices of objection, but only within the limits of the powers of amendment conferred on him by statute, and in the case of notices of objection his statutory power of amendment is limited by the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 28, sub-sect. 2, to the correction of mistakes. Here, if the objection which is stated is good, it is perfectly correctly stated, and there is nothing whatever in the notice of objection to show that any mistake has been made, either in the ground of objection or in the mode of stating it. Its only fault is that it is bad, and to create an objection which is good out of an objection which is clearly bad is going very far beyond the powers of amendment conferred on revising barristers by statute. I think, therefore, that the notice of objection was bad, and that the decision of the revising barrister must be reversed, and the appellant's name restored to the register.

POLLOCK, B.—I am of the same opinion. I find nothing in the statute defining the duties and powers of revising barristers which could lead me to suppose that it was the intention of the Legislature to confer upon them such an extensive power of amendment as that which it is contended was rightly exercised by the revising barrister in this case. I think, if we allowed such an amendment as this to be made, it would in all probability lead to very troublesome consequences.

HAWKINS, J.—I am not at all sure that the objector did not, in his ground of objection, say exactly what he meant, and make a mistake in his view of the law of registration. If he did make such a mistake, and imagined that the ground of objection which he stated with perfect clearness in his notice was a good ground on which to object to the appellant's name being retained on the register, the revising barrister had certainly no power to amend the notice of objection, and substitute a good ground for a faulty one. I think the appeal must succeed. *Appeal allowed.*

Solicitor for appellant, *C. S. Gover*, for *L. W. English*, Norwich.

Solicitors for respondent, *Sharpe, Parkers, Pritchard*, and *Sharpe*.

Monday, Nov. 28, 1887.

(Before Lord COLERIDGE, C.J., POLLOCK, B., and HAWKINS, J.)

BEAL (app.) *v.* THE TOWN CLERK OF EXETER (resp.). (*a*)

Parliament—Registration of voters—Freeholder of city being a county of itself—Residence—2 & 3 Will. 4, c. 45, s. 31.

By 2 & 3 Will. 4, c. 45, s. 31, no freeholder shall be registered in any year as a parliamentary voter in a city which is a county of itself, "unless he shall have resided for six calendar months next previous" to the 15th July (41 & 42 Vict. c. 26, s. 7) in such year within such city, or within seven statute miles thereof, or of any part thereof.

A freeholder entitled to be registered as a parliamentary voter for the county of the city of Exeter in all respects, except residence, was during part of the prescribed time employed as a draper's assistant in London, a bedroom, for which he paid no rent, being during the whole time set apart for his exclusive use in his father's house within the city of Exeter.

Held, that he had not resided in Exeter during the prescribed time within the meaning of the statute.

THIS was a case stated by the revising barrister appointed to revise the list of voters for the city and county and borough of the city of Exeter.

The facts stated in the case were, so far as material, as follows:—

At a court held by the revising barrister for the revision of the lists of voters for the borough of Exeter, James Beal duly objected to the name of Louis S. Robins being retained on the list of persons entitled to vote in the election of a member for the borough of Exeter in respect of his freehold house in Ware's-buildings, St. Thomas, on the ground that the said Louis S. Robins had not resided for the six calendar months next previous to the 15th July 1887 within the borough or within seven miles thereof, pursuant to 2 & 3 Will. 4, c. 45, s. 31. The following facts were proved:

The qualification of Louis S. Robins was duly proved and admitted in all other respects.

For a long time previous to the month of Jan. 1887 Louis S. Robins had continuously resided at his father's house, 73, Cowick-street, within the borough, as a member of his father's family, and a separate bedroom was set apart for his exclusive use in the house, with the right by his father's permission to use it up to the present time. No rent was paid by him to his father for such room.

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

During the month of Jan. 1887 Louis S. Robins left his father's house, and went to London for the purpose of seeking employment there as a draper's assistant. In a short time after his arrival in London he succeeded in obtaining employment under a verbal arrangement as an indoor assistant in a wholesale draper's establishment for certain work which required his being in London while so engaged. It was understood that when the particular work for which he was engaged was completed his employment would cease. The work took two months to complete, and he then left, and sought other employment in London, but being unsuccessful, returned to his father's house at Exeter, and again occupied the aforesaid bedroom therein, and was so residing at and during Easter 1887.

During the two months he was so employed in London he could not conveniently be in his father's house at Exeter.

He remained at his father's house at Exeter for a period of three weeks or more when he left, during the month of May, and went again to London for the purpose and with the intention of seeking employment there. Within a short time after his arrival he succeeded in obtaining employment as an indoor assistant in a draper's establishment, and from that time until after the 15th July last he continued in the said service and occupation, and to be in London, and did not at any time within such period return to his father's house at Exeter.

The employment on which he was last engaged required his being in London, and he might not during the working days, although he could from Saturday night to Monday morning, have returned to his father's house at Exeter.

The said Louis S. Robins is a single man, and had no other house but the house of his said father and the room therein during the whole time aforesaid, except under the circumstances before stated when he was employed in London.

The appellant contended that Louis S. Robins was not a free agent to return to or reside at his father's house in Exeter when he was engaged in working for his employers in London, and that consistently with the obligation which he had undertaken he was not at liberty to return to Exeter when he pleased; and, further, that he had no legal right to reside at his father's house, his only right (if any) to use it being subject to his father's permission. The cases of *Ford* v. *Drew* (41 L. T. Rep. N. S. 478; 5 C. P. Div. 59), *Ford* v. *Hart* (29 L. T. Rep. N. S. 685; L. Rep. 9 C. P. 273), *Ford* v. *Barnes* (53 L. T. Rep. N. S. 675; 16 Q. B. Div. 254), and *Spittal* v. *Brook* (56 L. T. Rep. N. S. 364; 18 Q. B. Div. 426) were cited by the appellant.

On behalf of Louis S. Robins it was contended that, notwithstanding his employment in London, he had a residence actual or constructive at his father's house at Exeter which was set apart for him there, and which he occupied and intended to occupy whenever he returned to Exeter.

The revising barrister decided that the residence of Louis S. Robins at his father's house was a constructive residence in Exeter, and sufficient to satisfy the requirements of the Act 2 & 3 Will. 4, c. 45, s. 31, and retained his name on the list of voters.

If the court was of opinion that his decision was wrong the register was to be amended by erasing the name of Louis S. Robins from the said list.

The 31st section of 2 & 3 Will. 4, c. 45, provides as follows:

> In every city or town, being a county of itself, in the election for which freeholders or burgage tenants either with or without any superadded qualification now have a right to vote, every such freeholder or burgage tenant shall be entitled to vote in the election of a member or members to serve in all future Parliaments for such city or town, provided he shall be duly registered according to the provisions hereinafter contained; but that no such person shall be so registered in any year in respect of any freehold or burgage tenement unless he shall have been in the actual possession thereof, or in the receipt of the rents and profits thereof for his own use, for twelve calendar months next previous to the last day of July in such year (except where the same shall have come to him at any time within such twelve months by descent, succession, marriage, marriage settlement, devise, or promotion to any benefice in a church, or to any office) nor unless he shall have resided for six calendar months next previous to the last day of July (*a*) in such year within such city or town, or within seven statute miles thereof, or of any part thereof.

J. Alderson Foote for the appellant.—The voter objected to had not resided for the six calendar months next previous to the 15th July within the city, or within seven miles thereof, within the meaning of 2 & 3 Will. 4, c. 45, s. 31. The meaning of the word "residence" in this Act is laid down by Erle, C.J. in *Powell* v. *Guest* (18 C. B. N. S. 72). He there says: "I entirely subscribe to the doctrine so clearly laid down in Elliot on Registration, 2nd edit. 204, where the learned author says that, in order to constitute residence, a party must possess at the least a sleeping apartment, but that an uninterrupted abiding at such dwelling is not requisite. Absence, no matter how long, if there be the liberty of returning at any time, and no abandonment of the intention to return whenever it may suit the party's pleasure or convenience so to do, will not prevent a constructive legal residence. But if he has debarred himself of the liberty of returning to such dwelling by letting it for a period, however short, or has abandoned his intention of returning, he cannot any longer be said to have even a legal residence there." In this case the voter by entering an employment in London debarred himself of the liberty of returning to his dwelling and therefore had no constructive residence in Exeter sufficient to entitle him to be placed on the list of voters. The case of *Ford* v. *Drew* (41 L. T. Rep. N. S. 478; 5 C. P. Div. 59) is exactly in point. There the respondent, in other respects duly qualified, had, during a portion of the statutory period, been actually absent in London under articles to a solicitor there, a bedroom in which some of his property remained being always set apart for his exclusive use in his father's house with the right to use it whenever he thought fit, and in that case Grove, J. said: "It would be reasonably impracticable for him to serve a person to whom he was articled in London and still reside with his father except by going down on Saturday and returning to London on Sunday night or Monday morning. That he might possibly do without the solicitor's permission, but he has no power to do more. He

(*a*) Now altered to the 15th July by 41 & 42 Vict. c. 26, s. 7.

has not the power, without committing a breach of his contract, to go to his father's house at all except on these occasions . . . Can that be called consistent with residence in Exeter? I am of opinion that it cannot." The learned judge also points out that the power of returning to his father's house was dependent upon two permissions, that of his father and that of the solicitor, and concludes that the claimant could not be said to have his residence in a place which he could only visit on improbable occasions and subject to two permissions. It is submitted that no valid distinction can be drawn for this purpose between the conditions under which an articled clerk is bound to serve a solicitor and those under which the claimant in this case is serving. It is true that the clerk is bound to serve his master, and that master only, for the full time of his articles, but in both cases there is the same absence of the liberty to return at any time. The dictum of Erle, C.J. in *Powell* v. *Guest*, to the effect that "a man who is imprisoned for debt has not absolutely lost the liberty of returning to his place of residence, for by paying the debt he becomes free to return," does not apply to this case, because, as Grove, J. points out in *Ford* v. *Drew* (*ubi sup.*), "in that instance the man could return at his own will and pleasure without doing any wrong to anybody." Here the claimant, in order to return at any time, would have had to break his contract of employment. [LORD COLERIDGE, C.J.—If we were to allow the vote on this occasion, is there any reason why the voter should not continue wholly in London for years and still retain his vote by alleging a vague intention to return?] No; the same considerations would apply. In *Ford* v. *Hart* (29 L. T. Rep. N. S. 685; L. Rep. 9 C. P. 273) the same principles were adhered to. There an officer in the army was in the habit of always living with his mother when on leave from his regiment, and had actually resided with her during three months of the qualifying period, and it was held that, as he could not return at his own option and only with the permission of his commanding officer, he was not entitled to be placed on the list of voters. It is submitted that *R.* v. *Mitchell* (10 East, 511), in which freemen of Norwich quartered at Colchester but having dwelling-houses in Norwich in which their families resided and to which they at times resorted on furlough, were held to be inhabitants within the charter of Norwich and the local Act 3 Geo. 2, c. 8, has now been completely overruled in *Atkinson* v. *Collard* and *Ford* v. *Barnes* (53 L. T. Rep. N. S. 675; 16 Q. B. Div. 254) and in *Spittal* v. *Brook* (56 L. T. Rep. N. S. 364; 18 Q. B. Div. 426).

The respondent did not appear.

Lord COLERIDGE, C.J.—In this case we have to put a construction on the words of the 31st section of 2 & 3 Will. 4, c. 45, "unless he shall have resided for six calendar months next previous to the 15th July" (as the date is now) "in such year within such city," and to decide whether the facts of the case can by any reasonable interpretation be brought within the section. If they cannot then the decision of the revising barrister must be reversed, and the name of the voter erased from the list. Now, I am of opinion that the facts cannot be brought within the meaning of the section. It is difficult to lay down any exhaustive rule as to what will or will not constitute residence, and it would almost seem that it must be in the last resort a question of common sense to be determined by the court on the facts of each case. If we are to say that this man resided in Exeter within the meaning of the section, we should be obliged to say that a man might comply with the words there used while remaining away for three or four years, and having only a vague intention of returning at some future time; and surely no one possessing an ordinary amount of common sense would say that such a man resided there in any usual acceptation of the term. There are, it is true, many cases in which a man, although absent for the length of time I have just mentioned, has been held to have a constructive residence at some place by the presence there of his wife and children. An illustration of this would be the case of a man who goes to sea, who as a rule without doubt intends to return. As a fact he is kept away for a long period of time, but however long his absence he means to return at the end of the voyage. In such a case a revising barrister might well say that there was a constructive residence notwithstanding a long absence. But in the present case I fail to see that there are any considerations of the kind I have mentioned. The voter objected to is an unmarried man, and it is suggested that he resides in a single room which is kept for his use in his father's house. If we decided that there was a constructive residence in this case we should be deciding that a man who is clearly not residing personally, and for whom no one is residing as a representative, has a constructive residence. He has himself gone away and obtained employment elsewhere, which, as far as I can see, is of indefinite duration, and it is impossible in these circumstances to say that he has a constructive residence. We must therefore answer the question put by the revising barrister in the negative, and his decision must be reversed, and the register amended by striking out the name of the voter.

POLLOCK, B.—I quite agree, and for the reasons given by my Lord.

HAWKINS, J.—I am of the same opinion. The man whose vote is in question could not return without breaking his contract with his employer, and I do not see any evidence of any intention to return to Exeter at all. In these circumstances it cannot, I think, be said that he resided in Exeter, and the appeal must therefore be allowed with costs against the respondent.

Appeal allowed.

Solicitor for the appellant, *S. D. Hamilton*, for *Friend* and *Beal*, Exeter.

Monday, Nov. 28, 1887.

(Before Lord COLERIDGE, C.J., POLLOCK, B., and HAWKINS, J.)

EDWARDS (app.) *v.* LLOYD (resp.).(*a*)

Parliament—Registration of voters—"Alms which by the law of Parliament disqualify from voting"—2 Will. 4, c. 45, s. 36.

Notwithstanding that the almspeople of Ruthin Hospital appointed under 26 & 27 Vict. c. 59, ss. 17-32, earn money in addition to the six

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

shillings a week which they receive from the charity under the 24th section, to the amount of from three to nine shillings a week, and notwithstanding that they would not as a fact, assuming the non-existence of the charity, be obliged to rely upon the poor law as a means of subsistence, yet they are in receipt of alms which by the law of Parliament disqualify them from voting within the meaning of 2 *Will.* 4, *c.* 45, *s.* 36, *inasmuch as one of the qualifications for their election is under the* 23*rd section that they are, by ill-health, accident, or infirmity, unable to maintain themselves by their own exertions.*

THIS was a case stated by the revising barrister for the borough of Ruthin. The facts stated in the case were, so far as material, as follows:—

On the 22nd Sept. 1887 the revising barrister held a court for the revision of the list of voters for the parliamentary and municipal borough of Ruthin.

The name of John Evans, of 11, Churchyard, Ruthin, and those of four other persons, appeared on Division 1 of the Parliamentary and Municipal List of Voters for the borough of Ruthin, and were duly objected to by the appellant, Thomas Edwards, of Colomendy-terrace, Ruthin-road, Denbigh, upon the ground that they had been during the qualifying year in receipt of alms which by the law of Parliament disqualified them from being registered as voters for a parliamentary borough, or as burgesses of a municipal borough.

It was proved before the revising barrister that all the said persons lived in almshouses (the qualifying property), and received an allowance of six shillings per week each.

The almshouses and charitable endowment in question are managed, and all arrangements connected with them are carried out under the statute 26 & 27 Vict. c. 59, ss. 17-32, the qualifications necessary for those who apply for election to the charity being contained in the 23rd section.

These sections are, so far as they are material, as follows:

RUTHIN HOSPITAL.

17. The hospital building and the appurtenances shall be used only for the purposes of the charity.

18. The establishment of the hospital shall consist of a warden and twelve almspeople, of whom ten shall be poor men to be called brethren and two shall be poor women to be called sisters.

22. The hospital building shall be appropriated and used for the occupation of the almspeople, in such a manner and subject to such reasonable regulations as the governors may from time to time prescribe consistently with the provisions of this scheme.

23. The almspeople respectively shall be poor persons not less than fifty years of age, of good character and not having a wife or husband living, who shall have resided in the borough of Ruthin without receiving parish relief for not less than three years next preceding the time of their appointment, and who by ill-health, accident, or infirmity, shall be unable to maintain themselves by their own exertions, with a preference for those persons who, being otherwise qualified as aforesaid, shall have become reduced by misfortune from better circumstances.

24. There shall be paid to each almsperson, out of the income of the hospital endowment, a weekly sum of not less than six shillings, and the governors in lieu of paying the whole amount of such weekly sums in money may from time to time expend any suitable portions thereof in providing the almspeople respectively with fuel, clothing, or other necessaries or comforts as the governors in their discretion shall think fit.

25. Every vacancy in the hospital shall be filled up by the governors by the appointment of some duly qualified person at their next half-yearly meeting which shall be held after the lapse of one calendar month from the occurrence of such vacancy.

30. If any almsperson shall be guilty of insobriety, insubordination, breach of rules, or immoral or unbecoming conduct, or shall become disqualified from retaining his or her appointment, or if in any case it should appear that any almsperson has been appointed without having the required qualifications, the governors upon proof thereof to their satisfaction may remove any such almsperson, and take possession of the tenement or room occupied by him or her, and may proceed to appoint another almsperson in his or her place, or in any such case (except that of disqualification) the governors may, if they so think fit, suspend the payment of the stipend to the almsperson either wholly or in part, during such time as they shall think fit and expedient.

31. No almsperson shall be permitted to let or part with the possession of the room or rooms allotted to him or her, or to suffer any stranger to occupy the same or any part thereof.

32. The governors may from time to time prescribe such reasonable regulations as they may consider expedient for the government of the almshouses and the inmates thereof, provided that no such regulations be at variance or inconsistent with any of the provisions of the scheme.

At the request of the appellant, the revising barrister appended a copy of the form of application which has to be filled up by all persons applying for election to the charity under the 26th section of the Act, and his attention was drawn especially to the seventh question, which he was informed by the clerk to the governors of the charity is invariably answered in the affirmative.

The form of application contained a number of questions, of which the sixth was, "Has he within the last three years received parish relief of any kind?" and the seventh, "Is he, from age, ill-health, accident, or infirmity, unable to maintain himself?" The other questions were not material.

It was stated to the revising barrister by the clerk that persons applying for election were not of the class who but for the benefits of the charity would have necessarily become dependent upon the poor law, and it was proved to his satisfaction by four of the persons objected to that they were earning money in addition to what they received from the charity, varying in amount from an average of three shillings a week to an average of nine shillings a week; and they appeared to the revising barrister to be well-to-do people of their class, although advanced in years. It was also proved that Joseph Jones, of 2, Churchyard, was on the parliamentary list of voters for one of the divisions of the borough of Ruthin in respect of a tenement which he occupied for the purposes of his trade as a shoemaker, and which he had continuously occupied for forty years.

It was a disputed point between the parties whether or not, assuming the non-existence of the charity, some or all of the persons objected to would be obliged to rely upon the poor law for the means of subsistence, and the revising barrister came to the conclusion upon the evidence that they would not.

It was contended, on the part of the appellant, that the 23rd and 24th sections of the scheme, taken in conjunction with the seventh question on the printed form of application, brought the whole of the persons objected to within the prohibition contained in 2 Will. 4, c. 45, s. 36, and that their names ought to be removed from the parlia-

mentary and municipal list of voters for the said borough of Ruthin, and he relied upon the case of *Harrison* v. *Carter* (35 L. T. Rep. N. S. 511; 2 C. P. Div. 26), and of *Baker* v. *Town Clerk of Monmouth* (53 L. T. Rep. N. S. 668), in support of this view.

The revising barrister held that the house room and allowance received by the said persons under the said scheme did not amount to parochial relief or other alms which by the law of Parliament would disqualify them from being registered as voters for the said borough, and retained their names upon the list accordingly.

The 36th section of the Reform Act 1832 (2 Will. 4, c. 45) provides as follows:

That no person shall be entitled to be registered in any year as a voter in the election of a member or members to serve in any future Parliament for any city or borough who shall within twelve calendar months next previous to the last day of July (*a*) in such year have received parochial relief or other alms which by the law of Parliament now disqualify from voting in the election of members to serve in Parliament.

Asquith for the appellant.—The persons objected to were in the receipt of alms which disqualified them from being registered as voters within the meaning of 2 Will. 4, c. 45, s. 36, and the revising barrister therefore was wrong in retaining their names upon the register. The fact that the seventh question in the form of application was always answered in the affirmative shows that they were unable to support themselves, and the finding of the revising barrister that they would not necessarily be dependent upon the poor law but for the charity, and that some of them earned a small sum of money weekly, does not rebut this. In *Harrison* v. *Carter* (35 L. T. Rep. N. S. 511; 2 C. P. Div. 26) it was laid down that the word "alms" in this section is not confined to parochial donations or sums distributed by the overseers other than from the funds collected for the poor rates, but may include moneys distributed annually from the income of a private charitable trust bequeathed by an individual for the use of the poor inhabitants of a parish, and it is submitted that the relief afforded in the present case is of a similar character. It would appear from the judgment of Lord Coleridge, C.J. in that case, quoting Erle, C.J. in *Smith* v. *Hall* (15 C. B. N. S. 485), that it was the intention of the Legislature that persons so placed by their indigence as to be presumably subservient and destitute of all freedom of mind should not be permitted to exercise the franchise, or, as he says in another place, "persons who are likely to be susceptible of manipulation for a purpose which the Legislature has always been anxious to discourage, and peculiarly open to the temptation from which this enactment was meant to shield them;" and Lindley, J. enunciates the same principle when he says: "Here we have all the three elements of disqualification as pointed to in the decisions—poverty, the receipt of alms, and the absence of that independence which is essential to the qualification of a vote." In *Baker* v. *The Town Clerk of Monmouth* (53 L. T. Rep. N. S. 668) again Lord Coleridge, C.J. said: "It is not the mere receipt of eleemosynary relief that disqualifies a man from voting, otherwise fellows of colleges might be disqualified, for they are in one sense in the receipt of alms; but what receipt of alms will disqualify is a question which depends upon the circumstances of each particular case. There are cases in which persons of extreme indigence are kept from parochial relief in the almshouses by some charity to which they are entitled. The question is whether in this case the alms disqualify the recipient from exercising the franchise. I think that they do." The only fact which distinguishes the present case from that case is, that here the almspeople were earning from three to nine shillings a week in addition to the amounts they received from the charity, but that must also have been the case in *Harrison* v. *Carter* (*ubi sup.*), in which the alms were an annual donation, and it is submitted that that fact does not take the case out of the principle laid down in the cases cited.

The respondent did not appear.

Lord COLERIDGE, C.J.—It appears from the case that the persons whose votes are in question are, from age, ill-health, accident, or infirmity, unable to maintain themselves by their own exertions, and I think that that fact brings their case within the principle of the cases referred to. Our decision therefore must, I think, be contrary to that at which the revising barrister has arrived.

POLLOCK, B.—There are no doubt numerous instances in which coals and gifts of a similar kind are given to poor people, where it would not be reasonable that they should be deprived for that reason of their votes; but here the persons objected to would be unable to maintain themselves, but for the relief which is given them. I think therefore that they are persons in the receipt of alms which by the law of Parliament disqualify them from voting.

HAWKINS, J.—I am of the same opinion.

Appeal allowed.

Solicitors for the appellant, *Kennedy, Hughes,* and *Kennedy,* for *R. Humphreys Roberts,* Denbigh.

(*a*) Now July 15 by the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 7.

Wednesday, Nov. 30, 1887.

(Before Lord COLERIDGE, C.J., POLLOCK, B., and HAWKINS, J.)

DONOGHUE (app.) *v.* BROOK (resp.). (*a*)

Parliament—Registration of voters—Borough vote—Inhabitant occupier—Non-commissioned non-combatant officer of militia—Militia bandsman—Break of residence during annual training—The Representation of the People Act 1867 (30 & 31 *Vict. c.* 102), *s.* 3.

Non-commissioned non-combatant officers and bandsmen of militia regiments, who in any qualifying year are absent from their dwelling-houses in camp during the annual twenty-seven days training of the regiment, are not entitled to be registered as voters under the 3rd section of the Representation of the People Act 1867 (30 & 31 *Vict. c.* 102) *as inhabitant occupiers of such dwelling-houses, notwithstanding that they have no duties to perform at night, that reasonable leave to return to such houses is always given as of course, and that no leave would be required if it were possible to return to the camp in time for*

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

duty in the morning, inasmuch as by the Queen's Regulations they cannot leave the camp without the leave of the commanding officer, and have not therefore the power of returning to their homes at any time.

THIS was a case stated by the revising barrister for the South-Eastern Division of the county of Lancaster.

The facts set out in the case were, so far as material, as follows:—

In the revision of the lists of voters for the borough of Warrington, George Brown, militia staff-quartermaster sergeant, and ten other non-commissioned officers on the permanent staff of Her Majesty's Auxiliary Forces, William Jolley, and five others of the Militia regimental band, were placed by the overseers on the occupiers' list Division I. as resident inhabitant occupiers for the borough of Warrington, and in the township of Warrington within the borough.

The said occupants were objected to on the grounds of non-occupation and non-residence in each case. The forms of objection being as follows:

1. That you have not for twelve months previous to the 15th July last occupied the qualifying premises.

2. That for the six months preceding the 15th July last you have not resided within seven miles of the parliamentary boundary of the borough of Warrington.

The votes of George Brown and William Jolley, and the fifteen applicants whose claims were the same, were duly allowed by the revising barrister.

The following were the facts established in support of the objections in each of these cases respectively:

George Brown, married, with a family, has rented a dwelling-house situated at 157, Orford-lane, as a weekly tenant, and has, by his wife, family, and furniture, occupied the said house during the full qualifying year. He is quartermaster-sergeant of the Liverpool Regiment of Militia now stationed at Warrington, and was away from Warrington with the regiment during the annual training at Altcar in the same county, for a period of twenty-six days in all, viz., from the 1st to the 3rd July, and from the 7th July to the 1st Aug. all inclusive. He returned on the 3rd July on duty to Warrington, and remained until the 7th, when he went back to the camp at Altcar aforesaid, which is within twenty-five or twenty-six miles of Warrington. He returned on the 1st Aug. on duty, and subsequently went to sleep at his house at Warrington upon verbal leave given him by his superior officer. He has never returned without leave. Reasonable leave is always given as of course, and he has never been refused such leave, and believes that leave to return to Warrington would be granted every night upon personal application if he needed it, and that no leave would be required to enable him to return home from Altcar to Warrington if he were ready at Altcar in the morning to do his duty. He is never required at the camp, and has no duties to perform at night, nor offices of any kind in reference to the men's quarters or picket duty more in Altcar than in Warrington. When in Warrington and not on the annual training he slept in his own house nightly and required no leave. If Altcar had been nearer he would have returned home to sleep each night without leave, because no leave would be required, as he was not wanted for any purpose at camp as a non-commissioned non-combatant officer. His wife, family, and furniture remained in the same house at Warrington during his entire absence, and were still there.

William Jolley, by trade a file cutter, occupied a dwelling-house, 15, Birchall-street, Warrington, with his wife and family, as weekly tenant, during the whole qualifying year. He was a drummer in the band of the Liverpool Militia Regiment, and on the permanent staff. He was away at Altcar for twenty-seven days, and returned home during that time to his wife and family at Warrington on three occasions, once with written and twice with verbal leave, and twice in one week. He was never refused leave, and had no duties to perform in camp after twelve noon parade, neither on picket nor on guard. Sometimes on Tuesday and Friday he played at the officers' mess dinner, but the band did not play every evening. He has no quarters in barracks, and receives lodging money all the year round, and pays his rent in the same way as other householders from his own earnings. He can remove to any other house he chooses, and the military authorities exercise no superintendence over his choice, and he is not bound to reside within any given distance, and unless he receives special instructions to the contrary, having no duties to perform, would return home to his house from Altcar if it were convenient or practicable every night. He had no intention to give up his house or remove while at Altcar, but to return when it suited him, and at the end of the training. He has always so returned to his own residence since he first went with the regiment to Altcar, and believes that leave to return would be granted him as of course every night if he required it and upon application, there being no reason to the contrary, and if he could return to camp in time to perform his duties in the morning. If Altcar had been in or near Warrington he knew no reason why leave would be required to enable him to return home every night as usual if he wished to do so.

The objector drew my attention to the 15th section of the Army Act 1881, part 5, par. 175, sub-sect. 5 of sect. 176, as amended by the Acts of 1885, 1886, and 1887, and to the Queen's Regulations 1883, sect. 8, par. 87, and par. 245 Rules of Procedure Forms of Charges.

Upon the facts adduced in evidence before the revising barrister he found that the persons so objected to were absent from their homes under no compulsion of law, and were in no sense domiciled at or resident inhabitants of Altcar, and their presence at Altcar was not enforced by the necessity of performing any duty, and was voluntary subject to the requirements of military discipline and the discretion of the superior officers as expressed in Her Majesty's Regulations, and at no period had they waived their intention to return, as they returned in fact, and that the cases did not fall within the authority of *Ford* v. *Barnes* and *Ford* v. *Elmsley*, and that the names of the said seventeen persons ought to stand on the list as placed there by the overseers.

If the revising barrister was wrong in allowing the claims of these persons respectively, and the court should be of opinion that they were not

duly qualified inhabitant occupiers under the Representation of the People Act 1867, s. 3, and the enactments amending or affecting the same, their names were to be expunged from the register as not entitled to vote in respect of the necessary household qualification.

The 3rd section of the Representation of the People Act 1867 (30 & 31 Vict. c. 102) provides as follows:

Every man shall, in and after the year 1868, be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in Parliament for a borough, who is qualified as follows—that is to say, (2) is on the last day of July (*a*) in any year, and has during the whole of the preceding twelve calendar months been an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough.

Henn Collins, Q.C. for the appellant.—The facts of this case bring it within the decisions in *Ford* v. *Barnes* (53 L. T. Rep. N. S. 675; 16 Q. B. Div. 254, *sub nom. Atkinson* v. *Collard*), and *Spittall* v. *Brook* (56 L. T. Rep. N. S. 364; 18 Q. B. Div. 421). In *Ford* v. *Barnes* the court, in deciding that a man who had been absent from his inhabitancy during the annual training of his regiment was not entitled to be registered, said: "The respondent did not therefore inhabit at Exeter during the whole of the 365 days making up the qualifying period. We think, however, that actual inhabitancy during every one of the days is not necessary, and that it is sufficient if the claimant can make out a constructive inhabitancy. But, in order to make out a constructive inhabitancy, there must be an intention of returning after a temporary absence, and a power of returning at any time without breach of any legal obligation." This principle was re-affirmed in *Spittall* v. *Brook* (*ubi sup.*), and the votes disallowed on the ground that there was not the power of returning at any time, notwithstanding that reasonable leave was granted as of course. In the present case also there was not the power of returning at any time, and therefore the inhabitancy was broken, and the revising barrister was wrong in retaining the names of the persons objected to upon the list, and they must consequently be struck out.

Mattinson for the respondent.—The revising barrister was right in retaining the names upon the list. The facts stated distinguish the case from the previous cases. [Lord COLERIDGE, C.J.—Do the new facts make any difference in the law applicable to the case? Do not the military rules preclude these men from leaving the camp during the period of training?] Leave being in all cases obtainable as of course, the power of returning at any time existed. It was in fact only the question of distance which prevented them from returning to their homes every evening, and had they been sufficiently near to enable them to be at the camp in time every morning, they would have returned every evening without leave. The leave was not leave to be absent during the night, during which these men being non-combatants had no duties, but to be absent during the early part of the morning until the arrival of the train from Warrington. In the argument in *Spittall* v. *Brook* (56 L. T. Rep. N. S. 365) Pollock, B. says: "A guard is always mounted in the night time in cases such as this, and the appellant, it must be presumed, had to take his turn, and, if so, how can you say his inhabitancy was not broken by the rules of the service?" That was one of the facts governing the decision in that case, which is not present here, it being found in the case that they had no night duties. [POLLOCK, B.—But the case does not show that they had the power of returning at any time.] Their absence did not under the circumstances break their inhabitancy of their dwelling-houses in which they left their families residing. The case of *R.* v. *Mitchell* (10 East, 511) is exactly in point. It was there held that freemen of Norwich, substitutes in the militia quartered at Colchester, but having dwelling-houses in Norwich, in which their families resided, and to which they at times resorted on furlough, were inhabitants within the charter of Norwich and a local Act requiring them to have been inhabitants for six calendar months previous to certain elections of corporate offices in order to qualify them to vote. In that case Lord Ellenborough said in his judgment: "Now, of what other place but of Norwich could these men be said to be inhabitants at the time? They had their own dwelling-houses or homes there, in which they left their families dwelling, and to which they returned from time to time when they obtained leave of absence from their regiment. They had no other abiding place than this; for the place where the regiment happened to be quartered could not be considered as such; and though they could not perform watch and ward at Norwich, yet they were liable there to all public burdens in respect of their houses there in which their families dwelt. They were therefore to be considered as *bonâ fide* inhabitants of the city, subject to have their inhabitancy there interrupted by the calls of the public service." [Lord COLERIDGE, C.J.—That case was cited in the argument in *Ford* v. *Barnes*, *ubi sup.*] There is no reason why the word "inhabitant" in the 3rd section of the Act of 1867 (30 & 31 Vict. c. 102), which we are considering in this case, should have a different meaning from that which it was held to have in the local Act and charter of Norwich, which were discussed in *R.* v. *Mitchell*. Many regiments of volunteers go out for an annual training, and during the period of the training they are under military regulations of precisely the same character as those relied upon by the appellant, and if this appeal is allowed, the effect of the decision will be to disfranchise all volunteers who go and leave their homes for the purpose of their annual training. [Lord COLERIDGE, C.J.—We will deal with that case when it arises. At present we are concerned with the case of militiamen only.]

Henn Collins, Q.C. was not called upon to reply.

Lord COLERIDGE, C.J.—I am of opinion that the facts of this case bring it within the principle of the cases previously decided. Members of militia regiments who leave their homes and go away with their regiments into camp for twenty-seven days for the annual training are during that period subject to the Queen's Regulations. By the Queen's Regulations for the Militia, during the annual training no non-commissioned officer can leave the camp without th leave of the commanding officer. That beine so, a non-commissioned officer has not the powe g

(*a*) Now the 15th July by Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 7.

when he is in camp during the period of the annual training, of returning to his home any time. There is, therefore, a break in his residence, and he is consequently not entitled to be registered as a voter under the 3rd section of the Representation of the People Act 1867 (30 & 31 Vict. c. 102). This is the fourth time we have come to this decision, and I hope that we shall not have to come to it for a fifth time.

POLLOCK, B.—The revising barrister has, it is contended, found certain facts which distinguish this case from previous cases. He has found one fact which was not found in *Spittall* v. *Brook*, viz., that the voters objected to had no duties to perform at the camp during the night time, but he has not found that they could return at any time to their wives and children without leave. This they could not do without a breach of the regulations, and the case therefore comes within the cases of *Ford* v. *Barnes* (*ubi sup.*) and *Spittall* v. *Brook* (*ubi sup.*), and the appeal must be allowed, and the register amended by striking out the names of the voters objected to.

HAWKINS, J.—I entirely agree.

Appeal allowed.

Solicitor for the appellant, *H. Fluker*, for *A. Browne*, Warrington.

Solicitors for the respondent, *Rowcliffes, Rawle*, and *Co.*, for *Nicholson, White*, and *Nicholson*, Warrington.

Friday, Dec. 2, 1887.

(Before POLLOCK, B. and HAWKINS, J.)

THE GUARDIANS OF THE POOR OF THE MEDWAY UNION (apps.) *v.* THE GUARDIANS OF THE POOR OF THE BEDMINSTER UNION (resps.). (*a*)

Poor law—Settlement—Residence partly as wife and partly as widow—The Divided Parishes and Poor Law Amendment Act 1876 (*39 & 40 Vict. c.* 61), *ss.* 34 *and* 35.

Although a wife derives her settlement from her husband under the 35*th section of the Divided Parishes and Poor Law Amendment Act* 1876 (*39 & 40 Vict. c.* 61), *her residence with her husband in any parish may nevertheless be "in such manner and under such circumstances as would in accordance with the several statutes in that behalf render her irremovable" within the meaning of the* 34*th section of that Act, and if the husband dies without having broken his, and by consequence his wife's residence, and his widow afterwards becomes chargeable, her residence as wife must be added to her residence as widow in order to ascertain whether she has gained a settlement in the parish under the section by a three years' residence.*

THIS was a case stated on the hearing, at the Easter General Quarter Sessions for the city and county of Bristol, of an appeal by the guardians of the Medway Union against an order of two justices for the removal of Caroline Baker, widow, and her three lawful children, Frederick, aged five years, Percy, aged three years, and Mabel, aged one year and eleven months, from the Bedminster Union to the Medway Union as the place of their last legal settlement.

The Court of Quarter Sessions confirmed the order subject to the opinion of the Queen's Bench Division on a case, which was, so far as material, as follows:

CASE.

On the 3rd March 1887 an order adjudicating the settlement of the paupers was made upon the guardians of the appellant union by two justices of the city of Bristol, upon the complaint of the respondent union.

On the 26th April 1887 the Court of Quarter Sessions of the city of Bristol heard an appeal against this order, and it was admitted by the appellants without putting the respondents to the proof that the pauper Caroline Baker had resided continuously with her husband William Baker in the parish of Gillingham, in the Medway Union, for two years and nine months at the time of her husband's death, and that after his death she continued as widow to reside in the said parish for a period of three months, and thereby completed a residence as wife and widow together of more than three years.

The pauper Caroline Baker was called as a witness, and proved herself and by other evidence that she and her husband had lived together and resided continuously in the parish of Gillingham, in the Medway Union, for more than three years prior to her husband's death. It was proved that the pauper's husband died on the 25th March 1886. The continued residence of the pauper as widow for three months in the said parish after the death of her husband was admitted.

The contention of the appellants was: That the order was bad on the face of it by reason of its being made (according to the statement in the grounds of removal under which the order of the justices was made) under sect. 34 of 39 & 40 Vict. c. 61, whereas if any settlement at all was shown it was a derivative settlement under sect. 35 of the same statute, and that under the 35th section no such settlement could now be gained; that no legal settlement was gained by the pauper in the appellants' union under sect. 34 of that statute, as her status of irremovability during her husband's life was in consequence of his residence in Gillingham for three consecutive years, which ultimately created his settlement under the statute; that the wife could not, whilst her husband was living, be gaining a settlement in her own right on the same grounds, and at the same time as the settlement was being created by her husband.

The respondents admitted that if the settlement were a derivative settlement from her deceased husband, the case of *The Guardians of the Maidstone Union* v. *The Guardians of the Holborn Union* (17 Q. B. Div. 817) was against her taking this derivative settlement, but contended that it would be a question for the Court of Appeal whether that case was right, and they contended that the pauper had gained a settlement under sect. 34 of the statute, and that the pauper's residence with her husband before his death could be added to and would coalesce with her residence after his death, so as to make up the term of three years required by sect. 34 for the acquirement of a settlement; and *Reg.* v. *Glossop* (12 Q. B. 117; 17 L. J. 171, M. C.) and *Reg.* v. *St. George's in the East* (22 L. T. Rep. N. S. 440; L. Rep. 5 Q. B. 364) were cited in support of this contention.

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

The learned Recorder held that it had been admitted or proved with corroboration sufficient under the 34th section that the pauper Caroline Baker had resided for more than three years with her husband prior to his death in the parish of Gillingham in such manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf render her irremovable, and that after his death such residence in like manner and under like circumstances was continued for three months, and that on these facts the pauper had gained a settlement under the 34th section, and confirmed the order of the justices.

The question for the opinion of the court was, whether on the above-mentioned facts the pauper gained a settlement in the appellants' union.

If the court should be of opinion that the pauper did gain a settlement as aforesaid, then the order of sessions was to be affirmed; and if not, to be quashed.

The 34th and 35th sections of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61) are as follows:

Sect. 34. Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or court think sufficient.

Sect. 35. No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

If any child in this section shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born.

Kinglake (with him *Douglas Metcalfe*) for the appellants).—The order of removal is bad, the pauper never having gained a settlement in the appellant union either under the 34th or 35th section of the Act. A wife cannot gain a settlement in her own right, but only a derivative settlement from her husband. As long as she is married she follows the husband's settlement, whatever that may be, and it is only when he dies that she begins to gain a settlement upon her own account. In *St. Giles, Reading*, v. *Eversley, Blackwater* (1 Str. 580) it was unanimously decided that, whatever doubt there might be about the children, the wife followed the last settlement of her husband, although she herself had apparently never resided there at all. Then, in *The Guardians of the Maidstone Union* v. *The Guardians of the Holborn Union* (17 Q. B. Div. 817) it was held that the term "wife" in 39 & 40 Vict. c. 61, s. 35, does not include a widow, and that therefore a pauper widow who had acquired no settlement since her husband's death did not take the settlement of her deceased husband. It cannot therefore be contended that the pauper in this case has a derivative settlement in any way under the 35th section. Nor has she gained a settlement in her own right under the 34th section, since during the lifetime of her husband she was not residing in the union in such manner and under such circumstances as would in accordance with the several statutes render her irremovable. A wife is not irremovable, because she has to follow her husband, and in *Reg.* v. *The Inhabitants of St Ebbes* (12 Q. B. 137) it was held that the word "removable" in such a statute, viz., 9 & 10 Vict. c. 66, s. 1, refers to the case of a man being legally removable, and not to his being in fact removable or not by reason of his presence in the parish or absence from it. Lord Denman, C.J. there says: "I am of opinion that the words 'when he is not removable' mean when he is irremovable by law, and not by the accidental circumstance of his having left the parish. According to this construction of the meaning of the word a wife can never reside under such circumstances as would render her irremovable, because she is always removable if her husband is, and no length of residence, however great, will affect the matter. Again, in *Reg.* v. *The Overseers of Manchester* (45 L. T. Rep. N. S. 679; 8 Q. B. Div. 50), a husband and wife had resided in a union for more than one year, and had thus acquired a status of irremovability. The husband left for America, and died there, and two months after his death the widow became chargeable, and it was held that the break of the husband's residence operated as a break of the wife's also, and that she not having re-acquired a status of irremovability by length of residence was removable. [HAWKINS, J.—No doubt a wife cannot acquire a status of irremovability unless the husband does; but, suppose a man and his wife live for twenty-five years in a parish, and are not removable because the man has acquired a status of irremovability and has received no relief, do you say that on the death of the husband the widow, if she becomes chargeable, is removable?] Yes, she takes her maiden settlement in accordance with the cases above cited. [HAWKINS, J.—Why does she not obtain a settlement for herself by being in this state of irremovability for so many years?] She does not, because she would otherwise be gaining two settlements, one by residence and the other derivative from her husband. [POLLOCK, B.—The settlement by residence would not arise until the death of the husband.] Such a position is inconsistent with *Reg.* v. *The Overseers of Manchester* (*ubi sup.*), where Bowen, J. says: "But had the woman so 'resided' within the true meaning of the Act? At the date of her becoming chargeable she had resided as widow for two months; had she then resided previously as wife for ten months? She did in fact reside for a much longer period, but did she in law? I am not prepared to say with confidence that she did."

R. Cunningham Glen (as *amicus curiæ*) stated that Stephen and Charles, JJ. had on the previous Thursday (*a*) decided, in the case of *The Highworth and Swindon Union* v. *The Westbury-on-Severn Union*, that a child under sixteen was, while residing with its father, residing in

(*a*) On Nov. 24, 1887; but this decision was reversed on appeal on Feb. 22, 1888 (20 Q. B. Div. 597).

such manner and under such circumstances as would render him irremovable within the meaning of the section, and gaining a settlement thereunder.

A. R. Poole (with him *J. G. Wall*).—The pauper's residence as widow coalesces with her residence as wife to complete the term of residence required to make her irremovable. In *Reg.* v. *Glossop* (12 Q. B. 117) it was held that where a pauper had resided five years continuously in a parish, first as wife and afterwards as widow, the two periods of residence coalesced so as to render her irremovable under 9 & 10 Vict. c. 66. [POLLOCK, B.—It does not appear in the case of *The Guardians of the Maidstone Union* v. *The Guardians of the Holborn Union* (*ubi sup.*) how long the wife had resided as a fact in the Maidstone Union, or that she ever resided with her husband.] The finding there is that the pauper had never acquired any settlement by any act of her own. That case, however, turned entirely upon the construction of the 35th section, and dealt only with the question as to whether the pauper derived her husband's last settlement from him. It was never suggested there that the pauper had gained a settlement in her own right. The case of *Reg.* v. *Glossop* was approved and confirmed in *Reg.* v. *The Inhabitants of St. George's in the East* (22 L. T. Rep. N. S. 440; L. Rep. 5 Q. B. 364). There a woman having a settlement in parish L., but having resided for more than a year in parish G., married a foreign sailor having no settlement. They resided together in parish G. until he left in the usual course of his occupation as a sailor, intending to return, but not having made any provision for the wife's maintenance. She continued to reside in parish G. and became chargeable thereto, and it was held, the husband not having resided one year in the parish, that the woman was irremovable by reason of her continuous residence before and during marriage. A married woman therefore can, during her husband's lifetime, reside in a parish in such a way as to be gaining a status of irremovability. The status of irremovability is liable to be broken by her husband as long as he lives, as it was in the case of *Reg.* v. *The Overseers of Manchester* (*ubi sup.*), but if that does not happen, the widow can avail herself of it at his death. Blackburn, J., in his judgment in *Reg.* v. *St. George's in the East*, expressly relies upon *Reg.* v. *Glossop*, and the decisions in those two cases decide the present case in favour of the respondent union.

POLLOCK, B.—It seems to me that we are now in a position to appreciate the actual point at issue on the facts stated in this case, and in my opinion the appeal must be dismissed, and the order of the Court of Quarter Sessions confirmed. If the pauper were claiming a derivative settlement through her husband under the 35th section of the Act of 1876, there is no doubt that the respondents would not have been entitled to succeed, because, as was pointed out in the case of *The Guardians of the Maidstone Union* v. *The Guardians of the Holborn Union* (17 Q. B. Div. 817), that section applies only to the case of an existing wife, that is, a person who fills the character of wife at the time when the question arises as to the settlement, and does not apply to a widow. The claim here, however, is not under the 35th section but under the 34th section, by which it is provided that "where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would in accordance with the statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise." We have to say, therefore, whether the pauper is a person who has resided in the parish of Gillingham for the term of three years in such manner and under such circumstances in each of such years as would in accordance with the statutes render her irremovable. Now, the statute does not say "irremovable in her own right," but "irremovable in accordance with the statutes in that behalf." Here the facts are, that the pauper lived in the parish for more than three years previous to the death of the husband. Then on the 25th March 1886 her husband died, and after his death she continued to reside in the parish as widow for a period of three months, and on these facts the learned recorder thought upon the whole that a settlement had been acquired in the Medway Union upon the woman's own right under the statute, and not merely derived from the husband's settlement. Now, I think that we must give full effect to the 34th section, and treat it not as confined to certain classes of persons only, but as generally applicable to all persons. Was then the pauper irremovable in each of the three years in accordance with the statutes in that behalf? This seems to have been decided in the case of *Reg.* v. *Glossop* (12 Q. B. 117). It was there held that where a pauper had resided five years continuously in a parish first as a wife and afterwards as widow, the two periods of residence coalesced, so as to render her irremovable under 9 & 10 Vict. c. 66, s. 1. The same view was taken in *Reg.* v. *The Inhabitants of St. George's in the East* (22 L. T. Rep. N. S. 440; L. Rep. 5 Q. B. 364) upon the same grounds. After quoting *Reg.* v. *Glossop*, Blackburn, J. says: "That is applicable to the present case, and shows that the residence as wife may be united with the residence before marriage, and as the residence was continous up to the time of receipt of relief, I cannot see why she is not within the enacting part of the statute." Those are the grounds on which we now decide this case, and relying upon them I think that the woman had gained a settlement by actual residence, and that the appeal must be dismissed.

HAWKINS, J.—I also think that this woman has gained a settlement in the appellant union under the 34th section of the Divided Parishes Act 1876 (39 & 40 Vict. c. 61). The question is, whether, under the circumstances in which she lived at Gillingham, she was irremovable; and this depends upon 9 & 10 Vict. c. 66, s. 1, which provides that no person shall be removed from any parish in which such person shall have resided for five years, coupled with the later statute, 28 & 29 Vict. c. 79, s. 8, which reduces the period to one year. I think that this woman certainly resided in Gillingham for three years before June 1886 under such circumstances and in such manner as to render her irremovable. During two years and nine months she resided with her husband. They resided together in the parish, and were both irremovable. Then, when

he died, she continued in the same residence for three months, making up three years, not indeed under the same circumstances all the time, but under such circumstances as rendered her irremovable. During the husband's lifetime he had gained a settlement, and she had a derivative settlement from him, but she could not gain a settlement for herself. After his death, however, she did gain a settlement, because at the time the order was made she had resided for three years in Gillingham under such circumstances as rendered her irremovable from that parish. That is the conclusion at which I should arrive from the words of the statute; but we are not altogether without authority upon the point. In 1848 the question arose in *Reg.* v. *Glossop* (12 Q. B. 117), and in a considered judgment of the Court of Queen's Bench Lord Denman, C.J. said: "In this case the question was raised, whether residence as widow would coalesce with residence as wife to complete the five years' residence required for irremovability, and we are of opinion that it would. Such residence is within the terms of the statute; it is residence; and I see no reason why full effect should not be given to the meaning of that word." That principle applies to this case, and therefore I think that our judgment ought to be in favour of the respondent union.

Appeal dismissed.

Solicitors for the appellant, *Prall* and *Son*, Rochester.

Solicitors for the respondents, *Guscotte*, *Wadham*, and *Daw*, for *O'Donoghue* and *Anson*, Bristol.

Friday, Jan. 27, 1888.

(Before CAVE and GRANTHAM, JJ.)

WILLIAMS (app.) *v.* WYNNE (resp.). (*a*)

Justices of the peace—Court of summary jurisdiction—Practice—Right to trial by jury—Night-poaching—9 Geo. 4, c. 69—Summary Jurisdiction Act 1879 (*42 & 43 Vict. c.* 49), *s.* 17.

A person charged with a first offence under 9 *Geo.* 4, *c.* 69, *s.* 1, *cannot claim to be tried by a jury under the* 17*th section of the Summary Jurisdiction Act* 1879 (*42 & 43 Vict. c.* 49).

THIS was a case stated by justices of the borough of Denbigh under the statute 42 & 43 Vict. c. 49, s. 33, for the purpose of obtaining the opinion of the court on questions of law which arose before them, as therein stated.

The facts set out in the case were, so far as material, as follows:—

Upon the hearing of a certain information preferred by the appellant against the respondent under the 1st section of the statute 9 Geo. 4, c. 69, charging the respondent, for that he, on the 5th Oct. 1887, about the hour of seven on the night of that day, at the parish of Henllan, in the borough of Denbigh, unlawfully did enter and was in a certain piece of land in the occupation of William Williams there situate, with a certain net for the purpose then and there by night as aforesaid of taking and destroying game, contrary to the form of the statute in that case made and provided.

It was contended on the part of the appellant that the respondent had not the right to demand to be tried by a jury in pursuance of the 17th section of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49).

On the part of the respondent it was contended that he had the right to demand to be tried by a jury in pursuance of the section referred to.

The respondent being liable (that being his first offence) to imprisonment not exceeding three calendar months, and also to be called upon to be bound himself in 10*l.* and two sureties in 5*l.* or one surety in 10*l.*, for not so offending again for a year, and, in default of finding such sureties, to further imprisonment for six calendar months, the justices were of opinion that he had the right to demand to be tried by a jury in pursuance of the 17th section of the Summary Jurisdiction Act 1879, and gave a determination against the appellant's contention.

The question of law upon which the case was stated for the opinion of the court was, whether the respondent had the right to demand to be tried by a jury in pursuance of the 17th section of the Summary Jurisdiction Act 1879.

The Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) provides as follows:

Sect. 17. A person when charged before a court of summary jurisdiction with an offence, in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, and which is not an assault, may, on appearing before the court, and before the charge is gone into, but not afterwards, claim to be tried by a jury, and thereupon the court of summary jurisdiction shall deal with the case in all respects as if the accused were charged with an indictable offence and not with an offence punishable on summary conviction, and the offence shall as respects the person so charged be deemed to be an indictable offence.

And the statute 9 Geo. 4, c. 69, provides that:

Sect. 1. If any person shall, after the passing of this Act, by night unlawfully take or destroy any game or rabbits in any land, whether open or inclosed, or shall by night unlawfully enter or be in any land, whether open or inclosed, with any gun, net, engine, or other instrument for the purpose of taking or destroying game, such offender shall, upon conviction thereof before two justices of the peace, be committed for the first offence to the common gaol or house of correction for any period not exceeding three calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognisance, himself in ten pounds, and two sureties in five pounds each, or one surety in ten pounds, for his not so offending again for the space of one year next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties are sooner found.

Malcolm Douglas for the appellant.—On the true construction of the 17th section of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) the respondent had not the right to claim to be tried by a jury. It was so decided by Bowen, J. at the Devonshire Winter Assizes 1882, in the case of *Reg.* v. *Lake* (46 J. P. 88). There the prisoner, being charged with an offence under 9 Geo. 4, c. 69, claimed the option of being tried before a jury, and was in consequence sent to the assizes, and the same point which has in this case been reserved for the opinion of the court being taken on behalf of the prisoner at the conclusion of the opening speech of the counsel for the prosecution, Bowen, J. held that, as the imprisonment, in the first instance, irrespective of imprisonment for default of sureties was for three months only, it was not within the section, and the case ought therefore to have been dealt

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

with summarily. It is also stated in the report that Bowen, J. consulted with the Lord Chief Justice (Lord Coleridge, C.J.) upon the point, and that the learned Lord Chief Justice took the same view, and that under these circumstances the jury, acting under his Lordship's direction, returned a verdict of not guilty, and the accused was discharged. The only authority to the contrary is one of which we have no certain account. In Jan. 1882, and therefore some time previous to the decision of Bowen, J., the same point was raised in a case of *Reg.* v. *Webb*, at the Essex Quarter Sessions (72 L. T. 184; 46 J. P. 27), and in that case the court were informed that precisely the same contention had been raised in a case, the name of which is not given, before Denman, J. at the last assizes at Chelmsford, and that that learned judge had held that "the justices had exercised a wise discretion" in sending the case for trial instead of dealing with it summarily, and that the obligation to find sureties in 9 Geo. 4, c. 69, formed part of the punishment, and on that ground refused to withdraw the case from the jury. It is submitted, on the authority of Lord Coleridge, C.J. and Bowen, J., that the former construction is correct. He also referred to Stone's Justices' Manual, 24th edit., p. 322, note (*d*).

E. H. Lloyd for the respondent.—The justices were right in acceding to the respondent's claim to be tried by a jury. It is clear that a person charged with a first offence under 9 Geo. 4, c. 69, is within the meaning of the 17th section of the Summary Jurisdiction Act 1879, "liable on summary conviction to be imprisoned for a term exceeding three months." The obligation to find sureties is part of the punishment, and in default of doing so, he is to be kept imprisoned for a further period of six calendar months. As therefore he is liable to be imprisoned for nine months, he has a right under the section to claim to be tried by a jury. The cases cited merely show that the judges have been divided in opinion upon the point, but it is submitted that on the true construction of the section the respondent is entitled to succeed.

Malcolm Douglas was not called upon to reply.

CAVE, J.—I am of opinion that the appellant is right in his contention, and that our judgment must be in his favour. The words of the 17th section of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) are not well chosen. The section provides that a person, when charged before a court of summary jurisdiction with an offence in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, and which is not an assault, may claim to be tried by a jury. It is clear that on these words it can well be contended, on the one hand, that a person charged with night poaching under 9 Geo. 4, c. 69, s. 1, for the first time, who is liable to three months' imprisonment and to be called upon at the end of that time to find sureties for his not so offending again for a year, is liable to be kept in prison for nine months "in respect of the commission of the offence." On the other hand, it can as well be said that he is only liable "in respect of the commission" of the offence to be imprisoned for a period not exceeding three months, and that, although he is liable to a further period of six months in default of finding sureties for not offending again, the additional period of six months is not in respect of the commission of the offence, but in respect of the default in finding sureties. But surely the law must be the same for all persons charged under the Act. Let us suppose then that two men are charged under this statute, 9 Geo. 4, c. 69, with night poaching for the first time, and convicted and sentenced each to a month's imprisonment, and in addition ordered to find sureties at the expiration of that period, and in case of failing to do so to be further imprisoned for six months. Then let us further suppose that one of these two men was able to find sureties at the expiration of his month's imprisonment, and that the other was unable to do so, the result would be that the man who was able to find sureties would be allowed to go free, while the man who was so unfortunate as to be unable to find sureties would be kept in prison. But the man thus allowed to go free would have committed just as great an offence as the other, and he would on going out have undergone all the imprisonment to which he was liable in respect of the commission of the offence, and would not in any case have been imprisoned for more than three months. It cannot, however, be supposed that there would be any difference between these two men as to the right to claim to be tried by a jury under the Summary Jurisdiction Act 1879. I think, therefore, that the amount of imprisonment which can be inflicted directly for the offence is the test to be applied in considering whether accused persons come within the provisions of the 17th section of this Act. I am confirmed in this opinion by the decision at which Lord Coleridge, C.J. and Bowen, J. both arrived in the case of *Reg.* v. *Lake* (46 J. P. 88). It is true that it was stated in a case of *R.* v. *Webb* (72 L. T. 184; 46 J. P. 27) that Denman, J. had in a case at the Chelmsford assizes at the end of 1881, of which no record appears to remain, entertained a contrary opinion. But Denman, J. there seems to have said that in his opinion the justices had exercised a wise discretion, and one can well understand that the learned judge might well consider that it was far better that the case should be tried and reconsidered, if it should become necessary so to do, by the Court of Crown Cases Reserved, than that the prisoner should be discharged without the case being tried at all. But in any case the decision of Bowen, J., after consulting with Lord Coleridge, C.J. in *R.* v. *Lake* (46 J. P. 88), was later in date than that of Denman, J., and there those two learned judges came to a distinct and clear conclusion that it was not the meaning of 9 Geo. 4, c. 69, s. 1, that a person charged with a first offence under that section should be liable to nine months' imprisonment, and that, as the imprisonment in the first instance, irrespective of imprisonment for default of sureties, was for three months only, a person charged thereunder did not come within the 17th section of the Summary Jurisdiction Act 1879, and ought therefore to be dealt with summarily. With that conclusion I entirely agree, and I therefore think that this appeal ought to be allowed, and the case remitted to the justices with the opinion of the court that they should have adjudicated upon the information.

GRANTHAM, J.—I am of the same opinion. The 17th section of the Summary Jurisdiction Act 1879 is capable of two constructions with respect to a man charged with a first offence under the statute 9 Geo. 4, c. 69, and liable thereunder, if convicted, to an additional term of six months' imprisonment at the end of his original term in default of finding sureties. I am of opinion, however, that the operation of the section is limited to cases in which the sentence is in the first instance limited to three months' imprisonment, that being all the imprisonment to which a person is, in my opinion, liable in respect of the commission of the offence. I therefore agree that the appeal ought to be allowed, and the case remitted to the justices.

Solicitors for the appellants, *Minshalls, Parry-Jones, Woosman*, and *Smith*, for *Alun Lloyd*, St. Asaph.

Solicitors for the respondent, *Nicol, Son*, and *Jones*.

Tuesday, Nov. 29, 1887.

(Before Lord COLERIDGE, C.J., POLLOCK, B., and HAWKINS, J.)

McCLEAN (app.) *v.* PRITCHARD (resp.).(*a*)

Parliament—Registration—Borough vote—Service franchise—Municipal vote—Representation of the People Act 1884 (48 *Vict. c.* 3), *s.* 3—*Municipal Corporations Act* 1882 (45 *& 46 Vict. c.* 50), *s.* 9.

The appellant was the occupier of certain premises in the borough of Brighton, within the meaning of sect. 3 *of the Representation of the People Act* 1884, *by virtue of his service or employment as manager of a coffee-house.*

Held, that this occupation of the premises did not entitle the appellant to be placed on the burgess-roll of the borough. Occupation of a house within the meaning of sect. 3 *of the Representation of the People Act* 1884 *is not a qualification for the municipal franchise.*

CASE stated by the revising barrister for the borough of Brighton:—

1. The name of the appellant appeared on Division 1 of the occupiers' list for the parish of Brighthelmstone, as a parliamentary voter for the parliamentary borough of Brighton, and as a burgess for the municipal borough of Brighton, and he was objected to in respect of his parliamentary and municipal vote.

2. The entry on Division 1 is: "McLean, Matthew, 14, Islingword-street, Brighton, house, 22, Carlton-hill, successive, 14, Islingword-street;" and the entry in the rate-book is: "Owner, Mr. Reason, occupier, Matthew McLean, premises, house, and club-room, with one rating for the whole premises."

3. Mr. Reason is the owner of the premises, 22, Carlton-hill, and the tenants are an association or committee of gentlemen, who have taken the premises for the purpose of a coffee-house. The premises consist of a single house, with entrance in front and at the rear.

4. The appellant was placed in the premises 22, Carlton-hill, by the committee, as manager, and he with the assistance of his wife and daughter was in charge of the premises, served the customers, took payment for the articles supplied, and accounted weekly with the committee for the receipts. For these services he received food, coal, lighting, and 4*s.* a week. He also inhabited with his family a portion of the premises. He paid no rent, but the furniture in the part inhabited by him was his own.

5. The rent and the rates for the whole of the premises, 22, Carlton-hill, were paid by the committee.

6. There was no separate rating for the part of the premises, 22, Carlton-hill, inhabited by the appellant and his family, but the whole of the premises were rated in his name, and the receipts for the rates were made out in his name.

7. It was admitted by the appellant and the respondent, Thomas Pritchard, respectively, that the appellant had inhabited the premises, 22, Carlton-hill, by virtue of his service or employment as transfer of the said coffee-house, and that the appellant was entitled to be placed on Division 2 of the occupiers' list under sect. 3 of the Representation of the People Act 1884.

8. It was contended on behalf of the appellant that he was also entitled, under the circumstances above stated, to be enrolled as a burgess of the said borough of Brighton.

9. I held that the appellant was not entitled to be enrolled as a burgess of the said borough of Brighton, and I accordingly erased his name from Division 1 of the said occupiers' list.

10. I held that the appellant has established his right under sect. 3 of the Representation of the People Act 1884 to be placed on Division 2 of the said occupiers' list, and I accordingly inserted his name in Division 2 of the occupiers' list.

11. If the court should be of opinion that I was wrong in removing the appellant's name from Division 1 of the said occupiers' list, his name will be restored to Division 1 and removed from Division 2.

By the Representation of the People Act 1884 (48 Vict. c. 3), s. 3:

Where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any other person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of this Act, and of the Representation of the People Acts to be an inhabitant occupier of such dwelling-house as a tenant.

By the Municipal Corporations Act 1882 (45 & 46 Vic. c. 50), s. 9, sub-sect. 2:

A person shall not be entitled to be enrolled as a burgess unless he is qualified as follows:

(*a*) Is of full age; and

(*b*) Is on the fifteenth of July in any year, and has been during the whole of the then last preceding twelve months, in occupation, joint and several, of any house, warehouse, counting-house, shop or other building (in this Act referred to as qualifying property) in the borough; and

(*c*) Has during the whole of those twelve months resided in the borough, or within seven miles thereof; and

(*d*) Has been rated in respect of the qualifying property to all poor rates made during those twelve months for the parish wherein the property is situate; and

(*e*) Has on or before the twentieth of the same July paid all such rates, including borough rates (if any), as have become payable by him in respect of the qualifying property up to the then last preceding fifth of January.

Clough for the appellant.—The case finds that the appellant is an inhabitant occupier, and entitled as such to the parliamentary service

(*a*) Reported by H. D. BOSSEY, Esq., Barrister-at-Law.

franchise. He occupies the premises in the popular sense of the term, and he is rated in respect of them. The essential qualifications for the municipal franchise are occupation and rateability, and the case finds that the appellant possesses both. The appellant is therefore entitled to be placed on the burgess-roll.

Newson, for the repondent, was not called upon.

Lord COLERIDGE, C.J.—The revising barrister has decided correctly, and has placed the appellant in the only division of the list for which he has a legal qualification. The appellant has no claim to be enrolled as a burgess of Brighton. Before the Representation of the People Act 1884 the class to which he belongs possessed neither the parliamentary nor the municipal franchise, and by that Act Parliament gave them the former and the former only. The word "occupier" is relied on; but "occupation" is a technical term, and means legal, not mere physical, occupation, and the appellant is still as little an occupier for the purposes of the municipal franchise as he was before the passing of the Representation of the People Act 1884.

POLLOCK, B. and HAWKINS, J. concurred.

Appeal dismissed.

Solicitors for the appellant, *R. Ballard* and *Co.*

Solicitors for the respondent, the Town Clerk of Brighton, *Boxall* and *Boxall*, for *Freeman, Gell*, and *Co.*, Brighton.

Tuesday, Nov. 29, 1887.

(Before Lord COLERIDGE, C.J., POLLOCK, B., and HAWKINS, J.)

CHILDS (app.) v. COX (resp.). (a)

Parliament—Registration—Borough vote—Notice of objection — Service of notice — "Ordinary course of post"—6 Vict. c. 18, *ss.* 17, 100.

The appellant objected to the names of certain persons being retained on the occupiers' list of voters, and notices of objection under 8 *Vict. c.* 18, *s.* 17, *were addressed to the barracks where the voters objected to resided. The notices were posted in time to be delivered by postmen in the ordinary course of post at places within the borough elsewhere than at the barracks. The postmen did not deliver any letters at the barracks, but all letters addressed to the barracks were taken from the post-office by an orderly. On the evening of the 20th Aug. the letters were taken from the post-office by an orderly; some were distributed at the barracks on the 20th Aug. and some on the 21st.*

Held, that there was no "ordinary course of post" to the barracks within the meaning of 8 *Vict. c.* 18, *s.* 100; *and therefore there was no evidence that the notices had been served on the persons objected to on the 20th Aug.*

CASE stated by the revising barrister for the borough of Woolwich.

1. At the court held for the revision of voters for the borough of Woolwich, William Henry Childs objected to the names of Robert Dendy and Frederick Francis Johnson, and to the names of the other persons whose names and addresses are set out in the schedule hereto, being retained on the general occupiers' list of voters for the parish of Woolwich, in the said borough.

2. The names and places of abode of the said Robert Dendy and Frederick Francis Johnson, hereinafter called the said voters, appeared in the said list as follows:

Robert Dendy, 43, Staff-Sergeants' Quarters, Royal Artillery Barracks.

Frederick Francis Johnson, C, Field Officers' Quarters, Commissariat and Transport Corps Barracks.

3. The following facts with reference to the giving notice of objection to the said voters were proved before me:

4. On the evening of the 20th Aug. 1887, at about three minutes to six o'clock, a notice of objection, addressed to each of the said voters at his place of abode as above mentioned, was delivered at the post-office at Woolwich, pursuant to the regulations for the purpose prescribed by the post-office. The stamped duplicates were by arrangement with the objector called for, and delivered to him at the post-office at about 7.30 p.m. Such stamped duplicates were produced in evidence before me to prove that in each case the necessary notice of objection was given.

5. The said Robert Dendy is a non-commissioned officer inhabiting the Royal Artillery Barracks, Woolwich, and the said Frederick Francis Johnson is an officer inhabiting the Commissariat and Transport Corps Barracks.

6. Letters posted at the time of day at which the said notices were posted would, in the ordinary course of post, be delivered to places in Woolwich other than the barracks on the evening of the same day, by a delivery commencing not earlier than a quarter to nine in the evening.

7. There is no postal delivery or source of post into the barracks respectively inhabited by the said voters. An orderly is sent down from the said barracks to call at the post-office for letters addressed to persons in the barracks, and these letters are delivered to such orderly, pursuant to military regulations, and directions given to the postmaster for carrying out the same. If on any day or at any time the orderly did not come the letters would wait at the post-office till called for. Telegrams addressed to persons in the barracks are delivered there by post-office carriers.

8. On the said evening of the 20th Aug. 1887, an orderly from the Royal Artillery Barracks called at the post-office and received across the counter the letters for the said barracks. The orderly, when he returned to the barracks, distributed the letters for the officers the same evening, but he did not distribute the letters for the non-commissioned officers and men until the following morning (Aug. 21, 1887). An orderly from the Commissariat and Transport Corps Barracks also called at the post-office the same evening, and received across the counter the letters for such barracks. At the Commissariat and Transport Corps Barracks letters for the officers were distributed the same evening, but there was no precise evidence as to when the letters were distributed to the non-commissioned officers and men.

9. I held that in each case there was no evidence that the objector had given the notice of objection required by law to be given by him, as it did not appear that there was any ordinary course of post by which the notices would have been delivered by post to the persons objected to

(a) Reported by H. D. BONSEY, Esq., Barrister-at-Law.

on the 20th Aug. 1887. I therefore retained the names of the said voters on the said lists.

10. If I was wrong in this holding that notice of objection had in each case not been given as required by law, the names of the said voters ought to be erased from the said list.

By 6 Vict. c. 18, s. 17, it is enacted:

That every person whose name shall have been inserted in any list of voters for any city or borough may object to any other person as not having been entitled on the last day of July next preceding to have his name inserted in any list of voters for the same city or borough, and every person so objecting shall, on or before the 25th day of August in that year, give or cause to be given a notice, according to the form numbered (10) in the said schedule (B), or to the like effect, to the overseers who shall have made out the list in which the name of the person so objected to shall have been inserted; or if the person objected to shall have been inserted in the list of freemen of any city or borough, except the city of London, then to the town clerk of such city or borough, and every person so objecting shall also give, or cause to be left at the place of abode of the person objected to, as stated in the said list, a notice according to the form numbered (11) in the said schedule (B); and every notice of objection shall be signed by the person objecting.

By sect. 100 it is enacted:

That it shall be sufficient in every case of notice to any person objected to in any list of county, city, or borough voters, and in the livery list of the city of London, and also in the case of county voters to the occupying tenant whose name and place of abode appears in such respective list as aforesaid, if the notice so required to be given as aforesaid shall be by the post, free of postage, or the sum chargeable as postage for the same being first paid, directed to the person to whom the same shall be sent, at his place of abode as described in the said list of voters; and whenever any person shall be desirous of sending any such notice of objection by the post, he shall deliver the same, duly directed, open and in duplicate, to the postmaster of any post-office where money orders are received or paid, within such hours as shall have been previously given notice of at such post-office, and under such regulations with respect to the registration of such letters, and the fee to be paid for such registration (which fee shall in no case exceed twopence over and above the ordinary rate of postage), as shall from time to time be made by the Postmaster-General in that behalf; and in all cases in which such fee shall have been duly paid, the postmaster shall compare the said notice and the duplicate, and, on being satisfied that they are alike in their address and in their contents, shall forward one of them to its address by the post, and shall return the other to the party bringing the same, duly stamped with the stamp of the said post-office; and the production by the party who posted such notice of such stamped duplicate shall be evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would in the ordinary course of post have been delivered to such place: Provided also, that if no place of abode of the person objected to shall be described in the said list, or if such place of abode shall be situate out of the United Kingdom, then it shall be sufficient if notice shall be given to the said overseers, and to such occupying tenant as aforesaid (if any) in the case of a county voter, or, in the case of a city or borough voter, to the overseers or to the town clerk, or in the case of a liveryman of the city of London, to the secondaries and clerk of the particular company to which the person objected to shall belong, as in each of the said cases hereinbefore required.

Asquith for the appellant.—The notices were delivered in the ordinary course of post. [HAWKINS, J.—It was only delivered to the orderly.] It would be most inconvenient to make the sufficiency of the posting depend upon such accidents as this wherever (as often happens in large establishments) a bag is sent for the letters. [POLLOCK, B.—It cannot be assumed that in every place there is an ordinary course of post.] That is no doubt true; but where the delivery is in the ordinary course used at the place in question it is sufficient. The employment of an orderly to bring the letters from the post-office can make no difference. It cannot be that the effect of an arrangement of this kind is to invalidate notices which are otherwise good. He cited

Hornsby v. *Robson*, 28 L. J. 55, C. P.;
Lewis v. *Evans*, L. Rep. 10 C. P. 297.

POLLOCK, B.—The question is, whether these notices of objection have been duly delivered under the statute. Under the statute the objector may either himself deliver the notice in accordance with sect. 17, or, as here, he may send the notice by post in accordance with sect. 100. In this case sect. 100 provides for the stamping of a duplicate notice by the postmaster of the office where the notice is posted, and enacts: "The production by the party who posted such notice of such stamped duplicate shall be evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would in the ordinary course of post have been delivered to such place." The facts of which the duplicate is to be statutable evidence clearly involve the existence of an "ordinary course of post." If it were a question of mere delivery, perhaps the orderly, though the agent of the voter to receive the notice, might also be accounted the agent of the objector to deliver it. But, in order to make the duplicate notice available as evidence, it must appear that the notices would have been, not merely delivered, but "delivered in the ordinary course of post" during the 20th Aug. The case shows that on the 20th Aug. no "ordinary course of post" existed. There was an arrangement by which orderlies were sent to the post-office for letters addressed to the barracks; but this arrangement was itself in substitution for "delivery in the ordinary course of post." I am of opinion that the decision of the revising barrister was right.

HAWKINS, J.—I am of the same opinion. If it were possible to treat the orderlies as agents of the objector there would be some evidence of delivery to the officers on the 20th Aug., while as regards some of the non-commissioned officers and men there would be no evidence as to date of delivery, and as regards others there would be no evidence of delivery on the 21st Aug. I do not, however, think that the orderlies can be regarded as agents of the objector, so that there is no question of service under sect. 17. As regards service through the post-office under sect. 100, it is essential that the notices shall be posted so as to be deliverable in "the ordinary course of post" on the 20th Aug. The case seems to me to show that no "ordinary course of post" existed which made the notices deliverable on this day. They were received by the orderlies late in the evening on the 20th Aug., and there is nothing in the case which shows any duty on the part of such orderlies either to the voters or to the post-office, if indeed the orderlies could have any duty to the post-office to have distributed the letters the same evening.

Lord COLERIDGE, C.J. concurred.

Appeal dismissed.

Solicitor for the appellant, *T. M. McDonnell.*
Solicitor for the respondent, *E. T. Hughes.*

Tuesday, Jan. 31, 1888.

(Before HAWKINS and CHARLES, JJ.)

REG. *v.* LEE. (*a*)

Bastardy order—Service of summons—Last place of abode of putative father—The Bastardy Laws Amendment Act 1872 (35 *&* 36 *Vict. c.* 65), *s.* 4.

A bastardy summons was on the 18*th May left at the house of a baker at Sunbury, in whose employ the defendant had been from the* 25*th Sept. previous to the* 20*th April, when he went to Southampton and took lodgings there, but left certain effects at the former place until the* 14*th May, when he removed them. On the* 19*th May he sailed for the West Indies with a ship on which he had obtained a situation.*

Held, that the summons was left at his last place of abode within the meaning of the 4th section of the Bastardy Laws Amendment Act 1872 (35 *&* 36 *Vict. c.* 65), *and that the justices had therefore jurisdiction on the hearing of it to make an order against him in his absence.*

THIS was a rule obtained on the part of the defendant to a bastardy summons calling upon justices of Middlesex and the complainant to show cause why a writ of *certiorari* should not issue to remove into the High Court an order made by the justices on the 18th June 1887, whereby the defendant was adjudged to be the putative father of a bastard child of which the complainant had been delivered.

It appeared from the affidavits that the complainant was delivered of a bastard child on the 18th April 1887, and that she had obtained a summons against the defendant, which was left by a constable, on the 18th May 1887, at the house of a baker, at Sunbury, in whose service the defendant had been, and with whom he had resided from the 25th Sept. 1886 to the 20th April 1887, the baker informing the constable serving the summons that he did not know where the defendant was, but that he had been to fetch his things on the 14th May.

The defendant made an affidavit to the effect that he left Sunbury on the 20th April, and went to Southampton to better himself, and took lodgings there at 27, Camden-street, Bedford-place, and remained there until May 1887, when he got a situation on board the *Moselle*, and sailed on the 19th May for the West Indies.

The justices having in the absence of the defendant, and on proof of such service, made an order adjudging him to be the putative father of the child, and ordering the payment of a sum of money weekly, the defendant obtained a rule *nisi* calling upon them and the complainant to show cause why a writ of *certiorari* should not issue to remove it into the High Court for the purpose of quashing it upon the ground that, the summons not having been left at the last place of abode of the defendant within the meaning of the 4th section of the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65), the justices had no jurisdiction to make the order.

The 4th section of the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65) provides, so far as is material, as follows:

4. After the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person, or left at his last place of abode, six days at least before the petty session, the justices in such petty session shall hear the evidence of such woman, and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the justices, they may adjudge the man to be the putative father of such bastard child; and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother of the bastard child, &c.

Taylor in support of the rule. (*a*)—The conditions prescribed by the Act as to the service of the summons were not complied with, and therefore the justices had no jurisdiction to make the order, and it must be quashed. It is not contended that the summons was personally served; neither was it left at the defendant's last place of abode. He left Sunbury on the 20th April with no intention of returning, as it is clear from the allegation in his affidavit that he went away for the purpose of bettering himself. He then went to Southampton and took up his residence in lodgings there at 27, Camden-street, and made that his place of abode. At the time the summons was served he had been residing there for a month, and some days previously had removed from Sunbury all his effects. He had therefore before the summons was served left his place of abode at Sunbury and formed a new place of abode at Southampton. In *Reg.* v. *Evans* (19 L. J. 150, M. C.) Coleridge, J. explains the meaning of the phrase "last place of abode." He there says, "By the word 'last' is meant the then present place of abode if the party have any, the last which he had if he has ceased to have any." Here the then present place of abode of the defendant on the 18th May when the summons was served was in his lodgings at Southampton. In *Reg.* v. *Evans* (*ubi sup.*) the summons was served at a house where the defendant formerly lodged, but did not lodge at the time of the service, and the order was quashed. The circumstances of the present case are identical, and the same reasons exist for quashing the order.

Mead showed cause against the rule.—The summons was served at the defendant's last place of abode in accordance with the provisions of the statute. This residence at Southampton was merely temporary. When he left Sunbury he had not obtained permanent employment, but was on his way to look out for a situation. This lodging, therefore, at Southampton was not a permanent lodging in the sense of being a lodging in which a person contemplates residing a considerable time, as is shown by the fact that he did not fetch his things from his residence at Sunbury till the 14th May. His lodgings at Southampton therefore never became his established place of abode within the meaning of the statute. [HAWKINS, J.—Why do you say that Southampton was not his place of abode during the time he spent there?] He left Sunbury to find a ship, and Southampton was only a temporary resting place. Sunbury

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

(*a*) The 147th rule of the Crown Office Rules 1886 provides as follows: "On the argument of any case entered in the Crown Paper, where the court has granted an order *nisi*, the counsel for the parties showing cause shall begin; but on an order *nisi* to quash an order or conviction, and in every other case, the counsel for the appellant or party desirous of displacing the *status quo* shall begin."

was his last place of abode until he obtained another, and he never did obtain any other before he left the country. In *Reg.* v. *Higham* (26 L. J. N. S. 116, M. C.) the facts are almost identical, and Lord Campbell held that the service was good. The defendant does not state in his affidavit that he went to Southampton to work there, but to better himself, and it is therefore submitted that he contemplated going abroad when he left Sunbury in order to be absent when the summons was served and not to reside at Southampton. He also cited

Reg. v. *Evans*, 19 L. J. 151, M. C.;
Reg. v. *Jabes Davis*, 22 L. J. 143, M. C.;
Reg. v. *Brown*, 24 J. P. 5;
Reg. v. *Damarell*, L. Rep. 3 Q. B. 50.

Taylor in reply.—The cases cited are in favour of the defendant. The place where the summons was served was not his last place of abode. In *Reg.* v. *Evans* (*ubi sup.*) it was proved that the clothes of the applicant in that case were in the lodgings where the summons was served at the time it was served. If the order of the justices was quashed in that case, *à fortiori* it should be in this case where the applicant had removed his clothes four days before the service of the summons.

Hawkins, J.—I am of opinion in this case that a writ of *certiorari* ought not to be issued, and that the order of the justices ought not to be quashed. The application to set aside the order is made on the ground that the justices had no jurisdiction to make it, inasmuch as the defendant never appeared before them, the order being made during his absence; nor was the summons served on him personally; nor was it left at his last place of abode six days before the petty session, one of which conditions must be fulfilled in order to give the justices jurisdiction to make an order under the 4th section of the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65). That section provides that, "after the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person, or left at his last place of abode six days at least before the petty session, the justices in such petty session shall hear the evidence of such woman, and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices they may adjudge the man to be the putative father of such bastard child, and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother of the bastard child of a sum of money weekly not exceeding five shillings a week for the maintenance and education of the child and of the expenses incidental to the birth of such child, and of the funeral expenses of the child, provided it has died before the making of such order, and of such costs as may have been incurred in the obtaining of such order." The section, therefore, gives the magistrates jurisdiction if the summons was duly served on the applicant himself, or left at his last place of abode. When this matter came before the justices on the 4th June 1887 the complainant satisfied them that the summons had been left at the defendant's last place of abode six days before the session, and that he was the father. It is quite certain that the justices on hearing the summons thought they had jurisdiction, but this is not conclusive of the matter. The party against whom judgment was given has a perfect right, if he can, to satisfy this court that the justices have wrongly found the facts, and that there was in reality no jurisdiction. This proposition is clearly laid down by Coleridge, J., in *Reg.* v. *Evans* (19 L. J. 155, M. C.), where he says: "In a question of jurisdiction, although the magistrates are to form an opinion in the first instance on the evidence offered, which is to warrant their proceeding; yet justice requires that, if it be clearly shown that the fact fails, and that they never ought to have proceeded, the party interested may be at liberty to show that. Suppose a proceeding against A. and evidence be given of personal service on him, the magistrates would properly proceed; but if it could be shown that the witness had in truth served B. and that A. was ignorant of the whole proceeding, it would be impossible to say that an order of commitment against A. could be enforced." It is for us now to decide whether or not the summons was served at the defendant's last place of abode; if it was, there can be no doubt the justices had jurisdiction to make the order. Cockburn, C.J., in *Reg.* v. *Damarell* (L. Rep. 3 Q. B. 52), says: "I think we are bound by the words of the statute which provides that, on proof that the summons was left at the defendandt's last place of abode six days at least before the petty sessions, the justices shall hear the evidence of the woman, and if it be corroborated may adjudge the man to be the putative father. Proof, therefore, that the summons was left at the last place of abode is sufficient without more to give the justices jurisdiction." I confess that the authorities which have been cited do not assist us much. In *Reg.* v. *Evans* (19 L. J. 151, M. C.) the order was quashed, as it was found as a fact that the summons had not been served at the applicant's last place of abode. In that case the applicant had left lodgings in one street and moved into lodgings in another street in the same town; the summons was served at the lodgings the applicant had left, and did not reach him until after the order was made. There was no difference in character between the lodgings. It might be fairly said, if the last lodging was not the last place of abode, neither was the first. In *Reg.* v. *Jabes Davis* (22 L. J. 143, M. C.) the rule was refused. The affidavits in that case showed that the applicant resided in his father's house in England up to the 7th Nov. 1850, on that day he went to Liverpool with the intention of proceeding at once to America. He remained at an inn at Liverpool until the 11th Nov., when he sailed for America. On the 15th Nov. a constable called at the father's house with the view of serving the applicant with a summons, and on being informed that he had gone to America he left the summons. The decision of the court upon that point was this: "I think you must take it the father's house was the last place of abode, as merely stopping at an inn at Liverpool while waiting for a ship would not make it his last place of abode." In *Reg.* v. *Damarell* (L. Rep. 3 Q. B. 50) Cockburn, C.J. says: "All we have to inquire is

whether the summons was left at the last place of abode of the man. He left the house where he had been lodging for a long time for the express purpose of going to America, therefore he had no other place of abode, and that was his last place of abode." In *Reg.* v *Higham* (26 L. J. 116, M. C.), which is strongly in favour of the decision of the justices in this case, it appeared by the affidavits that the applicant had resided at his father's house up to the 13th July 1856, when, having reason to anticipate further annoyance from the complainant, he determined to leave his father's residence and obtain employment in a different part of the country. Accordingly, on that day, he left and went to reside with a farmer in Bedfordshire and assisted him in his farm, and had no intention when he left of returning to reside with his father. The complainant was delivered of a child on the 23rd Nov. 1855, and obtained a summons against the applicant, which was dismissed on the 14th Jan. 1856. On the 14th July 1856 the complainant obtained another summons against the applicant, which was left, on the 29th July, at the house of his father, and the applicant did not become aware of it till the 11th Aug., the day on which the order was made against him by the magistrates. Nevertheless, it was held by Campbell, C.J. to have been served at his last place of abode. Now we come to the present case. There is no doubt that the applicant had been living at Sunbury assisting a baker at that place up to the 20th April 1887, so that up to that date it was clearly his last place of abode. He left his things at Sunbury till the 14th May, which is evidence that up to that time he had formed no intention to abandon his lodgings there. He says in his affidavit: "I went to Southampton to better myself, and took lodgings." I understand the meaning of those words to be, that he went, not to establish himself there, or to get permanent employment with any particular person, or in any particular work, but simply to look about him. There is no suggestion that he meant to make it his place of abode any more than the man did the inn at Liverpool in the case of *Reg.* v. *Davis*. He does not even say it was his place of abode. He says: "I took lodgings at 27, Camden-street, Bedford-place, Southampton, where I remained till May 1887, when I got a situation on board the *Moselle* and sailed on the 19th May for the West Indies." Taking all the circumstances of the case into consideration, I consider that, the magistrates having made the order, there is nothing which would enable us to say that they acted without jurisdiction, and on the same evidence I should have come to the same conclusion as they did, namely, that Sunbury was the applicant's last legal place of abode.

CHARLES, J.—I am of the same opinion. I do not think the authorities assist us; if anything, they are in favour of Mr. Mead's contention that the service was good. The applicant says he left Sunbury on the 20th April, and went to Southampton to better himself. He took lodgings, and remained there till he got a situation on board the *Moselle*, and sailed on the 19th May for the West Indies. Can we say that his place of abode was at Southampton? I am by no means satisfied. I think he left Sunbury to better himself, and to cast about to find employment. I think therefore that his last place of abode was Sunbury, and that his residence at Southampton was merely temporary while he was looking out for a situation. In my opinion it cannot be said that, under these circumstances, he made Southampton his place of abode.

Rule discharged.

Solicitors for the defendant, the applicant, *G. W. Lay*, Brentford.

Solicitors for the complainant, *S. F.* and *A. C. Langham*, for *W. J. Hodges*, Dorking.

Tuesday, Nov. 15, 1887.

(Before STEPHEN and SMITH, JJ.)

PAPE *v.* PAPE. (*a*)

Husband and wife — Married woman — Married Women (Maintenance in Case of Desertion) Act 1886—Desertion—Separation under agreement—Nonpayment by husband of agreed allowance—Order for support of wife—49 & 50 Vict. c. 52, sect 1.

A husband and wife agreed by an agreement for separation to live apart; the husband in the agreement agreed to allow his wife a certain weekly allowance for her support as long as she lived chastely and did not molest him. After making sundry weekly payments the husband discontinued the allowance on the ground, as he alleged, that his wife was guilty of adultery and had molested him, contrary to the terms of the agreement. The wife took out a summons against the husband under sect. 1 of the Married Women (Maintenance in Case of Desertion) Act 1886, and the justices were of opinion that the charge of adultery had not been made out, but that the husband had deserted his wife by reason of his refusal to make his wife the weekly allowance under the agreement, and made an order against him for a weekly sum for her support. The husband appealed.

Held, on appeal, that, as the husband and wife were voluntarily living apart, the refusal of the husband to pay the weekly allowance which he had agreed to pay his wife under the agreement for separation was not desertion, and that therefore the order of justices under the Married Women (Maintenance in Case of Desertion) Act 1886 was bad and ought to be quashed.

CASE stated under 20 & 21 Vict. c. 43.

At a petty sessions held in the borough of Middlesbrough on the 20th April 1887 a complaint was preferred by one Mary Pape, wife of William Pape, against the said William Pape, under sect. 1 of the 49 & 50 Vict. c. 52, charging him that on the 29th March 1887, being able wholly or in part to maintain her, he had wilfully refused or neglected so to do and had deserted her, and she asked for an order to be made upon him to contribute to her support. The justices heard the case and made an order that the said William Pape should pay a weekly sum of 7*s.* towards the maintenance of the said Mary Pape his wife.

Upon the hearing of the complaint it was proved that the respondent was the wife of the appellant, and that they had lived together uncomfortably owing to the respondent having been addicted to drink, and had signed an agreement of separation.

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

The material parts of the agreement were as follows:

Whereas unhappy differences have arisen and still exist between the said parties hereto, and in consequence thereof it has been agreed between them that they shall live separate and apart from each other upon the conditions and in manner herein contained. Now it is hereby agreed between the said parties that the said Mary Pape shall and may henceforth live separate and apart from the said William Pape as if she were a *feme sole*, and shall henceforth be freed from the authority and control of the said William Pape . . . and neither of the said parties will at any time hereafter molest or annoy the other of them or require or attempt to compel each other to live together or cohabit, or take proceedings for the restitution of conjugal rights . . . and that the said William Pape shall and will pay or cause to be paid to the said Mary Pape the sum of six shillings weekly for her maintenance and support, lodging and clothing, so long as she shall live chastely and shall not molest or annoy the said William Pape.

It was also proved that since June 1886 the appellant and respondent had not lived together, and that the respondent had paid the weekly sum mentioned in the agreement up to about the 15th March 1887, when the payments were discontinued through the respondent (as the appellant alleged) having molested or annoyed him. This she admitted, alleging that she so acted because he had broken the agreement by refusing and neglecting to pay her the agreed amount. The appellant alleged adultery against the respondent, and for these reasons refused to support her.

Witnesses were called by the appellant to prove the adultery of the respondent, which she denied, and the justices were of opinion and found, as a fact, that the adultery was not proved.

It was contended on behalf of the appellant that, the parties having separated by mutual arrangement under the agreement, there could not be any desertion by the appellant within the meaning of the 49 & 50 Vict. c. 52, and therefore the court had no jurisdiction to make an order upon him under that Act.

The justices were of opinion that the agreement had been put an end to by the appellant refusing to continue to make the agreed weekly payments, and that such refusal by the appellant to perform the agreement was a desertion of the respondent by the appellant within the meaning of 49 & 50 Vict. c. 52, and gave their determination against the appellant.

The questions for the opinion of the court were: 1. Whether the appellant had deserted the respondent within the meaning of the said Act by ceasing to make the payments required by the agreement of separation, and so leaving his wife wholly unprovided for. 2. Whether, the appellant and respondent having parted by mutual consent, there had been any desertion by the appellant within the meaning of the said Act under the above circumstances.

If the court should be of opinion that the said order was legally and properly made, and the appellant was liable, then the order was to stand; but if the court should be of opinion otherwise, then the order was to be quashed.

By 49 & 50 Vict. c. 52, sect. 1:

It shall be lawful for any married woman who shall have been deserted by her husband to summon her husband before any two justices in petty sessions or any stipendiary magistrate, and thereupon such justices or magistrate, if satisfied that the husband, being able wholly or in part to maintain his wife, or his wife and family, has wilfully refused or neglected so to do, and has deserted his wife, may order:

(1.) That the husband shall pay to his wife such weekly sum not exceeding two pounds as the justices or magistrate may consider to be in accordance with his means and with any means the wife may have for her support and the support of her family, and the payment of any sum so ordered shall be enforceable and enforced against the husband in the same manner as the payment of money is enforced under an order of affiliation.

(2.) Provided always, that no order for payment of any such sum shall be made in favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned, and that any order for payment of any such sum may be discharged by the justices or magistrate . . . upon proof that the wife has since the making thereof been guilty of adultery.

McClymont for the appellant.—The order is bad and ought to be quashed. The order was based on the desertion of the respondent by the appellant; but there has been no desertion here. The mere fact of the wife being destitute of means does not constitute desertion of her by the husband. Under the circumstances of this case there could not be desertion, for the husband and wife were voluntarily living apart under an agreement for separation. The term "desertion" has been interpreted both under the Divorce Act of 1857 (20 & 21 Vict. c. 85, s. 16) and the Poor Law Act of 1861 (24 & 25 Vict. c. 55, s. 3). Under the earlier Act it has received the following interpretation, "if the husband wilfully absents himself from the society of his wife in spite of her wish:"

Thompson v. *Thompson*, 27 L. J. 65 P. & M.

That interpretation was approved of by the court in *Reg.* v. *Cookham Union* (9 Q. B. Div. 522), which was a case under the poor law statute of 1861, but the learned judges went further and said that for the purposes of the poor law it meant something more, and involved the leaving of the wife by the husband. In that case the wife, accused of adultery, quarrelled with her husband, and then went and lived in adultery with her paramour till his death. She then wrote to her husband that she would come back to him, but he took no notice of the letter and would not have taken her back if she had returned. It was held that that did not amount to desertion. Field, J. said: "Desertion must be leaving of somebody or something. A sailor deserts his ship, a soldier deserts his regiment. But suppose a sailor goes on shore, and gets drunk, and his ship sails without him; or suppose a soldier outstays his leave for the same cause, and does not appear at roll-call, and in the meantime his regiment is ordered off in the middle of the night, and embarks for foreign service the next day before he can rejoin it; in either of these cases, could it be said that the sailor deserts his ship or the soldier his regiment?" So it was said in

Fitzgerald v. *Fitzgerald*, 49 L. T. Rep. N. S. 575; L. Rep. 1 P. & D. 694:

"No one can desert who does not actively and wilfully bring to an end an existing state of cohabitation. If the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion' in my judgment becomes from that moment impossible to either, at least until their common life and home have been resumed." If the agreement for separation was a valid contract between these parties, the proper remedy of the wife was to sue the husband for the

breach of it. The justices have no power under the Married Women Act 1886 to make an order for allowance against the husband under such an agreement as this; that Act creates a new remedy for women who have been actually deserted by their husbands. There was no legal desertion here, as the husband might have taken the wife back if she had presented herself.

No counsel appeared for the respondent.

STEPHEN, J. — I am of opinion that Mr. McClymont's argument on behalf of the respondent is well founded; and I think it sufficient here to say that "desertion" has not taken place in the case before us. The interpretation of what is legal "desertion" has always required that the parties must be living together at the time when the desertion takes place, and not after they have come to any voluntary agreement to live apart. Here the husband and wife had agreed to live apart, and during their separation the husband, for reasons good or bad, ceased to pay the money in consideration for which they had so separated. But that is not desertion; and the real complaint of the wife is, that her husband has ceased to pay her the weekly allowance in consideration for which she agreed to live apart from him. The Married Women (Maintenance in Case of Desertion) Act 1886 is one to facilitate the rights of those women who have been deserted by their husbands. Those rights existed before the Act and exist now. Here the husband may or may not take the wife back, or she may or may not obtain parish relief, through which process an order for contribution to her maintenance could be obtained. But at present there has been no such legal desertion as to enable the justices to deal with the case; and the order must therefore be quashed.

SMITH, J.—I concur.

Order quashed.

Solicitors for the appellant, *Belfrage* and *Co.*, for *Bainbridge* and *Barnley*, Middlesbrough.

Dec. 17 *and* 20, 1887.

(Before POLLOCK, B. and HAWKINS, J.)

THE GUARDIANS OF THE POOR OF THE IPSWICH UNION (apps.) *v.* THE GUARDIANS OF THE POOR OF THE WEST HAM UNION (resps.). (*a*)

Poor law—Settlement—Status of irremovability—Residence of one year—Husband continuously resident—Wife maintained as pauper lunatic—Intervals of residence with husband amounting in all to one year—9 *&* 10 *Vict. c.* 66, *s.* 1—11 *&* 12 *Vict. c.* 111, *s.* 1—24 *&* 25 *Vict. c.* 55, *s.* 1—28 *&* 29 *Vict. c.* 79, *s.* 8.

An order adjudicating a pauper lunatic wife to be settled in a parish other than that in which her husband resides, and an order for her removal to the lunatic asylum of that parish, and her removal and maintenance there, do not break the residence of the husband.

Where a wife is maintained at intervals as a pauper lunatic and at other times resides with her husband, the husband, in the absence of other disqualifying circumstances, gains, under 9 *&* 10 *Vict. c.* 66, *s.* 1, *and* 28 *&* 29 *Vict. c.* 79, *s.* 8, *a status of irremovability in a parish in which he is continuously resident, as soon as the intervals during which the wife resides with him amount to one year.*

A husband and wife left the Ipswich Union, in which they were then legally settled, on the 23*rd Sept.* 1883, *and took up their residence in the West Ham Union. The husband continuously resided there until the* 17*th Nov.* 1886, *but the wife was twice removed to the Essex County Lunatic Asylum and maintained there as a pauper lunatic, and twice adjudicated to be settled in the Ipswich Union, and on the second occasion an order was made for her removal to the Ipswich Borough Lunatic Asylum, and she was removed and maintained there. On the* 1*st March* 1886 *she was again removed to the Essex County Lunatic Asylum as a pauper lunatic. When she was not in the asylums she resided with her husband, and on the* 1*st March* 1886 *the periods of her residence with her husband amounted in all to* 390 *days, and the husband had received no relief save by reason of her maintenance as a pauper lunatic.*

Held, on appeal against an order adjudicating her to be settled in the Ipswich Union, that the husband had acquired a status of irremovability in the West Ham Union by a residence of one year within the meaning of 9 *&* 10 *Vict. c.* 66, *s.* 4, *as amended by* 24 *&* 25 *Vict. c.* 55, *s.* 1, *and* 28 *&* 29 *Vict. c.* 79, *s.* 8; *that the previous adjudication of the settlement of the wife in the Ipswich Union and her removal to the Ipswich Borough Lunatic Asylum did not break the residence of the husband; and that therefore, by the operation of* 11 *&* 12 *Vict. c.* 111, *s.* 1, *the husband being irremovable the wife was irremovable also.*

THIS was a case stated by the justices for the county of Essex sitting in quarter sessions on the hearing of an appeal against an order of the stipendiary magistrate of the West Ham Police-court, whereby it was adjudged that the parish of St. Clement in the Ipswich Union was the place of the last legal settlement of one Sarah Ann Warne, a pauper lunatic, and whereby the appellant union was ordered to pay certain sums of money, alleged to have been expended and paid, by or on account of the respondent union, in respect of Sarah Ann Warne, and also to pay a certain sum weekly for her lodging, maintenance, medicine, clothing, and care in the lunatic asylum at Brentwood, in the county of Essex.

The appeal was heard at the Easter Quarter Sessions for the county of Essex, when that court confirmed the order subject to the opinion of the Court of Queen's Bench on a special case.

The case was, so far as material, as follows:—

The pauper Sarah Ann Warne is the wife of Thomas Warne.

Until the 23rd Sept. 1883 Sarah Ann Warne resided with Thomas Warne in the parish of St. Clement, Ipswich, where Thomas Warne was legally settled within the district of the appellant union.

On the 23rd Sept. 1883 Thomas Warne left Ipswich and went accompanied by Sarah Ann Warne to reside at Leyton within the district of the respondent union, and has ever since continuously resided within such district.

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

On the 9th Nov. 1883 Sarah Ann Warne having become insane was lawfully removed by an order of the justices to the Essex County Lunatic Asylum as a pauper lunatic, and on the 31st Dec. 1883 an order was regularly made by the justices, by which order Sarah Ann Warne was adjudged to be settled in and chargeable to the appellant union. This order of adjudication was not appealed against.

On the 12th March 1884 Sarah Ann Warne, having recovered her right mind, was discharged from the asylum as cured.

On the 19th June 1884 Sarah Ann Warne was again lawfully removed by an order of the justices to the Essex County Lunatic Asylum as a pauper lunatic, and on the 17th Oct. 1884 a further order was regularly made, by which she was adjudged to be settled in and chargeable to the appellant union. This order of adjudication was not appealed against.

On the 21st March 1885 Sarah Ann Warne was lawfully removed to the Ipswich Borough Lunatic Asylum as a pauper lunatic under an order which was regularly made pursuant to such order of adjudication, dated the 17th Oct. 1884, and was maintained there, and was chargeable to the parish of St. Clement, in the Ipswich Union.

On the 28th May 1885 Sarah Anne Warne was by order discharged from the Ipswich Borough Lunatic Asylum for a month on trial.

On the 1st March 1886 Sarah Anne Warne, having again become insane, was lawfully removed under an order of the justices to the Essex County Lunatic Asylum, where she was confined as a pauper lunatic at the time the order next hereinafter mentioned was made.

On the 17th Nov. 1886 the stipendiary magistrate for West Ham made the order appealed against.

Except that Sarah Ann Warne was during the several periods above mentioned maintained as a pauper lunatic out of the rates, Thomas Warne did not at any time after he began to reside in the district of the respondent union receive relief from any parish, nor was he in any way maintained out of any rate or subscription.

Except when confined as a pauper lunatic as above mentioned Sarah Ann Warne has always resided with Thomas Warne within the district of the respondent union since the 23rd Sept. 1883, and has not been maintained or relieved out of any rate or subscription.

Sarah Ann Warne resided with Thomas Warne within the district of the respondent union (after deducting the several periods during which she was maintained as a pauper lunatic) for 390 days before the 1st March 1886, although there has been no one continuous period of one year, since the 23rd Sept. 1883, during which Sarah Ann Warne was not maintained as a pauper lunatic.

If the court should be of opinion that Sarah Ann Warne had not acquired a status of irremovability in the West Ham Union, the order of adjudication and the order of quarter sessions were to be confirmed; but if the court should be of a contrary opinion, then the order of adjudication and the order of quarter sessions was to be quashed.

By the statute 9 & 10 Vict. c. 66, s. 1, it is provided that,

From and after the passing of the Act no person shall be removed, nor shall any warrant be granted for the removal of any person from any parish in which such person shall have resided for five years next before the application for the warrant; provided always, that the time during which such person shall be a prisoner in a prison, or shall be serving Her Majesty as a soldier, marine, sailor, or reside as an in-pensioner in Greenwich or Chelsea Hospitals, or shall be confined in a lunatic asylum, or house duly licensed or hospital registered for the reception of lunatics, or as a patient in a hospital, or during which any person shall receive relief from any parish, or shall be wholly or in part maintained by any rate or subscription raised in a parish in which such person does not reside, not being a *bonâ fide* charitable gift, shall for all purposes be excluded in the computation of time hereinbefore made, and that the removal of a pauper lunatic to a lunatic asylum under the provisions of any Act relating to the maintenance and care of pauper lunatics shall not be deemed a removal within the meaning of this Act: provided always, that whenever any person shall have a wife or children, having no other settlement than his or her own, such wife and children shall be removable whenever he or she is removable, and shall not be removable when he or she is not removable

By 24 & 25 Vict. c. 55, s. 1, that,

After the 25th March next, the period of three years shall be substituted for that of five years, specified in 9 & 10 Vict. c. 66, s. 1, and the residence of a person in any part of a union shall have the same effect in reference to the provisions of the said section as a residence in any parish.

By the Union Chargeability Act 1865 (28 & 29 Vict. c. 79), s. 8, that,

From and after the 25th March 1866 the period of one year shall be substituted for that of three years specified in 24 & 25 Vict. c. 55, s. 1.

And by 11 & 12 Vict. c. 111, s. 1, that,

Whenever any person should have a wife or children having no other settlement than his or her own, such wife and children shall be removable from any parish or place from which he or she would be removable, notwithstanding any provisions of the said recited Act (9 & 10 Vict. c. 66), and shall not be removable from any parish or place from which he or she would not be removable by reason of any provision in the said recited Act.

J. C. Earle (with him *Poland*) for the appellants. —The order of the stipendiary magistrate and of the Court of Quarter Sessions was wrong, since the pauper had gained a status of irremovability in the respondent union. By 11 & 12 Vict. c. 111, s. 1, a wife is not removable from any parish or place from which the husband is not removable. The question therefore is, whether the husband is removable under 9 & 10 Vict. c. 66. The husband was not removable, because he had acquired a status of irremovability in the respondent union under 9 & 10 Vict. c. 66, s. 1, 24 & 25 Vict. c. 55, s. 1, and the Union Chargeability Act 1865 (28 & 29 Vict. c. 79), s. 8, by residing therein for one year. It is not disputed that the maintenance of the wife as a pauper lunatic at the expense of the appellant union was relief to the husband, but it is found in the case that, excluding the time during which the wife was confined in the asylum, and he was, by consequence, receiving relief in the computation of the time, he had resided in the respondent union for a period of 390 days. As therefore there was a period of one year during which he had resided in the respondent union without receiving relief, he had acquired a status of irremovability, and no order could rightly be made, either for his removal or for that of his wife. In *Reg.* v. *The Inhabitants of Christchurch* (18 L. J. 28, M. C.) it was decided as long ago as 1848 that the residence need not be a continuous residence. In his judgment

in that case Lord Denman, C.J. says: "The enacting clause includes all persons who have resided five years; the excepting clause excepts from the class of all residents several classes, and among others prisoners. The form of the excepting clause appears to make it applicable to all the time to which the enacting clause applies; it assumes that the five years required by the enacting clause have been computed, and the excepting clause is to come into operation only in respect of such persons who have been thus found to have resided for the required five years, and the mode in which it is directed to operate is by excluding the time—say, of imprisonment, for example—from the computation so assumed to have been made. The process directed may be described to be this: when the five years have been computed for any person, then examine whether such person has been under disability during any part thereof; has part of such residence been within a prison, for example? If no, the person is irremovable. If yes, the time thereof shall be excluded from the five years, and an equal portion of preceding time brought into computation instead." Adopting this process in the present case, we obtain a full residence of one year in the respondent union, during which the husband of the pauper was not under any disability. The same process of computation was adopted in *Reg.* v. *The Overseers of Hartfield* (21 L. J. 65, M. C.), in which case Lord Campbell, C.J. says: "What then is the intention of the Legislature by this provision (9 & 10 Vict. c. 66, s. 1)? First, that in computing whether the pauper has resided altogether five years in the parish, the time during which he has been a prisoner in any prison, either in or out of the parish, shall be excluded from the computation; and secondly, that the same course shall be pursued in computing whether there has been a residence of five years next before the application for the warrant; or, in other words, that the time of the imprisonment shall neither tell in making up the five years, nor shall operate as a break in the residence if altogether it has continued for five years. Looking to the whole scope of this proviso, we think it distinctly intimates that, in the computation to determine whether the pauper is removable, certain periods of time are to be struck out of the computation for all purposes; and the result is to be arrived at as if those periods of time never had existed so as to prevent the pauper from taking advantage of them in making up his five years, and to prevent the parish officers from depriving him of the status in the parish which he has acquired by reason of any of the occurrences enumerated." In *Reg.* v. *The Guardians of the West Ward Union* (7 E. & B. 21) also, the same principle was followed. The order for removal to the appellant union ought not therefore to have been made.

Philbrick, Q.C. and *Woollett* for the respondents.—The order adjudging the pauper to be settled in the appellant union is right. [POLLOCK, B.—Is not the husband irremovable by reason of one year's residence, and is not that sufficient?] It is stated in the case that, on the 31st Dec. 1883, an order was made adjudging the pauper to be settled in the appellant union, which order was not appealed against. Again, on the 17th Oct. 1884, a similar order was made, and not appealed against; and on the 2nd March 1885 she was removed by order pursuant to the last-mentioned order of adjudication to the lunatic asylum of the appellant union. These orders of adjudication, and the order of removal, are adjudications *in rem*, and constitute a break of residence. There can be no greater break of residence than an order of adjudication and removal. [POLLOCK, B.—How do you show that a break in the wife's residence is a break in the husband's?] Under the 35th section of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61) the wife derives her settlement from that of her husband, and consequently an adjudication of her settlement was necessarily an adjudication of his settlement. [HAWKINS, J.—The order of adjudication of her settlement was merely an order for the purpose of fixing the union with the cost of her maintenance in the asylum.] But an order was regularly made, and carried into effect for her removal to the Ipswich Borough Lunatic Asylum, that is, for her removal into the appellant union; and there can be no greater break of residence than that. After that, therefore, a fresh start was necessary in the computation of the length of residence necessary to confer a status of irremovability. [HAWKINS, J.—Do you say that if the husband had himself applied for relief, and the guardians had tried to remove him, he could not have said that he would not be removed because he had a status of irremovability by a year's residence?] That is my argument, since, if the husband is irremovable, the wife is so also.

Earle was not called upon to reply.

POLLOCK, B. — Although this case at first seemed to raise a difficult point as to the proper construction of the various Acts of Parliament dealing with the question of the settlement and removability of paupers, yet now that we have heard the whole case there does not seem to be any real difficulty. The husband of the pauper, the order for whose removal to the appellant union is now appealed against, has since the 3rd Sept. 1883 resided continuously at Leyton in the respondent union. Unfortunately, his wife is subject to periodical attacks of insanity, and on three occasions since that date it has been found necessary to remove her to an asylum, where she has been maintained as a pauper lunatic. On the 1st March 1886, the date on which the last order was made removing her to an asylum, the husband had been resident in the respondent union, after deducting the several periods during which the wife was maintained as a pauper lunatic, for a period of 390 days, although there had been no one continuous period of one year during which the wife had resided with him, and the question which we have to decide is, whether under these circumstances he has resided in the respondent union for one year within the meaning of 9 & 10 Vict. c. 66, s. 1, as modified by subsequent statutes. By that statute, passed in the year 1846, it was provided that no person shall be removed from any parish in which such person shall have resided for five years next before the application for the warrant, certain periods being for all purposes excluded in the computation of the five years, one of such periods being the time during which such person shall receive relief from any parish. This statute is still in force, except that the period of

five years mentioned in it, after being reduced to three years by 24 & 25 Vict. c. 55, s. 1, has now been fixed at one year by the Union Chargeability Act 1865 (28 & 29 Vict. c. 79), s. 8. The question therefore is, whether the husband, on whose removability the removability of the wife by 11 & 12 Vict. c. 111, s. 1, depends, and who, it is not disputed, received relief during the time the wife was confined as a pauper lunatic by reason of her maintenance in the asylum as such, had within the meaning of the statute I have quoted resided for one year in the respondent union. Now, he had not, it is true, resided, deducting the periods ordered by the statute, for any one continuous year; but the cases cited by Mr. Earle show that the law does not require that. From *Reg.* v. *The Inhabitants of Christchurch* (18 L. J. 28, M. C.), *Reg.* v. *The Overseers of Hartfield* (21 L. J. 65, M. C.), and *Reg.* v. *The Guardians of the West Ward Union* (7 E. & B. 21), it is abundantly clear that disjointed pieces of residence may be put together to make up the period prescribed by the Act. In *Reg.* v. *The Inhabitants of Christchurch* the process of computation is described in this way: "When the five years have been computed for any person, then examine whether such person has been under disability during any part thereof; has part of such residence been within a prison for example? If no, the person is irremovable. If yes, the time thereof shall be excluded from the five years, and an equal portion of preceding time brought into computation instead." This shows what the law is very clearly. Now what are the facts of this case? On the 23rd Sept. 1883 the pauper and her husband left Ipswich, and went to reside in the West Ham Union. The wife became insane, and on the 9th Nov. 1883 was removed by an order of justices to the Essex County Lunatic Asylum as a pauper lunatic, and on the 31st Dec. 1883 an order was made adjudging her to be settled in and chargeable to the Ipswich Union. On the 12th March 1884 she was discharged, but on the 19th June 1884 she was again sent to the Essex County Asylum, and on the 17th Oct. 1884 a second order was made adjudging her to be settled in and chargeable to the Ipswich Union; and further, on the 2nd March 1885 an order was made for her removal to the Ipswich Borough Lunatic Asylum, under which she was actually removed, and maintained there. On the 28th May 1885 she was discharged, but on the 1st March 1886 she was again sent to the Essex County Asylum, but on an order being again made adjudging her to be settled in the Ipswich Union, that union appealed on the ground that she had gained a status of irremovability in the West Ham Union by a residence of one year. Now, computing the time according to the process which has been long ago declared to be the law, there has been a residence of one year within the meaning of the statute; but it has been argued by Mr. Philbrick that the last order adjudicating her settlement to be in the Ipswich Union and ordering her removal there, which removal was carried out, was an adjudication *in rem*, and caused a break of evidence. But I do not see how these orders can affect the husband. As to the time during which the wife was being maintained under them, of course they affect him, because he is in receipt of relief during that time by virtue of her maintenance under them. In this case, however, that is immaterial, because there still remains without that time one year during which he resided in the respondent union without any disability. But those orders cannot, in my opinion, affect his status in any other manner, because, according to the true construction of the statute, no order whatever made as to a man's wife can, as far as I see, affect the question of his removability. He then being irremovable, the 1st section of 11 & 12 Vict. c. 111 comes into operation, with its provision that where a man is removable his wife is removable also, but where a man is irremovable the wife also is irremovable. On these grounds I think that the order was improperly made, and must be quashed.

HAWKINS, J.—I am of the same opinion. By 9 & 10 Vict. c. 66, s. 1, reading into that statute the alterations made by 24 & 25 Vict. c. 55, s. 1, and 28 & 29 Vict. c. 79, s. 8, it is provided that no person shall be removed from any parish in which such person shall have resided for one year next before the application for the warrant, provided that the time during which any such person shall receive relief from any parish shall for all purposes be excluded in the computation of the time mentioned. That is the law at the present time, and it was decided in the case of *Reg.* v. *The Inhabitants of Christchurch* (18 L. J. 28, M. C.), and some other cases which followed the rule there laid down, that according to the true construction of the statute all the periods during which a person receives relief are to be excluded from the computation of the time, and that when that has been done the fragments which remain after the exclusion are to be added together, and if they bring the result up to one year then the person is irremovable. Now there is also one other section which we have to apply to the facts before us, and that is the 1st section of 11 & 12 Vict. c. 111, which provides that when any person shall have a wife and children having no other settlement than his or her own, such wife and children shall be removable from any parish or place from which he or she would be removable, notwithstanding any provisions of the recited Act, that is, of 9 & 10 Vict. c. 66, and shall not be removable from any parish or place from which he or she would not be removable by reason of any provision in the said recited Act. This is the law which we have to apply, and the facts are these: On the 23rd Sept. 1883 Thomas, the husband of Sarah Ann Warne, came with his wife to reside at Leyton in the West Ham Union, and there is no doubt that from that time to the present he has been resident there, and but for the fact that his wife has been removed at intervals during that period to the county lunatic asylum as a pauper lunatic, there could be no possible objection to his claim to and status of irremovability on the ground of a continuous residence. Personally he has never changed his residence or become chargeable, and but for the circumstances I am about to mention his claim to a status of irremovability would be perfect. But it is said that that status is destroyed by reason of his wife having become a pauper lunatic and been removed as such to the Essex County and Ipswich Borough Lunatic Asylums. I will not go into the circumstance of her first removal to the Essex County Asylum and subsequent discharge. But on the 19th June 1885 I find she was lawfully

removed by an order of the justices to the Essex County Lunatic Asylum as a pauper lunatic, and on the 17th Oct. 1884 a further order was regularly made, by which she was adjudged to be settled in and chargeable to the Ipswich Union, in which union the husband and wife were legally settled before their migration to Leyton. Then on the 2nd March 1885 she was lawfully removed to the Ipswich Borough Lunatic Asylum, as a pauper lunatic, under an order which was regularly made, pursuant to the order of adjudication of the 17th Oct. 1884, and was maintained there, and was chargeable to the parish of St. Clement, in the Ipswich Union. I think that the order of adjudication was only made for the purpose of determining by whom the expense of maintenance was to be paid, and I do not see any statement that she was removed to the place of her last legal settlement. It is said that these facts constitute a break in her residence, and therefore in the residence of the husband. I am of opinion that that is not the case. The husband has been continuously resident in the parish of Leyton, and the very object of the statute was to confer a benefit on a person who had resided in a parish for a considerable time, and to obviate the hardship which existed under the old law when persons were removed from places where they had resided for a long time and from their friends to a distant part of the country where they had no friends. That is the object of the statute, and its effect is to make this man irremovable unless we say that there is a break in his residence because his wife was unfortunately removed as a lunatic to the Ipswich Borough Lunatic Asylum. I am far from saying, and it is not at all necessary that I should say, that he might not have been removed before he had gained an absolute status of irremovability and his wife included in the order; but whatever might have been done, there never was any order of removal of any sort or kind affecting the husband. If it was in the power of the parish officers to have him removed, they never, as a matter of fact, obtained any such order, and I am of opinion that the mere fact that the wife was removed to a lunatic asylum as a pauper lunatic was no break in the residence of the husband. It would, in my opinion, be straining the facts to an unconscionable extent to say that during the time he was living in his own house in Leyton and maintaining himself there by his own labour, he was to be deemed to be resident in the parish of St. Clement, Ipswich, where he had never been since the year 1883, simply because his wife was an inmate of the Ipswich Borough Asylum. I am clearly of opinion that the husband had a status of irremovability in the West Ham Union, and it is not necessary to go further than that, because, if the wife has not completed the period necessary to give her a status of irremovability, yet she is not removable, because when the husband is irremovable the wife is irremovable also. This, I think, answers the question submitted to us, which is, "If the court shall be of opinion that the said Sarah Ann Warne had not acquired a status of irremovability in the West Ham Union, the order of adjudication and order of quarter sessions are to be confirmed; but if the court be of a contrary opinion, then the order of adjudication and the order of quarter sessions to be quashed." I am of the contrary opinion. I think that Sarah Ann Warne had acquired a status of irremovability by the fact of her husband having acquired a status of irremovability by reason of his having, excluding the periods during which she was in the lunatic asylums, resided in the parish of Leyton for a period of 390 days, which covers the 365 days required by the statute.

Order of sessions quashed.

Solicitor for the appellants, *Rexworthy*, for *A. F. Vulliamy*, Ipswich.

Solicitors for the respondents, *Hillsary* and *Taylor*.

Monday, Jan. 16, 1888.

(Before MATHEW and SMITH, JJ.)

REG. *v.* THE LICENSING JUSTICES OF CREWKERNE. (*a*)

Licensing Act 1872 (35 *&* 36 *Vict. c.* 94), *s.* 39—*Six-day licence—Renewal—Application thereon for seven-day licence.*

A holder of a licence, in which a condition is inserted under the 49th section of the Licensing Act 1872 (35 *&* 36 *Vict. c.* 94) *that the holder shall keep the premises in respect of which such licence is granted closed during the whole of Sunday, (referred to in the Act as a six-day licence) cannot, on an application for the renewal of such licence under the same section, apply for its renewal without the condition.*

THIS was a rule calling upon the licensing justices for the division of Crewkerne in the county of Somerset to show cause why a writ of *mandamus* should not issue commanding them to hold an adjournment of the general annual licensing meeting for that division, holden on the 20th Aug. 1887, and at such adjournment to hear and determine the matter of an application by Walter Miller for the renewal of a licence authorising him to apply for and hold any of the excise licences that might be held by a publican for the sale by retail, at a house situated at Misterton in the said county known by the sign of "The Queen," of intoxicating liquor to be consumed either on or off the premises without any condition attached thereto.

It appeared that at the general annual licensing meeting held at Crewkerne on the 27th Aug. 1881 application was made for a provisional alehouse licence for a house in course of erection at Misterton, which was subsequently completed and became the house mentioned above as known by the sign of "The Queen."

The ground principally made use of in support of the application was, that the house was situated near the Crewkerne railway-station, and that persons driving to the railway-station were inconvenienced by being unable to find stabling accommodation within a reasonable distance.

The applicant at an early stage of the proceedings stated to the licensing justices that he desired a six-day licence only.

The application was opposed on the ground that there were already a sufficient number of licensed houses in the neighbourhood to satisfy the reasonable requirements of the public, and that there was scarcely any resident population.

The justices at the conclusion of the arguments

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

stated that, had the applicant pressed for a full seven-day licence, they should have refused it, but that, as it appeared that it would be a convenience to persons in the locality to put up their horses at a house very near to the railway-station, they would grant a six-day licence on condition that thoroughly satisfactory stabling accommodation were provided.

At the monthly petty sessions at Crewkerne, on the 18th Feb. 1882, this provisional order was declared final.

The applicant, Walter Miller, became the tenant of the house at the commencement of 1883, and from that period yearly took a six-day licence in respect thereof.

On the 20th Aug. 1887 application was made on his behalf for a renewal of the licence without the condition that it should be closed on Sundays, whereupon the justices, on the ground that there was not any greater population in the district than there was at the date of the original application, and that the number of passenger trains stopping at Crewkerne railway-station on Sunday was two, and feeling that there was no necessity for the sale of intoxicating liquor there on Sunday, refused the application.

Independently of these considerations the justices were of opinion that the Legislature, in giving them a discretion whether to grant an original licence or to refuse it altogether, could not have intended virtually to limit this power to remain in force for one year only by depriving them of the authority to continue the restriction unless at the request of the licensee.

On the refusal of the application the holder of the licence applied for and obtained a rule *nisi* calling upon the justices to show cause why a writ of *mandamus* should not issue commanding them to hold an adjournment of the general annual licensing meeting, and to proceed to hear his application for the renewal of his licence without any condition attached thereto.

The Licensing Act 1872 (35 & 36 Vict. c. 94) provides:

Sect. 49. Where on the occasion of an application for a new licence, or transfer or renewal of a licence, which authorises the sale of any intoxicating liquor for consumption on the premises, the applicant, at the time of his application, applies to the licensing justices to insert in his licence a condition that he shall keep the premises in respect of which such licence is or is to be granted closed during the whole of Sunday, the justices shall insert the said condition in such licence.

The holder of a licence in which such condition is inserted (in this Act referred to as a six-day licence) shall keep his premises closed during the whole of Sunday, and the provisions of this Act with respect to the closing of licensed premises during certain hours on Sunday shall apply to the premises in respect of which a six-day licence is granted as if the whole of Sunday were mentioned in those provisions instead of certain hours only.

The holder of a six-day licence may obtain from the Commissioners of Inland Revenue any licence granted by such commissioners which he is entitled to obtain in pursuance of such six-day licence, upon payment of six-sevenths parts of the duty which would otherwise be payable by him for a similar licence not limited to six days; and if he sell any intoxicating liquor on Sunday he shall be deemed to be selling intoxicating liquor without a licence.

The notice which a licensed person is required to keep painted or fixed on his premises shall, in the case of a licence under this section, contain words indicating that such licence is for six days only. In calculating the amount to be paid for a six-day licence, any fraction of a penny shall be disregarded.

The justices did not appear to show cause by counsel, but it appeared that they had filed an affidavit which was read, setting out the above-mentioned facts.

Paterson, for the applicant, in support of the rule.—The origin of the jurisdiction of the justices is to be found in 9 Geo. 4, c. 61, s. 1. That section establishes general annual licensing meetings, and gives the justices power to grant licences to persons keeping or being about to keep inns, alehouses, and victualling houses to sell excisable liquors by retail to be drunk or consumed on the premises therein specified. There is, however, nothing in the section giving the justices power to put any condition of any kind whatever into a licence. [SMITH, J.—Do you contend that the holder of a six-day licence can come when the time arrives for its renewal, and claim to have it renewed as a seven-day licence?] That is so. The 49th section of the Licensing Act 1872 (35 & 36 Vict. c. 94) is the foundation of what is called a six-day licence. That section provides that where on the occasion of an application either for a new licence, or for a transfer or for the renewal of a licence, for the sale of intoxicating liquor for consumption on the premises, the applicant at the time of his application applies to the justices to insert in his licence a condition that he shall keep the premises closed during Sunday, the justices shall insert the condition in the licence. The condition is inserted on the application of the applicant, and for his benefit, as he thereby has only to pay six-sevenths of the full duty. Further, by the 10th section of the Licensing Act 1874 (37 & 38 Vict. c. 49) it is provided that no person holding a six-day licence shall sell any intoxicating liquor on Sunday to any person whatever not lodging in his house, and that also is a benefit which the applicant receives by applying to have this condition inserted, inasmuch as he thereby gets rid of his common law obligation to serve travellers on Sunday. [SMITH, J.—Do you say that, if the justices tell the applicant they will not give him an ordinary licence, but that if he likes to apply to have the six-day condition attached they will give him a six-day licence, and he takes that course, the justices are bound to give him a seven-day licence on any renewal day on which he likes to come and demand it?] He is entitled to a renewal of his licence to sell, and the condition can only be inserted in it at his desire. The 7th section of the Act of 1874 contains a similar enactment as to an early-closing condition, also to be inserted on the application of the applicant and not otherwise. [MATHEW, J.—Is not that of which he is seeking a renewal a six-day licence?] He was seeking the renewal of a licence, which is a licence to sell without limitation, and there is nothing to show that if on one occasion he applies to have a six-day condition inserted in it, he is always to be bound to apply to have the same condition inserted, and that he cannot apply to have a licence without a condition. In the case of *Reg.* v. *The Justices of Kirkdale* (18 Q. B. Div. 248) it was decided in terms that this condition can only be inserted in a new licence if the applicant for it himself applies to the licensing justices to insert it. Lord Coleridge, C.J. there says: "It is said that sect. 49 under the circumstances gives the justices discretion, on the application for a new licence, not only to withhold it, but of their own

motion and will to insert in the new licence they are then for the first time granting a condition which the applicant has not applied for. I think the words of sect. 49 are clear, and that where an application for a licence has been granted, or is to be or is intended to be granted, it is only at the instance of the applicant that such a condition can be imposed. Here, therefore, the justices could not impose a limitation except in circumstances which did not arise, viz., a request by the applicant himself. It is at least doubtful whether, if the matter had arisen on renewal in the old shape, the justices could on a mere application for a renewal of the old licence have inserted such a condition. With all respect to the views of the learned judges in Ireland, I very much doubt whether the justices could have inserted such a condition, but the facts here do not raise that point, and I do not decide it." The Irish cases of the correctness of which the learned Lord Chief Justice speaks with doubt are *Reg.* v. *The Recorder of Dublin* (2 L. Rep. Ir. 385) and *Reg.* v. *Cathcart* (4 L. Rep. Ir. 567), but these cases are not an authority on the point, in view of the fact that the Irish statutes are different, and of the doubt thrown upon them in the case cited. On the correct construction of the statute, which couples together applications for new licences, transfers, and renewals, placing them all on the same footing, the justices have no jurisdiction in any of the three cases, and it has been held specifically that they certainly have not in the first any jurisdiction to grant any licence other than the unlimited licence mentioned in 9 Geo. 4, c. 61, s. 1, unless the applicant himself applies to have one of the conditions prescribed by statute inserted.

MATHEW, J.—I am of opinion that this rule must be discharged. We now know the history of this licence. It was originally granted seven years ago to the predecessor of the present holder, who is now applying for a writ of *mandamus* directing the justices to renew his licence as a licence authorising him to sell on all the seven days of the week. The predecessor applied for a licence in the full sense of the word. The application was opposed, and at an early stage of the proceedings the applicant stated that he was willing to accept a licence with a condition inserted, usually described as a six-day licence. This licence was granted, and was renewed from time to time in the same form, but on the last occasion of renewal the applicant, not asking for a new licence but for a renewal of the old licence, suggested that it was for him to say whether it should be a six-day or a seven-day licence, and that the justices had no discretion, but were obliged to grant him a seven-day licence. Mr. Paterson has now put before us on his behalf an argument in favour of the same view, and contends that the insertion of the six-day condition is a concession in favour of the holder of the licence, and that therefore he can come when it pleases him and tell the justices that he is for the future willing to forego the benefit of the concession, and take instead a seven-day licence with all its disadvantages, and that thereupon the justices must on an application for the renewal of the licence renew it as a seven-day licence. All that I will say of that contention is, that it is extremely ingenious. In my opinion the application to renew was an application to renew a six-day licence. It is obvious that opposition to the granting of a licence might be and frequently is bought off by a concession on the part of the applicant in agreeing to take a six-day licence instead of a seven-day licence. Is it, then, to be said that on some future occasion, when no opposition has been organised or prepared, he may apply to have it renewed as a seven-day licence? That is not, in my opinion, the proper construction of the statute. I quite agree with the view expressed by May, C.J. in the Irish case *Reg.* v. *The Recorder of Dublin* (2 L. Rep. 388), where he says: "It is quite conceivable that an applicant for a new licence might get rid of opposition by electing to take a six-day licence, and if he, on the next occasion of renewal, is to be permitted at his pleasure to substitute a general licence for that accorded to him, it is plain the licensing authorities would be deceived."

SMITH, J.—I am clearly of the same opinion. With regard to the argument put before us by Mr. Paterson I quite agree with him that, under the statute 9 Geo. 4, c. 61, s. 1, the justices could not put in any condition whatever. If they did not wish intoxicating liquors to be sold at any house on a Sunday, all they could do was to refuse the licence altogether. But the 49th section of the Licensing Act 1872 (35 & 36 Vict. c. 94), in my opinion, entirely altered the law in this respect. Under that section the justices can insert a condition that the holder of the licence shall not sell on Sunday, and what really happens now in a case similar to that which I have put is, that an applicant can, if a seven-day licence is refused him, ask for a six-day licence. On this point I quite agree with Lord Coleridge, C.J. in *Reg.* v. *The Justices of Kirkdale* (18 Q. B. Div. 249), where he says: "I think the words of sect. 49 are clear, and that where an application for a licence has been granted, or is to be and is intended to be granted, it is only at the instance of the applicant that such a condition can be imposed." This is all that was decided in that case, and it is exactly what happened in this case in 1881. Then after that for some years the licence was renewed with the six-day condition, until at length at the general annual licensing meeting in Aug. 1887 application was made for a renewal of the licence without the condition that it should be closed on Sundays. In my opinion the word "renewal" in the Act of 1872 means the renewal of the licence which a man holds, and if he desires to have a licence of a different kind from that which he has he must make a fresh application for an original licence. The fallacy of the whole case lies in the supposition that a man may apply for a renewal of something which he had not before. The justices, I think, rightly answered the applicant by saying that the licence which he held was a licence with a condition attached to it, and that his application for a licence without a condition could not be granted as a renewal.

Rule discharged.

Solicitors for the applicant, *Geare, Son,* and *Pease.*

Tuesday, Jan. 17, 1888.

(Before MATHEW and SMITH, JJ.)

HOLGATE AND ANOTHER (apps.) *v.* BRETT (resp.). (*a*)

Poor law — Churchwarden — Attending audit of accounts—4 & 5 Will. 4, c. 76, s. 98—General Order for Accounts, Jan. 14, 1867, art. 40.

The mere absence of a churchwarden from the audit of the poor law accounts of his parish, due notice having been given, is not sufficient in itself to support a conviction for wilful disobedience of the rules of the Poor Law Commissioners under the 98th section of 4 & 5 Will. 4, c. 76.

A churchwarden who failed to attend the audit of the poor law accounts of his parish, was convicted of a wilful neglect, or disobedience of the rules, orders, and regulations of the Poor Law Commissioners under the 98th section of 4 & 5 Will. 4, c. 76.

Held, that, as he had taken no part in the poor law administration of the parish; as the churchwardens had not usually attended the audit, and no intimation had been given that their absence had interfered with the transaction of the business; and as the notice of audit under 7 & 8 Vict. c. 101, s. 33, contained an intimation that it was "requisite that one at least of the overseers" should personally attend the audit, as well as the assistant overseer, he might reasonably have supposed that his attendance was not necessary; and that the conviction must be quashed.

THIS was a case stated by justices of Essex sitting as a court of summary jurisdiction at Chelmsford, under 20 & 21 Vict. c. 43, to obtain the opinion of the court upon the questions of law which arose before them as therein stated.

The facts stated in the case were, so far as material, as follows:—

At a court of summary jurisdiction, held at Chelmsford on the 5th Aug. 1887, Wyndham Holgate and five other persons were charged by the respondent, George Henry Brett, of Colchester, district auditor for the Essex audit district, comprising the Chelmsford Union, as follows: "For that you, on the 20th July 1887, at the parish of Chelmsford, then being overseers of the parish of Springfield, in the Chelmsford Union, and by law bound to account to the respondent as such auditor, unlawfully and wilfully did disobey a certain order of the Local Government Board, dated Jan. 14, 1867, to wit, did not attend at the time and place appointed by the auditor for the audit of your accounts, and submit to such auditor all books, documents, appointments in writing, contracts, bills, orders for payment, receipts, and other vouchers, containing or relating to your account, together with the banker's pass-book."

The defendants were the churchwardens and overseers of the parish of Springfield, one being an assistant overseer nominated by the vestry and appointed by the justices, and authorised by his written appointment "to perform all the duties of an overseer," being paid a salary.

The evidence adduced on the part of the prosecutor was, that a notice of the audit in the form required by law was sent to him by post prepaid, addressed "To the overseers of the poor of the parish of Springfield near Chelmsford," and that such notice was delivered in due course into the hands of the assistant overseer.

It was also proved that such notice of the audit was duly advertised in a newspaper circulating in the county wherein the union is situated, by the production of the *Essex Weekly News* newspaper, which is published at Chelmsford. It was further proved, by the production of the valuation lists, and the overseers' rate books of the parish of Springfield, that each of the two churchwardens had occasionally signed those documents in conjunction with some of the overseers.

It was also proved that neither the churchwardens, the overseers, nor the assistant overseer attended the audit, or produced any books, vouchers, &c., at any time during the day appointed by the notice sent and advertised by the auditor, nor gave any reason for not so attending. On cross-examination the auditor stated that, if two overseers attended the audit, it was all that was required, and that he had never seen either churchwarden of Springfield at any audit. It was admitted by the assistant overseer that he had made out all the rates and collected them, and also performed nearly all the duties of the overseers of the parish.

It was contended before the justices, on behalf of the two churchwardens, the appellants, that as an assistant overseer had been appointed to perform all the duties of an overseer, and that as the notice of the audit had not been actually received or seen by them, and as they had never acted in the relief of the poor nor had taken any part in the collection or distribution of the poor rates, they were not overseers within the meaning of the poor law statutes, or the orders of the Local Government Board, and that they were not, therefore, liable to a conviction for not attending the audit, and for not producing to the auditor the accounts, books, papers, &c., on the day appointed.

The justices were of opinion that the auditor had done all the law required as to giving notice of the audit, that the appointment of an assistant overseer did not relieve the overseers from the performance of any of their duties, or otherwise from seeing that such duties were properly performed—in fact, that he was appointed, as his name implies, simply to assist them in carrying out such duties, and that churchwardens are overseers as much as any other overseers or assistant overseers, and were bound with the other overseers to see that the accounts were made up and produced to the auditor, and to attend the audit, or to see that this was done by some of their number. They therefore convicted all the defendants, and fined each of the two churchwardens, and each of the two overseers, one shilling each and costs, and the assistant overseer 2*l.* and costs, considering that his conduct was highly culpable, and therefore deserved a larger penalty.

The churchwardens applied to the justices to state a case for the opinion of the High Court of Justice, which they consented to do.

If the court should be of opinion that their decision was right, then the conviction was to stand; if the court should be of a contrary opinion, then the conviction was to be quashed.

The statute 4 & 5 Will. 4, c. 76, provides as follows:

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

Sect. 98. In case any person shall wilfully neglect or disobey any of the rules, orders, or regulations of the commissioners, or be guilty of any contempt of the commissioners sitting as a board, such person shall upon conviction before any two justices forfeit and pay for the first offence any sum not exceeding 5*l*.

The General Order for Accounts (dated the 14th Jan. 1867), and issued by the Poor Law Board, in compliance with the direction contained in the 11th section of the statute 28 & 29 Vict. c. 79, to render the accounts of the guardians conformable to the provisions of that Act, provides as follows:

Art. 40. The officers of the union, and the overseers and officers of the parishes therein, who by law are bound to account to such auditor, shall attend at the time and place appointed by him for the audit of their accounts, and shall submit to the auditor all books, documents, appointments in writing, contracts, bills, orders for payment, receipts, and other vouchers containing or relating to their accounts, together with the banker's pass-books, where the overseers keep their accounts with a banker; and the same shall at the time of the audit be open to the inspection of any owner of property or ratepayer interested in such accounts, but to such extent and in such manner only as will not, in the judgment of the auditor, interfere with the audit. (*a*)

Art. 59. Whenever the word "overseers" is used in this order, it shall be taken to mean overseers of the poor and churchwardens, so far as they are authorised or required by law to act in the management or relief of the poor, or in the collection or distribution of the poor rate in any parish, and to apply to the majority of the whole body of churchwardens and overseers, or of the overseers only, as the case may be. (*b*)

To the notice of audit to be given to the overseers fourteen days before the audit under 7 & 8 Vict. c. 101, s. 33, is appended (*inter alia*) the following note:

It is requisite that one at least of the overseers whose accounts are to be audited, shall personally attend the audit, as well as the assistant overseer or collector (if any).

Channell, Q.C. (with him *Wightman Wood*).—The conviction of the churchwardens was wrong. The section provides for the punishment of persons who wilfully neglect or disobey, and here there was no wilful disobedience, as the churchwardens never personally received the notice of the auditor nor knew in any way that their attendance was necessary. There is a paid assistant overseer, and his attendance together with that of one of the overseers is all that has ever been customary or considered necessary. The object of their attendance is to produce all books of account and documents to the auditor, and none of these were in the custody of the churchwardens.

A. Glen.—The conviction was right, as the churchwardens are just as much overseers as those who are called by that name, and were bound to attend. As to the sufficiency of the notice it was held in *Rex* v. *The Justices of Warwickshire* (6 A. & E. 873) that, under the 81st section of the statute 4 & 5 Will. 4, c. 76, notice of grounds of appeal is sufficiently given if served on one of the officers having the management of the poor of the removing parish. It has always been the rule that service on one overseer is equivalent to service on all, and it has never been contended that it was necessary to serve notice upon all. The auditor therefore in this case had given all due and usual notice of the audit to be held, and it was the duty of the appellants to attend the audit. In *Points* v. *Attwood* (6 C. B. 38) it was held that an assistant overseer appointed in general terms under 59 Geo. 3, c. 12, s. 7, was an overseer within 6 & 7 Vict. c. 18, s. 17, and that service of notice of objection upon such assistant overseer was good service. In *Caunter* v. *Addams* (15 C. B. N. S 512) service upon an assistant overseer of a notice of claim under the 30th section of the Reform Act was held to be a good service. (See also *Baker* v. *Locke* (18 C. B. N. S. 52). There can be no question therefore as to the sufficiency of the notice. Next, the churchwardens are overseers for this purpose. The statute 43 Eliz. c. 2, provides that "the churchwardens with certain other persons shall be called overseers of the poor." (See *Rex* v. *Beeston*, 1 Bott. by Const. 473, p. 421.) Art. 59 of the General Order for Accounts of the 14th Jan. 1867 provides that the word "overseers" shall be taken to mean overseers of the poor and churchwardens so far as they are authorised or required by law to act in the management or relief of the poor;" and schedule A., which contains the forms in accordance with which by art. 1 of the order the overseers of every parish are to keep their accounts, provides a space in which the churchwardens are to sign the accounts. Negatively, the Church Building Acts provide that the churchwardens of ecclesiastical districts shall not be overseers.

Wightman Wood in reply.—The churchwardens did not personally assist in the collection of the rates, and were therefore not persons "bound to account" to the auditor. [SMITH, J.—Are not the churchwardens persons required by law to assist in the collection or distribution of the poor rate?] The statute 7 & 8 Vict. c. 101, under which the notice of audit is issued, provides by the 33rd section that, "the overseers or other officers employed in any parish in carrying the laws for the relief of the poor into execution," shall make up the rate-books and send them to the overseer, and the auditor may require "any person holding or accountable for any money, books, &c., relating to the poor rate or relief of the poor to produce his accounts and vouchers." These words apply, and apply only, to persons actually and as a fact employed in carrying out the poor laws and actually holding the money, and not to persons in the position of the churchwardens in this case. The section proceeds to impose a fine of 40*s*. for neglect or refusal to attend the audit or produce the accounts on the part of those persons. [SMITH, J.—Do you say that that section repeals the 8th section of 4 & 5 Will. 4, c. 76?] It amplifies it, and makes it clear that the only persons bound to attend are persons who have taken some active part in the administration of the poor law, and have in their possession money, books, or accounts. The notice of audit is founded on statute, but not statutory, and if it contains anything contrary to this view it is *ultra vires*. The cases cited as to notice deal with civil matters, and do not apply in a criminal matter, where the wilfulness of the neglect to do an act is an essential part of the offence; and, even if the churchwardens were legally bound to attend, which it is submitted they were not, the conviction ought not to be sustained in the absence of proof that the holding of the audit was brought to their individual knowledge.

(*a*) Glen's Poor Law Orders, 10th edit., p. 393.
(*b*) Glen's Poor Law Orders, 10th edit., p. 402.

Mathew, J.—I am of opinion that this conviction cannot be upheld. I am unable to come to the conclusion that there has been in this case wilful disobedience within the meaning of the section under which these proceedings were taken. That section is the 98th section of 4 & 5 Will. 4, c. 76, which provides that in case any person shall wilfully neglect or disobey any of the rules, orders, or regulations of the Poor Law Commissioners appointed under the Act, or of their assistant commissioners, or be guilty of any contempt of the said commissioners sitting as a board, such person shall, upon conviction before any two justices, forfeit and pay for the first offence any sum not exceeding five pounds, and for subsequent offences larger penalties. It seems to me that the Legislature intended by those words to create a criminal offence involving a contumacious disposition. But the justices have not found in the present case that a contumacious disposition existed either to treat the auditor with disrespect or to repudiate any obligation which the appellants were bound to perform in respect of their office as churchwardens. I think that, upon the authority of the cases which have been cited by the learned counsel for the respondents, notice of the audit must be taken to have been brought home to the appellants; but, on looking at the notice, I do not think that, judging from the matters appearing on the face of it, we can come to the conclusion that the appellants have been guilty of a wilful disobedience to its requirements. The notice is in a prescribed form, and purports to be given under the Poor Law Amendment Act 1844 (7 & 8 Vict. c. 101); but it is significant that towards the end of it there is a memorandum in these terms: "It is requisite that one at least of the overseers whose accounts are to be audited shall personally attend the audit, as well as the assistant overseer or collector (if any)." I do not think, judging from that memorandum, that the notice of audit can have contemplated that all the churchwardens and overseers would attend. When, in addition to this, we consider that the appellants were the churchwardens of the parish, whose actual duties were of an ecclesiastical character, and who took no actual part in the poor law administration, all the rates having been made out and collected, and all the duties of the overseers of the parish having been performed by the assistant overseer; that the auditor had audited the accounts many times before in the absence of the churchwardens; and that there is nothing to show that it was ever brought to their knowledge that their absence had in any way interfered with the transaction of the business of the audit, as indeed it did not, since the auditor himself stated that if two overseers had been present that would have been all that was required—when we consider all these matters, it seems to my mind clear that the churchwardens might very reasonably conclude that the attendance required was that of the overseers who had the management of the parish accounts for poor law purposes, and that their attendance was not required, and would not expedite the business of the audit. For these reasons, I think that the conviction cannot be sustained, and must be quashed.

Smith, J.—I am of the same opinion. After having my attention called to the provisions of the 33rd section of 7 & 8 Vict. c. 101, I think that the evidence tendered on behalf of the prosecution amounted only to *primâ facie* evidence of disobedience which could be rebutted by evidence showing that it was not wilful or contumacious. The conviction must therefore be quashed, but without costs.

Conviction quashed.

Solicitors for the appellants, *Paterson, Snow, Bloxam,* and *Kinder.*

Solicitors for the respondents, *Duffield* and *Bruty,* Chelmsford.

Monday, Feb. 6, 1888.

(Before Mathew and Smith, JJ.)

Reg. *v.* The Justices of Cumberland; *Ex parte* The Midland Railway Company. (*a*)

Justice—Disqualification—Interest—Bias—Justice taking active part in defending appeal against a rating decision—Justice ex officio member of board of guardians—Justice sitting to hear appeal.

Where a justice of the peace is shown to have taken an active part in defending an appeal against a decision of which he approves, but to which he was no party, he is disqualified on the ground of probability of bias from taking part in deciding the appeal.

A magistrate, an ex officio member of a board of guardians, took an active part in defending an appeal which a railway company brought against the decision of an assessment committee in respect of the rating of their property in a particular parish, and voted that the costs of the assessment committee in defending the appeal should be defrayed by his board of guardians. When the appeal came on to be heard at quarter sessions, he mentioned that he was an ex officio member of the board of guardians, and offered to retire from the bench, but did not mention that he had taken an active part in the proceedings connected with the rating of the railway company, or its appeal against the decision of the assessment committee which was adverse to the company; and he was allowed to take part in the adjudication on the understanding that he was merely an ex officio guardian, and had in no way interested himself in the subject-matter of the appeal. The Court of Quarter Sessions made an order affirming the decision of the assessment committee.

Held, that the previous conduct of the magistrate showed that he was or was likely to be swayed by a real bias in the matter, and that therefore the proceedings of the Court of Quarter Sessions were irregular, and the order of the court ought to be quashed.

This was a rule *nisi* which had been obtained by the Midland Railway Company, calling upon the justices of Cumberland to show cause why a writ of *certiorari* should not issue to bring up an order of the Court of Quarter Sessions for that county to be quashed, dismissing the appeal of the railway company against the valuation of their property in the parish of Wetheral, by the Assessment Committee of the Carlisle Union, on the ground of interest in one of the justices who sat on the appeal.

(*a*) Reported by W. P. Eversley, Esq., Barrister-at-Law.

The facts of the case were as follows:

When the appeal of the Midland Railway Company came on to be heard at the Court of Quarter Sessions, at Carlisle, in Oct. 1887, a Mr. Mounsey-Heysham, who is a justice of the peace, and an *ex officio* member of the Carlisle Board of Guardians, asked Mr. Littler, Q.C., who appeared as counsel for the railway company, whether there would be any objection to his sitting on the bench, though he was *ex officio* a member of the board of guardians. Mr. McIntyre, Q.C., who appeared for the parish of Wetheral, suggested that neither shareholders of the company nor *ex officio* members of the board of guardians should sit. But the chairman of the court said he was an *ex officio* member of the Carlisle Board of Guardians, but had never attended any of their meetings. Thereupon Mr. Littler suggested that no member of the court who had sat on the assessment committee, from whose decision the appeal lay, should sit, but that he did not see that anybody else could be objected to, except technically.

At this time those who appeared for the railway company were under the impression that Mr. Mounsey-Heysham was nothing more than a mere *ex officio* member of the board of guardians, and, like the chairman, had not taken any part in any of the previous proceedings connected with the rate in question.

The appeal was heard, and the rating of the assessment committee affirmed.

Some short time after, in the month of Nov. 1887, the attention of the railway company was called by means of a paragraph in one of the local newspapers to the fact that Mr. Mounsey-Heysham had taken an active part at the board of guardians in defending the appeal in which he afterwards sat as a magistrate, and had himself moved to defend the appeal, and voted that the guardians should defray the costs incurred by the assessment committee in defending the appeal. This Mr. Mounsey-Heysham did not deny, as appeared in his reply to the newspaper criticism.

On further investigation it appeared from the minute books of the Carlisle Board of Guardians, that Mr. Mounsey-Heysham, as *ex officio* member of the board of guardians, had attended thirteen meetings between Nov. 1886 and the end of Sept. 1887, and that the question of the assessment of the railway company and matters connected with the pending appeal were discussed at nine meetings, and that before Nov. 1886 he did not appear to have ever attended the meetings of the board of guardians.

At the October session of 1886 a previous appeal against the rating of the same assessment committee of the Midland Railway had been allowed on the ground that the gross rateable value of their property in the parish of Wetheral had not been accurately stated, and Mr. Mounsey-Heysham was dissatisfied with that decision, and immediately after attended the board of guardians for the first time on Nov. 11, 1886, and took an active part in obviating the effects of the mistake that had been made in the rate-books of the parish.

The mistake arose through the overseers of Wetheral, after ascertaining the net value of the railway property in their parish, thinking they might insert any amount they pleased in the gross annual value column of the rate-book; and in one case the gross annual value was represented to be 10*s.* less than the net annual value. The Midland Railway Company contended that they ought to be allowed the usual deductions for working expenses, &c., from the gross estimated value, and to reduce by the amount of such deductions the total of the net annual value; and in this contention they were successful.

On the above facts a rule *nisi* for a writ of *certiorari* was granted by Wills and Grantham, JJ.

McIntyre, Q.C. (*F. Marshall* with him) for the overseers.—This rule ought to be discharged. The proceedings at quarter sessions were not irregular, as the justice whose conduct has been impugned was not so interested a party as to vitiate the decision to which the court came in upholding the rating of the assessment committee of the property of the Midland Railway Company. In the first place it does not lie in Mr. Littler's mouth to object to the presence of the justice at the hearing of the appeal. Before the case came on for hearing he mentioned that he was an *ex officio* member of the Carlisle Board of Guardians, and offered to retire from the bench, but Mr. Littler, on behalf of the railway company, consented to his taking part in the decision, and only objected to any member of the assessment committee sitting on the appeal. The question here is whether the justice was a person interested in the appeal, and so the order of the justices ought to be quashed. The justice was not a member of the assessment committee, and being a mere *ex officio* member of the board of guardians does not make him in any way an interested party. His case is within the principle of 5 & 6 Vict. c. 57, s. 15, which provides that no justice of the peace shall be disabled from acting as such justice at any petty or special, or general or quarter sessions, in any matter merely on the ground that he is an *ex officio* member of any board of guardians complaining, interested, or concerned in such matter, or has acted as such at any meeting of such board of guardians. Because the justice has acted in, or discussed, or decided, anything in connection with this appeal as an *ex officio* member of the board of guardians he is not thereby disqualified from sitting to hear it. [He was stopped.]

Littler, Q.C. (*E. Page* with him) for the Midland Railway Company.—I consented to the justice taking part in the appeal because I was under the impression that he was a mere *ex officio* guardian—a mere titular guardian, and had taken no part or lot in the discussion of the rating of the railway by the guardians. The justice was more than a mere *ex officio* member of the board of guardians, he was a most active member in the matter of this rating and the appeal consequent upon it; he attended all the meetings of the board of guardians at which the matter came on for discussion; he resisted the contention of the railway company, and proposed that the costs of the assessment committee in defending the appeal should be defrayed by the guardians; and had I or those who instructed me known of these facts, we should not have consented to his adjudicating on this appeal. The present case is within the principle that where a person is affected, or likely to be affected by bias in a particular matter, he is disqualified from sitting as judge in that matter. Pecuniary interest is by no means necessary, and here we do not suggest any such

improper motive. [Smith, J. referred to *Reg.* v. *Farrant*, 57 L. T. Rep. N. S. 880; 20 Q. B. Div. 58.] The facts of that case were different to this, and did not show that the justice had or would be likely to have any bias if it were brought before him to adjudicate upon. Here the justice was a leading spirit in the dispute with the railway company, and showed by his acts and conduct that he had formed a *primâ facie* judgment before he adjudicated on the appeal. This case is within the principles of the law laid down in the following cases:

Reg. v. *Milledge*, 40 L. T. Rep. N. S. 748; 4 Q.B. Div. 332;
Reg. v. *Lee*, L. Rep. 9 Q. B. Div. 394.

McIntyre in reply.—The justice has done nothing which precluded him from giving a fair and impartial mind to the consideration of the appeal. The Legislature clearly contemplates that *ex officio* guardians should be members of assessment committees (25 & 26 Vict. c. 103, s. 2); but the justice here did not serve on such committee; it was not his rating or valuation that was appealed against, and his actions were not inconsistent with strict impartiality when he came to adjudicate on the appeal.

Mathew, J.—In this case I am of opinion that this rule must be made absolute. It is quite clear what the law upon the subject is, and the only question here is, whether the facts that have been brought before us establish that the principle of law relied upon by the appellants, if I may so call them, is applicable to the particular case. The rule of law is that where a magistrate takes such an interest in the subject-matter of the litigation as to make a real bias reasonably probable, he is disqualified from sitting as a magistrate. Now the circumstances that are relied upon in this case are no doubt peculiar. It has not been contended on the part of the railway company that there was the slightest reason to impute to the magistrate that he had any pecuniary interest in the result of the appeal, or that he was influenced by any pecuniary motive, in anything that he did; nor has it been suggested for a moment that he acted from anything else than a sense of public duty and what he thought was incumbent on him as a magistrate. All that being conceded, it is insisted for the railway company that what took place in the particular case clearly brings him within the prohibition contained in the rule to which I have referred. Now the first important fact with reference to this subject-matter of inquiry is the original appeal at which Mr. Heysham, as a magistrate, presided. That was an appeal against the assessment. The assessment had been made in this extraordinary and irregular way. The net assessment had been arrived at somehow, and it had been thought unimportant what the gross assessment under the circumstances was. We are told that in some cases the gross assessment was a little more, and in one case a little less, than the net assessment. That being so, an appeal was to be anticipated from the railway company, and one of those appeals came before Mr. Heysham and his brother magistrates. The case of the railway company was perfectly clear. Treating the gross valuation as part of the assessment, and a necessary part of it, they pointed out the deductions that ought to be made under the statute, and demonstrated in that way that the net assessment should be reduced. The magistrates were coerced to come to that conclusion; they had no alternative, and I have not the slightest doubt that Mr. Heysham at any rate thought that great injustice had been done as the result of that appeal. Influenced by that feeling, he appears to have taken the matter in hand, and it is a noticeable thing that at every meeting subsequently whenever any question between the guardians and the Midland Company turned up there was Mr. Heysham. He had not, apparently, exhibited a similar devotion to the interests of the public with reference to any other questions which arose. In his capacity of *ex officio* guardian he had not attended before. Now what steps were taken to set this matter right? Messrs. Hedley, the gentlemen we have heard of, were employed to value. I asked whether the net valuation was interfered with. No; the old net valuation continued; and what Messrs. Hedley appeared to have been requested to effect was to add to the valuation so much as would make the gross valuation practically correct so that no deductions afterwards would bring the assessment below the net assessment. That Messss. Hedley did. The moment they had completed their labours and the assessment committee had begun to act on the results, there was a notice from the railway company of objection. First, there was a proposal of compromise. The railway company offered to accept an assessment of 400*l.* a mile instead of 500*l.* a mile, which appeared to be what the other assessment worked out at. That was refused. Singular to state, Mr. Heysham was again present on that occasion. The exact part he took we do not know, but it appears that proposal was refused. A further discussion took place. An application was made on the part of the Caledonian Railway Company—another railway—for some information to guide them. Mr. Heysham, again no doubt influenced by public spirit, declined to assist the Caledonian Railway Company, and would give no information. We are told he has had a legal training, and probably he might consider that that was a perfectly justifiable treatment of the matter from a lawyer's point of view, viz., withholding any information of that sort. Then there was a correspondence with reference to a Mr. Payne attending to discuss the whole matter with the assessment committee. I do not know that much turns upon that, all we know is that Mr. Payne did attend to discuss matters before the assessment committee, and nothing came of it. Then a question was raised as to how the costs of the appeal were to be provided for; again Mr. Heysham was present at the meeting, and a very important resolution was come to, that the assessment committee should be assisted to prosecute this particular appeal—that is the second appeal—and added to that it was proposed by Mr. Heysham that if any other appeal should be made by any of the other railway companies similar assistance should be afforded to the particular parish; so that he had taken the whole matter in hand and clearly had a very strong view that there should be any amount of litigation that was needful between the railway companies and the assessment committee in order to establish what, I cannot help seeing he thought, were the rights

of the public, and the rights of the parish in the matter. After all this has taken place he takes his seat at the quarter sessions. Then the chairman of the quarter sessions mentions that he is an *ex officio* guardian. I have not the slightest reason for thinking that Mr. Heysham was concealing anything, or supposed he was concealing anything, but he certainly did not express himself in such a way as to convey to the learned counsel present anything of the part he had taken before, and the concession made by the learned counsel does not appear to me to extend, as I thought it might at first, to what is now complained of. Taking his seat at quarter sessions on that occasion on the bench, he sat on an appeal upon a matter with regard to which it appears to me clear he had formed a strong opinion. I am satisfied that he is shown to have been under the influence of a real bias in the matter, and whatever the result—the result which is arrived at does not influence me in the least—the proceedings were, it appears to me, irregular, and this rule must be made absolute. At the same time, subject to what my learned brother may think, I do not consider this a case in which we should mark our sense of his conduct, and the rule must be made absolute without costs.

SMITH, J.—I entirely agree with what has fallen from my brother Mathew; I also agree with the view he has taken of the facts of the case and of the principle to be applied to them, and I am not going to add one syllable to what he has said thereon. One word with regard to what we have to decide. The rule was laid down by Blackburn, J. as applicable to a case like this in the case of *Reg.* v. *Rand* (L. Rep. 1 Q. B. 230). This is the point: "wherever there is a likelihood that the judge, whether from kindred or any other cause, would have a bias in favour of one of the parties, it would be very wrong in him to act." That is the rule; whether there is a real likelihood from kindred or any other cause that he may have a bias in favour of one of the parties he ought not to act. Now I have to ask myself whether there was any such likelihood in this case. What do I find? I find from Oct. 1886, the date when the first appeal by the company was heard at quarter sessions in which the company were appellants on what I may call a technical point, which my brother Mathew has pointed out, Mr. Heysham taking the liveliest interest in the case against the company. I find him taking a conspicuous and prominent part in getting up the case of what I may call the assessment committee against the railway company. I find him advising and directing them to fight in antagonism to the railway company from Oct. 1886 till he went abroad in April 1887; and in April 1887 everything had been prepared for the appeal which was then imminent, and which ultimately came off in Oct. 1887. I cannot bring myself to any other conclusion than that unwittingly, for I have no doubt as my brother Mathew has said, he honestly believed he was doing what he ought to do for the public—he has brought himself within the rule of law I have already read, and that this rule must be made absolute. *Rule absolute.*

Solicitors for overseers of Wetheral, *T. Dixon Parker*, for *H. B. Lonsdale*, Carlisle.

Solicitors for the Midland Railway Company, *Beale* and *Co.*

April 18, 19, *and* 30, 1888.

(Before FIELD and WILLS, JJ.)

REG. v. WAKEFIELD AND OTHERS (Justices of Westmoreland). (*a*)

Inn—Licence—Renewal—Discretion of justices—9 Geo. 4, c. 61, s. 1—Licensing Act 1872 (35 & 36 *Vict. c.* 94), *s.* 42—*Licensing Act* 1874 (37 & 38 *Vict. c.* 49), *s.* 32.

Licensing justices refused to renew the licence of an innkeeper on the grounds of "remoteness of the inn from police supervision, and the character and necessities of the neighbourhood."

Held (affirming the decision of the justices), that licensing justices are entitled to inquire into the character and wants of the neighbourhood, and, in the judicial exercise of their discretion, to refuse a grant of a licence by way of renewal on such grounds.

SPECIAL CASE.

1. On the 10th Sept. 1887 William Ridding duly applied to the licensing justices for the Kendal Division of Westmoreland, for a grant by way of renewal for the sale by him of all intoxicating liquors at the Low Bridge Inn, at Kentmere, in the county of Westmoreland, and was refused such renewal.

2. Susannah Short, the owner of the said inn, and a person aggrieved by such refusal, appealed in due form of law to the quarter sessions of the peace for the county of Westmoreland, holden at Kendal, and such appeal was heard by the Court of Quarter Sessions on the 21st Oct. 1887.

3. On the part of the appellant it was contended that, on the hearing of an application for the renewal of a licence under the Intoxicating Liquor Licensing Acts of 1828, 1872, and 1874, the court was not by law entitled to inquire into the character and wants of the neighbourhood, or to refuse the grant of a licence by way of renewal upon such grounds.

4. The Court of Quarter Sessions overruled the said contention, and, after hearing evidence, refused to renew the licence, on the ground of the remoteness of the inn from police supervision, and upon the ground that the character and necessities of the locality and neighbourhood in which the said inn was situate did not require it.

5. The question of law for the court was whether the Court of Quarter Sessions was entitled to refuse the said renewal upon the grounds stated.

6. If it was not so entitled, the order of sessions was to be quashed, but if the court should be of the contrary opinion, then the said order was to be affirmed.

By sect. 1 of the Licensing Act 1828 (9 Geo. 4, c. 61):

Whereas it is expedient to reduce into one Act the law relative to the licensing by justices of the peace of persons keeping or being about to keep inns, alehouses, and victualling-houses, to sell excisable liquors by retail, to be drunk or consumed on the premises, in that part of the United Kingdom called England: Be it therefore enacted that . . . there shall be annually holden a special session of the justices of the peace (to be called the general annual licensing meeting), for the purpose of granting licences to persons keeping or being about to keep inns, alehouses, and victualling-houses, to sell excisable liquors by retail to be drunk or consumed on the premises therein specified . . . and that it shall be lawful for the justices

(*a*) Reported by F. A. CRAILSHEIM, Esq., Barrister-at-Law.

. . . to grant licences for the purposes aforesaid, to such persons as they, the said justices, shall in the execution of the powers herein contained and in the exercise of their discretion deem fit and proper.

By sect. 42 of the Licensing Act 1872 (35 & 36 Vict. c. 94):

When a licensed person applies for the renewal of his licence, the following provisions shall have effect: (1) He need not attend in person at the general annual licensing meeting, unless he is required by the licensing justices so to attend; (2) The justices shall not entertain any objection to the renewal of such licences, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence (and stating in general terms the grounds of opposition) has been served on such holder not less than seven days before the commencement of the general annual licensing meeting: Provided that the licensing justices may, notwithstanding that no notice has been given, on any objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given. . . . Subject as aforesaid licences shall be renewed, and the powers and discretion of justices relative to such renewal shall be exercised as heretofore.

By sect. 32 of the Licensing Act 1874 (37 & 38 Vict. c. 32):

A "new licence" means a licence for the sale of any intoxicating liquor, granted at a general annual licensing meeting, in respect of premises in respect of which a similar licence has not theretofore been granted.

Candy, Q.C. (*L. Sanderson* with him) for the appellant.—It is submitted that, upon the hearing of an application for the renewal of an innkeeper's licence, it is not competent for the justices to go into the question of the character and requirements of the neighbourhood. The jurisdiction of the justices in this matter is conferred by sect. 1 of the Act of 1828 (9 Geo. 4, c. 61), and their powers and discretion are there defined. Upon that section, standing by itself, it appears that the discretion of the justices is limited to the consideration of the fitness of the applicant. There is a recognised interest in an existing licence, and an intention by the Legislature to preserve it. Although the Legislature has not in express words drawn a distinction between a new licence and a renewal, and although there is no such expression as "vested interests" used in the Acts, yet the distinction underlies many of the provisions of the Acts, and the interest is both recognised and protected. In the Act of 1872 (35 & 36 Vict. c. 94) the difference between a new licence and a renewal is in terms recognised, and sect. 42 of that Act places the applicant for a renewal in a different position from that of the applicant for a new licence. Under that section it is submitted that the applicant is entitled as of right to his renewal if no notice of objection has been given. He is clearly *primâ facie* entitled. In the Acts of 1872 and 1874 the licence is said to be "attached to" the premises, which shows that the licence is recognised as existing apart from the individual holder of it. The licence is for the premises, as well as for the person. The case of *Reg.* v. *The Justices of Market Bosworth* (57 L. T. Rep. N. S. 56; 57 L. J. 96, M. C.) is relied upon. The following cases were also cited:

Reg. v. *Schneider*, 48 L. T. Rep. N. S. 482; 11 Q. B. Div. 66;
Reg. v. *Sylvester*, 2 B. & S. 322; 31 L. J. 93, M. C.;
Reg. v. *The Justices of Lancashire*, 23 L. T. Rep. N. S. 461; L. Rep. 6 Q. B. 97;
Smith v. *The Justices of Hereford*, 39 L. T. Rep. N. S. 604;
Ex parte Martin, 40 J. P. 133;
Ex parte Bendall, 49 J. P. 88;
Reg. v. *Kay*, 10 Q. B. Div. 213;
Reg. v. *The Justices of Liverpool*, 49 L. T. Rep. N. S. 244; 11 Q. B. Div. 638.

Addison, Q.C. (*Poland* with him) for the respondents.—If the contention of the appellant is right, it must be decided that, under the Act of 1828, the discretion of the justices was limited to the consideration of the personal fitness of the applicant when the application was for a new licence. Under that Act there is no distinction of any sort between a grant of a new licence and a grant by way of renewal; and there is nothing in any of the later Acts applicable to innkeepers' licences which in any way cuts down or limits the absolute discretion conferred upon the justices by the Act of 1828. It is clear that the justices have an unlimited discretion upon applications for new licences, and, therefore, under the Act of 1828, at any rate, their discretion is unlimited as to renewals. The first time any distinction was made between new licences and renewals was in the Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27). Certificates under that Act were to be granted or refused in the same manner as licences under the Act of 1828, but it was further enacted that the justices should be entitled to refuse this certificate only upon four specified grounds (sect. 8). But, if the discretion of the justices had been already limited to refuse licences only on the ground of the unfitness of the applicant, the beerhouse keepers would have been sufficiently protected without any further limitation being put upon the discretion of the justices; and the qualification in sect. 8 of the Act of 1869 would have been unnecessary. That section is repealed by the Beerdealers Act 1882 (45 & 46 Vict. c. 34). The fact that the courts have never inquired into the grounds upon which justices have exercised their discretion, shows that their discretion must be regarded as absolute. This shows that the discretion of the justices under the Act of 1828 was unlimited, and in that Act new licences and renewals are put upon the same footing by the terms of the 1st section, where the words are "to grant to persons keeping or being about to keep inns." On an application for a new licence, the justices ought to take into consideration the number of houses in the neighbourhood already licensed (*Reg.* v. *The Justices of Lancashire*, 23 L. T. Rep. N. S. 461; L. Rep. 6 Q. B. 97), and, as applications for renewal are on the same footing, the same inquiries ought to be entered into on such applications. The fact that under the Act of 1874 applicants for renewals were not bound to attend personally, merely shows that someone else than the licence-holder may apply for a licence to continue to sell, but it does not place him on a more advantageous footing than any other applicant for a licence. None of the statutes show that the discretion of the justices is limited. It is submitted therefore that the decision of the justices ought to be upheld. He also cited the following cases:

Marwick v. *Codlin*, 30 L. T. Rep. N. S. 719; L. Rep. 9 Q. B. 509;
Reg v. *Huddersfield*, 1 Q. B. Div. 52;
Rex v. *Hann*, 3 Burr. 1716;

Garrett v. *The Justices of Middlesex*, 12 Q. B. Div. 620; 53 L. J. 81, M. C.;
Reg. v. *The Justices of Over Darwen*, 39 L. T. Rep. N. S. 444;
Reg. v. *The Justices of Market Bosworth*, 57 L. T. Rep. N. S. 56; 57 L. J. 96, M. C.

Candy, Q.C. in reply.

Cur. adv. vult.

FIELD, J.—The question of law in this case was reserved for our determination by the justices of the quarter sessions for the county of Westmoreland, on appeal from the licensing justices by the applicant for the renewal of a licence for the Low Bridge Inn at Kentmere. The licensing justices withheld the renewal of the licence in question on the ground of the remoteness of the inn from police supervision, and on the ground that the character and necessities of the locality did not require it. The justices at quarter sessions came to the same opinion on appeal, but, at the instance of the applicant, they reserved the question for us, as to whether they have a discretion on such grounds to refuse to renew a licence. The question turns upon the true construction of the Act known as the Intoxicating Liquor Licensing Act of 1828 (9 Geo. 4, c. 61), and, it is alleged, of certain subsequent statutes. My own impression and view is that it depends entirely upon the construction of the Act of 1828, because I have very carefully gone through the Acts cited by Mr. Candy and all the cases to which he has referred; and the result is that I cannot find that he has established his contention that there has been any alteration of the law, either by legislation or by judicial construction, relating to the discretion of the magistrates as applied to this case. Mr. Candy's contentions were, first of all, that it was not competent for the justices to entertain these objections on the grounds on which they refused this licence, and that it would not have been so, even if this had been an application for a new licence; and, secondly, that inasmuch as it was an application for a licence by way of renewal, it was, I will not say less competent, but equally incompetent for them to entertain these objections. With regard to the case of a new licence, I must confess that the contention startled me very much, because I have, ever since I have considered this question, always thought that if one proposition had been established in the law on this subject above another, it was that, in the case of the granting of a new licence to an inn, the discretion of the justices was—I use the word, but I do not say it is a word I should have selected—absolute. What I understand by that is a very large and wide discretion in the exercise of judicial power, and I was surprised when Mr. Candy told me that my contention to that effect many years ago in *Simpkin* v. *The Justices of Birmingham* (26 L. T. Rep. N. S. 620; L. Rep. 7 Q. B. 482) was altogether wrong. I do not think he went so far as to say that it was wrong at that time; but absolutely wrong now, because of subsequent legislation and subsequent decisions in the Court of Appeal, which had entirely altered the law upon the subject, both as regards new licences and applications for renewals. Mr. Candy contended that it was not within the competence of the justices to withhold the licence, provided the justices were satisfied that the applicant was a respectable man, and that the house was a respectable and convenient house. Mr. Candy assured me gravely that that was the state of things, and of course I thought it my duty to go through the series of statutes and decisions to see whether that was borne out. I do not think it is. To my mind, the law upon the subject, so far as the granting of this licence is concerned, was declared clearly and emphatically as far back as 1758. I know of no contradiction of that in judicial construction to the present time, nor do I know of any legislative repeal or alteration of that which the Legislature must be taken well to have known, and so the courts of law have put upon the licensing statutes the construction that the jurisdiction of the justices is absolute. Now, the present question depends upon the construction practically of 9 Geo. 4, c. 61—the Act of 1828. Mr. Addison referred us to the earlier legislation upon the subject, which tends to make the Act of 1828 clear and intelligible. I have referred to some of the older statutes on the subject to see how that is. Mr. Candy asserted that there was a time in English history and English law when the natural right of the subject to sell intoxicating liquors by retail was understood to be unrestricted either as to place or as to person; but certainly restrictions have existed ever since the reign of Edward VI., or earlier still, when the Legislature took the matter in hand by requiring the granting of licences. At first the licences were granted by justices in their own houses, where they exercised their jurisdiction; but in the reign of George II. a very important modification was introduced, and that was that licences should be granted, or refused, or withheld, at a general meeting of the justices at quarter sessions; therefore substituting, for the individual discretion of particular justices, all the justices before whom the application might be made in quarter sessions assembled. The only use of referring to this is for the sake of a decision given in 1758 upon that state of the law, in the case of *Rex* v. *Young and Pitts* (1 Burr. 557). That was a very important case, and I have never heard that it was ever questioned or quarrelled with. The motion was for an information against the justices, because they arbitrarily, obstinately, and unreasonably refused to grant a licence to one Day. It was an application to renew a licence, but for other premises; and it was held that, notwithstanding that the matter was left in a great measure to the discretion of the justices, if it appeared that their conduct was partial, oppressive, corrupt, or arbitrary, instead of fair and candid, they might be called upon to show the reasons whereby they guided their discretion, and therefore the court proposed to grant a rule; there were also various interlocutory proceedings which it is unnecessary to refer to. The case again came on on a motion against the justices for persisting in refusing to grant a licence, and upon that Lord Mansfield said the court did not impute criminal intention. The justices had a discretion, it was said, yet they must not be permitted to exercise arbitrary and uncontrolled power over the rights of other people, and in cases where their livelihood depended upon it. The case was argued at great length, and ultimately the court distinctly held that there was no such evidence of partiality or corruption as to form any ground for an information, and it was therefore held that the court could not interefere with the exercise of their

discretion by the justices. In that case the application was for a renewal of a licence, not to the same place, but to the same person. Now, up to a late period, I am not aware that there is any distinction whatever in the Acts between a new licence and a licence by way of renewal. In the Acts of 1869, 1872, and also in the Act of 1874, the Legislature did introduce for the first time practically a distinction between a new licence and the renewal of a licence. A new licence was defined in the Act of 1872, and afterwards, by way of amendment, by the Act of 1874, as a licence granted in respect of premises in respect of which a similar licence had not theretofore been granted. Up to that time I am not aware of any distinction between a licence granted to a man for the first time and a licence granted to him for the hundredth time, if such a thing could happen. Each was in itself an application for a licence. The previous licence had expired, or would expire, unless a new licence were granted; and practically it is actually to all intents and purposes a new application for a new period, although the licence-holder applied in respect of the same premises in which he had been occupier before. Now, let us consider what is the effect of the Act of 1828. It is very convenient to refer to a useful book by Mr. Paterson on the Intoxicating Liquor Licensing Acts, and referring to it I find that the 1st section the Act of 1823 says it is expedient to reduce into one Act the law relating to all these things. It then says: "Be it enacted, that there shall be annually holden a special session of the justices of the peace for the purpose of granting licences to persons keeping or being about to keep inns, alehouses, and victualling-houses, to sell excisable liquors by retail to be drunk or consumed on the premises therein specified." Now, the words are that a session is to be held; that is, must be held. That is absolute. Is to be held for the purpose of what? "Granting licences to persons keeping or being about to keep." Mark those words, because Mr. Candy argued that there was a difference between the one and the other. I cannot see the ground for arguing that anything can be founded upon those words. Then the statute goes on to say what they are to do, namely, to grant licences to persons; and it then says who those persons are to be, namely, "such persons as the said justices shall, in the execution of the powers herein contained, and in the exercise of their discretion, deem to be fit and proper persons." It is alleged by the appellant that these words limit the discretion of the justices only to whether the man is a fit and proper man, and that, if he is fit and proper, then the justices are bound to grant him the licence, whatever their views may be in the matter. But when we come to look at sect. 9, it seems to me that that construction entirely fails, even if it is the true construction of the 1st section; and I do not think it is, because, when the Legislature says that a body of men shall hold a session for granting licences, it may mean that they shall exercise their discretion whether they will grant or not. If they have the power of granting, it implies also that they have the power of withholding. The great controversy between the absolute Sovereign and her subjects has always been whether they should accept a charter from the Crown. The subjects say, "No; we will not take a charter from you, because, if you have the power of granting a charter, you have the power of refusing it, and therefore we will not have it, but will insist upon our constitutional right." Well, then, it is by the 9th section enacted that, "When at any meeting of the justices any question touching the granting, the withholding, or transferring any licence, or the fitness of the person applying for such licence, or of the house intended to be kept by such person, shall arise, such question shall be determined by the majority of the justices." That is clearly intended to show that the fitness of the person and the house kept, or to be kept, is not the only question which the justices may have to consider. That was the construction which the Court of Queen's Bench put upon this section in the case of *Reg.* v. *The Justices of Lancashire* (23 L. T. Rep. N. S. 461; L. Rep. 6 Q. B. 93). Judgment in that case was given by Lush, J., and it is remarkable that in that very case the ground upon which the justices had refused the licence was that in their view of the case the proposed accommodation was not required in that particular locality. That is, therefore, a very similar case to that which we are now considering. In the present case the justices have only said that the place is too far off from the police, and that the village does not require this accommodation. That is the very ground which Lush, J. and the court said was a matter entirely within the discretion of the justices, and upon which the Court of Queen's Bench could not in any way interfere. The result of that clearly is, that at that time an application for a new licence, and an application for the renewal of a licence, were upon the same footing. So long as the justices did not act corruptly, arbitrarily, or unfairly, but were honest, and exercised their discretion judicially, no power, no person, had a right to interfere. There are two or three cases which, it was alleged, might be taken as a sort of qualification of that. The cases of *Reg.* v. *Sylvester* (2 B. & S. 322; 31 L. J. 93, M. C.) and *Reg.* v. *Schneider* (48 L. T. Rep. N. S. 482; 11 Q. B. Div. 66), so far from denying the discretion of the justices, in fact asserted it most strongly, and laid down that the justices, having to exercise this discretion, must not act upon any general rules so laid down as to limit their discretion, but must exercise it judicially in each individual case. In one case the magistrates exacted conditions not within the statute. Of course, such conduct may be legally interfered with, not because the justices have not got the discretion, but because they are not judicially exercising it. Therefore, I say that, up to 1830, there was no change whatever in the law upon this question, and it has been said that there has been no change ever since upon the question whether a licence-holder has an absolute right, provided he is a fit person and has a fit house, to have a licence by way of renewal. The contention which is invoked in favour of the contrary view is, that a series of statutes and cases have enlarged the class of persons through whom intoxicating liquors may be sold or retailed. Commencing with the Beerhouse Act of 1830 (1 Will. 4, c. 64), that gave a new mode of obtaining a licence for the sale of beer and cider through the Excise. The Excise and the magistrates always wanted money, and at the time of the passing of this statute the Excise would grant a licence to anyone who was

willing to pay a proper sum for it. But the Legislature thought it desirable that there should be a free sale of beer and cider on retail premises. Accordingly, they enacted that anyone desirous of selling beer, ale, or porter by retail might go to the Excise and obtain an Excise licence, and then sell beer and cider upon his premises, and a man in that case who obtained a licence for that purpose was said to be able to sell beer, ale, and porter by retail in any house, place, or premises specified by the licence. Certainly there was no distinction in an Excise licence between a new licence and a licence by way of renewal. These licences were continued up to 1869, when the Legislature interposed a limit with regard to beerhouses, because, as in the reigns of Edward VI. and George II. with regard to inns and alehouses, there was considerable complaint on the part of the authorities of bad conduct either on the part of the people who kept the houses or on the part of those who frequented them; and the Legislature thought it necessary that the beerhouse-keeper should be a man of good character. Accordingly, for the first time. they introduced this qualification, that after the 15th July 1869 no licence or renewal of a licence for the sale by retail of beer, cider, or wine in inns and refreshment-houses of that kind should be granted except upon the production of a certificate granted under this Act. A discretion was vested in the justices to grant or refuse a certificate in the same manner as under the Act of 1828. Now this is the legislation on which Mr. Candy founds a strong argument—strong as I think he called it himself—but I fail to see its strength. The 7th section provides that every person intending to apply for a certificate under this Act shall, twenty-one days before he applies, give notice in writing of his intention to one of the overseers, and in the case of a house or shop which has not theretofore been granted a licence, the owner is also to put a notice on the door of such house or shop, and on the door of the church or chapel, that he intends to make such application. There, again, there is no limitation as to the discretion of the justices, but the Act requires that the neighbours, police, and authorities shall, in the case of a new application for a licence, know what is going to be done, because if they have any objections they may take them. In cases of renewal such notice is not required. Then comes the important sect. 8, which provides that "all the provisions of 9 Geo. 4, c. 61, as to the terms upon which, and the manner in which, and the persons by whom, grants of licences are to be made by the justices at the general annual licensing meeting, and as to appeal from any act of any justice, shall, so far as may be, have effect with regard to grants of certificates under this Act." It is impossible to find wider words than those by which the Legislature in this Act defined and regulated the granting of licences. The Act said that no application for a certificate under this Act in respect of a licence to sell by retail beer, cider, or wine, not to be consumed on the premises, should be refused except upon one or more of the following grounds: That the applicant has failed to produce satisfactory evidence of good character; that the house or shop for which he seeks a licence is of a disorderly character; that he is disqualified by misconduct; or that he or the house in respect of which he applies is not duly qualified. Those are the only grounds upon which application for "off licences" to sell beer, cider or wine by retail are to be refused. Now, not only does that not apply to the licences we are dealing with, but the reason for the exception made is, that the legislation of 1828, which had existed for thirty-nine years, had been to create a number of persons who had invested under the provisions of the Act of that year, and therefore it was unjust and unreasonable that those persons who were in that position should have their licences refused except upon those particular grounds. So far, therefore, it seems to me to qualify the statute of 1828 by way of exception; and were it not for such qualifications, the discretion of the justices under the Act of 1869 would be as absolute as under the Act of 1828, the provisions of which are declared to be incorporated in this Act. In point of fact the Legislature very well knew what sort of discretion the justices had to exercise with regard to the granting of licences under the Act of 1828. Sect. 19 again is also very important, because that provides with regard to the sale on the premises—not off—that the existing licences should be subject to the same discretion as those under the statute 9 Geo. 4, c. 61, and that applications for renewals in these houses should not be refused except on certain specified grounds. Thus far the legislation has not affected the alehouse licence-holder under the Act of 1828. But in 1872 all licensing of the sale of intoxicating liquors was brought into one scheme; and sect. 3 of the Act of that year says that, "No person shall sell or expose for sale by retail any intoxicatiug liquor without being duly licensed to sell the same." This, again, is an Act which Mr. Candy relied upon with reference to the difference between granting a new licence and a licence by way of renewal. By sect. 36 there was to be a register of licences kept, and this section Mr. Candy also relied upon as supporting another error, viz., that this section indicates the intention on the part of the Legislature to protect not only the holder of a licence, but also the landlord and owner of the house, who no doubt has also a considerable pecuniary interest in the house, which, being licensed, is of more value. Sect. 40 is the next section relied upon, and it gives regulations as to new licences and the transfer of licences, and requires a certain notice for the renewal of a licence and for the transfer. Sect. 42 is the one which Mr. Candy most relied upon, but that, in my opinion, in no way affects the discretion of the magistrates. It provides that a licensed person applying for the renewal of a licence need not attend in person at the general annual licensing session, unless he is required by the licensing justices so to attend. But the old state of the law was this: Under the Act of 1828, and before and since up to this time, the justices were in the habit of requiring publicans who were applying for a licence, whether new or old, to come before them, in order that they might see them and discuss any matter with them. That, however, was found to be an inconvenience both to the publican coming and to the justices in petty sessions, the applicant being called away from his business, a considerable distance, probably, to attend when there was no necessity for his attendance. In the granting of a new licence no

alteration was made, but when the licence was granted by way of renewal, it was provided that he need not attend in person, unless required by the justices. There is also in sect. 42 another most important distinction between a new licence and the renewal of a licence. It is there laid down that the justices shall not entertain any objection to the renewal of a licence, or take evidence with respect to the renewal, unless after notice stating in general terms the grounds of the opposition to the certificate, not less than seven days before the commencement of the meeting. Then comes a most important proviso: an objection being taken, the licensing justices may, notwithstanding that no notice has been given, adjourn the granting of the licence to a future day, and require the attendance of the licence-holder, when the case shall be heard and the objection considered as if the prescribed notice had been given. Then comes a most important thing at the end — "subject as aforesaid, licences shall be renewed, and the powers and discretion of justices relative to such renewal shall be exercised as heretofore." That section in no way limits the discretion of the justices when the case is properly before them. It simply gives a statutory safeguard to a man who has already had a licence. That is done for the plain reason that the licence-holder has already told his neighbours that he is going to have a renewal; he has already produced a certificate of good character, and already passed the ordeal of an examination before the magistrates, and has had a licence granted to him. Therefore, not only is this section reasonable, but it is also perfectly just, for that man is a man who stands *primâ facie* as a person with premises entitled to hold the licence he already holds, and to bring that man arbitrarily before the justices every year, without having had notice of objection, would be an act of injustice which the statute remedies. But it does not limit in any way the discretion of the justices. Mr. Candy contended that, by reason of taking the two subsections together, the applicant need not attend in person unless required so to attend, and that, by the clause with regard to personal objection, the discretion of the justices was limited in the case of a renewal only to what may be called personal objection to the holder. It might be difficult to say what is a personal objection. I know that permitting gaming and misconduct would be personal objections, but whether or not the fact that the wants of the neighbourhood do not require the house would be a personal objection is not so clear. In one sense it is so; but, on the other hand, is that what the Legislature intended? I do not think the distinction which Mr. Candy seeks to draw is legitimately to be drawn; and therefore the discretion is in none of these ways limited. Merely to show the tendency of legislation, in 1882 a great step was made with regard to the class of off-licences, by what is known as "Mr. Ritchie's Act" of that year (45 & 46 Vict. c. 34), in which words were inserted, unnecessarily, it seems to me, by which the Legislature expressed its meaning in the strongest possible and most absolute language, by giving "a free and unqualified discretion" to the justices in respect of refusing licenses for the sale of beer off the premises, notwithstanding sect. 8 of the Act of 1869. The matter came before my brother Stephen and myself in the case of *Reg.* v. *Kay* (10 Q. B. Div. 213), and we held that the Act must be construed to mean that the discretion of the justices was absolute with regard to the renewal of old as well as the granting of new licences. I think I have now carefully gone through all the legislation which Mr. Candy has cited in his favour. I will now just observe upon certain specific points he has taken. The first specific point relied upon by him was the attendance of the applicant, which, he said, limited the discretion of the justices to such objections only as were personal. I think there is no room for that construction, and I have already pointed out the reason why I think so. Then Mr. Candy founded another argument upon the section of the Act which indicated a consideration of the rights or interests of the owner of the premises. There are, as is well known, a number of clauses in the Act by means of which, after one, two, or three convictions, a disability is imposed not only upon the man, but upon the house, and it was thought right that, under these circumstances, the owner of the house should have every opportunity of knowing of the existence of that objection, and of taking proper steps either to make his letting in accordance with the policy of the Act, so that he might be able, in case of an offence being committed, either to enter and resume possession of his property, or of applying for a renewal of the licence under the provisions of the Act. Nothing in this seems to me to indicate any intention whatever on the part of the Legislature to limit or control the discretion of the justices. Now what is the result, therefore, generally of the legislation? It has introduced a new class of persons and premises by whom and upon which intoxicating liquors may be sold by retail. It has, as to one class of those persons, limited the discretion of the licensing magistrates upon four grounds of objection, and has relieved these licence-holders from the onus of attending, except in one particular case. But it has in no way limited the discretion of the justices. Mr. Candy also said the authorities had altered the state of the law on the subject. I followed through his arguments, but I was unable to see, after having considered them, anything of the kind. The only case which gave me any hesitation or doubt was that of *Reg.* v. *The Justices of Market Bosworth* (57 L. T. Rep. N. S. 56; 57 L. J. 96, M. C.). One thing is quite clear to my mind from that case, and that is, that the Lord Chief Justice and Smith, J., who decided that case, had not the remotest idea that the Act altered the discretion of the justices. They founded their judgment on a then recent decision in the Court of Appeal in the case of *Reg.* v. *The Justices of Liverpool* (49 L. T. Rep. N. S. 244; 11 Q. B. Div. 638). That case had the effect of reversing two or three—I do not know how many—of the decisions of the divisional courts. They held that, in order to obtain a renewal of a licence, a person coming in under sect. 14 of the Act of 1828 must make the application himself pending the currency of the licence, and that if the licence were once allowed to drop then it was supposed that a renewed licence could not be obtained by any of the various classes of persons whose rights were safeguarded by sect. 14. But an application under sect. 14 is as much in the discretion of the justices, if the applicant fulfils the terms of

it, as any other licence. Not a word was said in this case upon that question at all; what was said was, that in the particular case of *Reg.* v. *The Justices of Liverpool* (49 L. T. Rep. N. S. 244; 11 Q. B. Div. 638), the position of the applicant was not restricted to making the application during the currency of the licence, but that he might make the application, although the licence had expired, if he came within the other provisions of the section. Therefore I see no reason, either upon the old statutes or the new statutes, or the old cases or the new cases, for throwing the smallest doubt upon what has been my experience of the universal practice, that in granting new licences, or licences by way of renewal, the justices have what is called absolute discretion, meaning thereby that they are unfettered as to their discretion, provided they exercise it judicially, and not corruptly, arbitrarily, or in any way oppressively on the subject. Within these limits, therefore, I think it was competent to the justices, both below and in the quarter sessions, to withhold the licence in question upon the grounds which they have stated, and therefore the appeal must be dismissed with costs.

WILLS, J.—I desire to express my entire concurrence in the result of my brother Field's judgment, and after the very elaborate review which he has given of the statutes and the cases, I feel that it would be a waste of time for me to go minutely over the same ground; but I wish shortly to state in my own way the grounds of my opinion. I think it cannot be doubted that before the Act of 1872 every application for what is now called the renewal of a licence was exactly the same thing in all its legal incidents as that which is now called a new licence. There was but one enactment under which such applications could be dealt with, namely, 9 Geo. 4, c. 61, s. 1. The licence, if granted, lasted for a year, and no longer (sect. 13). When the year expired it was gone, and if the applicant did not get a fresh licence there was an end of his right to sell excisable liquors to be consumed on his premises. The word "renewal" does not occur in the Act. The expression "to renew a licence" appears in the marginal note to sect. 27, and nowhere else; and the use of the phrase there comes to no more than if it were used in a text-book. The phrase "new licence" is equally absent from the Act of 1828. The phrase "renew," as applied to a licence, first appears, so far as I know, in 23 Vict. c. 27, s. 11—the Act of 1860—relating to wine licences, which, so far as I am aware, is not incorporated expressly or impliedly by the subsequent Acts, and which I only notice for the purpose of tracing the use of a phrase in legislation of a kindred nature. In the Act of 1872 both phrases are defined. The definition of "new licence" is modified by the Act of 1874, s. 32, but only to correct a mistake which arose from using in the definition the term "licensed premises," which, inasmuch as premises never were licensed, had to be interpreted by another part of the interpretation clause defining "licensed premises," which contained words likely to create confusion if applied to some of the circumstances under which the statutory interpretation of "licensed premises," as it stood in the Act of 1872, might have to be resorted to. I may, therefore, take the definition given by the Act of 1874, which is "a licence granted at a general annual licensing meeting in respect of premises in respect of which a similar licence has not been granted before." A "renewal of a licence" is defined as "a licence granted at a general annual licensing meeting by way of renewal." As the licence is in all cases a personal one, and the phrase "licensed premises," though only to be exercised in respect of specified premises, is only introduced in company with a definition clause, which shows that it is, taken by itself, an inaccurate and misleading phrase—and one which, I cannot help thinking, is answerable for a good deal of misapprehension—I think it follows that a licence granted by way of renewal is a phrase applicable only to the case in which both the person applying and the premises are the same as those appearing in the previous licence. A document can hardly be said to be by way of renewal of another where so important a factor as the person to whom alone it can apply is changed. The phraseology of sect. 42 of the Act of 1872 seems to me completely to bear out this view. It treats the applicant for renewal as necessarily a person already licensed. So far it is, I think, impossible to contend that there was by the Act of 1828 (9 Geo. 4, c. 61) any limitation upon the absolute discretion of the justices, when applied to for a new licence, to grant or refuse it upon any grounds which to them seem fit grounds to act upon, provided that there is a real judgment exercised in respect of the individual case. I mean to exclude, for instance, a case in which the ground of refusal had absolutely nothing to do with the question in hand, as, for instance, where the justices refused the licence because the applicant had not taken out a spirit licence (*Reg.* v. *Sylvester*, 2 B. & S. 322; 31 L. J. 93, M. C.); or where they had laid down a general rule that they would grant no more licences in the locality (*Reg.* v. *Justices of Walsall*, 3 C. L. R. 100). In such cases there is really no exercise of discretion at all, and it is very much as if the licence had been refused because the applicant wore a blue coat or a white hat. But where it cannot be shown that no real discretion has been exercised, the applicant has, in case of refusal, no other resort, and must submit to his fate. I do not pause to cite cases. It is abundantly clear upon the words of the Act, and there is equally abundant authority upon the subject, and as by that Act there was absolutely no distinction between applications for licences made at the annual general licensing sessions by a person who did not and those made by a person who did already hold a licence, it follows that there was no limit to the discretion of the justices in the case of renewal any more than in a case of a grant for the first time. I proceed to inquire what the Acts of 1872 and 1874 have done for a person already holding a licence. By sect. 42 of the Act of 1872 the applicant for the renewal of a licence is undoubtedly put in a better position than he would have been in had he had no licence. By that section he is relieved from the necessity of appearing personally to obtain the licence, whereas it is clear from sect. 12 of 9 Geo. 4, c. 61, that the applicant for a new licence must do so, unless prevented by one of the causes there mentioned. If objection be taken to the renewal of his licence, he is entitled to notice and to a hearing; but the omission by an objector to give notice at the proper time was not necessarily fatal

to the objection, as the magistrates might, in their discretion, adjourn the case and require the applicant to attend upon a future day to have the case heard, and the evidence on the hearing of the objection must be taken upon oath. Subject to these conditions, however, licences were to be renewed and the discretion of the magistrates exercised as heretofore. The alteration was simply one of procedure, and made it imperative upon the justices to give the applicant an opportunity of being heard; but there is nothing at all in the Act to limit their discretion as to the class of objection which they will entertain and act upon. Then came the Act of 1874, which contains further provisions in favour of the applicant for the renewal of a licence. Such applicants are relieved from personal attendance if they do not wish to give it, unless the nature of the objection be some special cause personal to such licensed person. They are entitled to have the notice of the grounds of any objection to their application. It is further provided that it shall not be necessary to serve copies of notices of any adjournment of a general annual licensing meeting on holders of licences or applicants for licences who are not required to attend at such adjourned annual general licensing meeting. I find it very difficult to say what this provision means, and I doubt very much if its meaning with reference to the then existing legislation was understood by anyone when it was passed. But it is a provision in ease, not of the persons applying for licences, but of others—I cannot say of whom—for I do not see who was likely to serve notice of adjournment in the case of such applicants for new licences as were not required to attend personally. I am quite sure, however, that an obscure general provision of this kind, relating solely to procedure, was never meant to interfere with the discretion of the justices. As I understand the argument on this head, it is as follows: "Because, if objection be taken to an application for renewal for the first time at the annual general licensing meeting, there must be an adjournment, and because it is only in the case of that objection being one personal to the applicant that he can be required to attend personally, and because it is said that in case of adjournment it shall not be necessary to serve notice of adjournment on the holder of a licence (or the holder of a licence not required to attend at such adjourned meeting, for the section may be read both ways), therefore the application of a holder of a licence cannot be objected to on any ground but one personal to himself." I am not sure what the paragraph does mean, but I am very sure it does not mean this, and that the repeal of a most important discretion absolutely necessary for good government and administration has not been effected in this roundabout and bungling fashion. There are abundance of cases upon which it is just as necessary to refuse to renew a licence as to grant a new one where the personal character of the applicant may have nothing whatever to do with the objection. Suppose, for instance, that a street once perfectly respectable becomes full of brothels and thieves' lodging-houses. The action of the magistrates may be just as necessary to prevent the renewal of a licence in respect of a public-house in such a locality as to refuse one in the first instance. And cases of a like kind must be perpetually occurring. I have considered the Acts apart from authority. But it seems to me that there is direct authority in favour of the view I take of the effect of legislation. In *Reg.* v. *Smith* (39 L. T. Rep. N. S. 604; 48 L. J. 38, M. C.), it was held by Cockburn, C.J. and Mellor, J. that under 9 Geo. 4, c. 61, and the Act of 1872, the discretion of the justices in cases of applications for renewal was as unqualified as in cases of application for new licences. That case was decided after the Act of 1874 was passed, viz., in 1878, and I can find no case since then which casts any doubt upon this view of the law. It was argued that the case of *Reg.* v. *Justices of Market Bosworth* (57 L. T. Rep. N. S. 56; 57 L. J. 96, M. C.) is an authority to the contrary. I do not think so. In that case the justices had decided against the applicant on the ground that there were public-houses enough already in the neighbourhood They had treated the case as one of an application for a new licence, and had decided against the applicant without adjournment and without giving him an opportunity of being heard upon the point. This they could not do if he was entitled to be considered as an applicant for renewal under sect. 42. The court held that under the particular circumstances the case fell within the decision of the Court of Appeal in *Reg.* v. *Justices of Liverpool* (49 L. T. Rep. N. S. 244; 11 Q. B. Div. 638), and that it was a case of renewal; and granted a *mandamus* to the justices to hear the application. This is certainly no authority against the present contention. The only shred of authority that I can find in favour of the notion that under words like those in the Act of 9 Geo. 4, c. 61, s. 1, there can be any limit to the discretion of the justices is the expression of Lord Romilly in *Day* v. *Luhke* (L. Rep. 5 Eq. 336). There a vendor had contracted to sell a public-house as a going concern, possession to be given on the 21st Nov. To do this it would have been necessary to procure a transfer of the licence under 9 Geo. 4, c. 61, s. 11. The vendor had put it out of his power to apply to justices under that section. It was held that the purchaser might repudiate the bargain. In giving judgment, the Master of the Rolls said: "The transfer of the licence under sect. 11 is a matter of course, and no discretion is exercised by the justices unless they have information that the transferee is an objectionable person" (p. 344). He cannot mean, however, that the magistrates have no discretion; only that in practice they do not exercise it under such circumstances, as to which there was some evidence before him. The very exception he specifies shows that he thought they had a discretion. The words conferring jurisdiction on the justices are the same in sect. 11 as those in sect. 1, and nothing is said about whether the transferee is an objectionable person or not. That they had the discretion in such a case was held in *Reg.* v. *Rowell* (26 L. T. Rep. N. S. 732; L. Rep. 7 Q. B. 490). *Day* v. *Luhke* (*ubi sup.*) has been followed in *Claydon* v. *Green* (L. Rep. 3 C. P. 511) and *Cowles* v. *Gale* (L. Rep. 7 Ch. App. 12), and it seems to be perfectly right, but in neither of those cases is anything said to give countenance to the notion that under sect. 11 the justices have not the discretion in question. It was merely that the procedure under sect. 11 was in those cases necessary to

enable the contract to be carried out, and that the vendor was not in a condition to apply under that section. I would not have noticed these cases but for the fact that in the judgment of Fitzgerald, J. in *Reg.* v. *The Recorder of Dublin* (Ir. C. L. R. 412-430), they are quoted as authorities for the proposition that licences have been by the English courts recognised as matters of property annexed to a house. It seems to me that they really do not afford any support to that proposition. The Irish case itself was concerned with a transfer under the Irish Acts, and it is no authority with reference to the present question. "The statutes" says the learned judge, speaking of those in force in England and in Ireland respectively, "though dealing with general questions, differ in particulars so important that the decisions on them given by the courts of one of the two islands afford no real guide in the case of questions arising in the sister island." I do not think it necessary to discuss the enactments affecting licences for the sale of beer, and other licences to which the provisions of the Wine and Beerhouse Act of 1869 (32 & 33 Vict. c. 27), s. 8, apply, as they contain a set of provisions so very different from those regulating this case that they, and the decisions upon them, have no direct bearing upon the present question. They do, however, suggest the remark that where the Legislature meant to limit the discretion of the justices in dealing with applications for licences, it has done so in very clear and unmistakable terms, the entire absence of which in the present instance forms a striking contrast with the provisions in this respect of the Act of 1869. In my opinion, therefore, the Court of Quarter Sessions had jurisdiction to decide the appeal to them upon the grounds upon which they acted, and the present appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant, *Sykes*, for *Watson*, Kendal.

Solicitors for the respondents, *Nicol, Son*, and *Jones*, for *J. Bolton*, Kendal.

Friday, Dec. 16, 1887.

(Before POLLOCK, B. and HAWKINS, J.)

PINE *v.* BARNES. (*a*)

Licensing Acts—Allowing intoxicating liquors to be consumed during closing hours—Guests of lodger—Liquors supplied to and paid for by lodger, and consumed after closing hours by bonâ fide guests of lodger—Licensing Act 1874 (37 & 38 *Vict. c.* 49), *ss.* 9, 10.

A lodger in a licensed house gave a private dinner to a number of his friends in one of the rooms of the house. The room and dinner had been previously ordered by him, and were paid for by him. The room was in fact taken by him for the evening for the purpose of giving the entertainment, and was reserved for his exclusive use during the evening. Intoxicating liquors were supplied to the lodger during the evening for the guests, and the eating and drinking went on until ten o'clock, when the house was duly closed to the public. Some of the guests remained after the closing hour. After the closing hour liquors were supplied for the entertainment, and consumed in the same room by the lodger and his guests, but all of such liquors were supplied upon the order and credit of the lodger alone, and were sold to and paid for by him, and the persons who consumed the liquors so supplied were the bonâ fide guests of the lodger.

The holder of the licence was convicted, under sect. 9 *of the Licensing Act* 1874, *for allowing intoxicating liquors to be consumed on his licensed premises during the time that the same were required to be closed. Sect.* 10 *of the Act, however, provides an exemption in favour of bonâ fide travellers and persons lodging in the house.*

Held, that the conviction was wrong, as there was nothing in the Licensing Acts to prevent a licensed person supplying liquors after closing hours to a bonâ fide lodger in his licensed premises, and such lodger can, during closing hours, entertain his friends—being his bonâ fide guests—with liquors which have been supplied to the lodger alone, and paid for by him alone.

CASE stated by justices under the Summary Jurisdiction Act 1879.

At a court of summary jurisdiction, holden at Tonbridge, in the county of Kent, on Tuesday, the 19th July 1887, an information was preferred by Alfred Barnes, superintendent of police, against Edward Gooding Pine, the appellant, under sect. 9 of the Licensing Act 1874 (37 & 38 Vict. c. 49), for that the appellant, then being a licensed person for the sale of intoxicating liquors by retail in his house and premises, on the 4th July 1887 unlawfully did allow intoxicating liquors to be consumed on his said licensed premises during the time that the same were required to be closed by and in pursuance of the Licensing Act 1874, upon which information we convicted the appellant, and fined him in the nominal penalty of one shilling, and the appellant, being dissatisfied with our determination in point of law, duly applied to us in writing to state a case for the opinion of the Queen's Bench Division of Her Majesty's High Court of Justice, and, in compliance with such application, we have stated the following

CASE.

1. On the 4th July 1887, at about 10.25 in the evening, one Charles Le May, Esq., and several other persons, were found by Sergeant Springett, of the Kent County Constabulary, drinking intoxicating liquors in a room in the Greyhound, situate at Hadlow, in the county of Kent, which was a fully licensed house kept by the appellant, after ten o'clock, the hour at which the said house was directed to be closed by the Licensing Act 1874.

2. The said Charles Le May, in the evening and night of the said 4th July, was a person lodging in the said house, within the meaning of sect. 10 of the Licensing Act 1874, and during that night slept in a room in the said house, which room had previously to that day been ordered by him, and the hire of which was paid for by him.

3. At seven o'clock on that evening the said Charles Le May had given a private dinner to a number of friends in one of the rooms of the Greyhound, the room and dinner having been previously ordered by him of the appellant, and the said room and dinner were paid for by him.

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

The room mentioned in paragraph 1 is the room in which the dinner was given.

4. The persons attending the said dinner were friends of the said Charles Le May, and had been previously invited by the said Charles Le May by written invitation, and the room in which the dinner was given was, during the whole of the said evening kept for the sole and exclusive use of the said Charles Le May and his said guests, and with the exception of the appellant and the waiters attending upon the said Charles Le May and his guests, no one else was admitted into the said room.

5. At ten o'clock the house was duly closed to the public, but after that hour some of the guests of the said Charles Le May remained in his company in the said room in which the dinner had been given.

6. At and after the said dinner, and after ten o'clock, intoxicating liquors were supplied by the appellant, and consumed in the said room by the said Charles Le May and his said guests, but all of such liquors were supplied by the appellant upon the order and credit of the said Charles Le May alone, and were sold to, and paid for by him, and the persons who consumed the intoxicating liquors so supplied were the *bonâ fide* guests of the said Charles Le May, and the whole of the said intoxicating liquors so sold to the said Charles Le May as aforesaid were consumed by him and his guests in the room reserved for him as aforesaid.

7. The appellant had not obtained any extension of time for supplying intoxicating liquors after closing hours.

8. It was contended on the part of the appellant that upon the facts he had been guilty of no offence under sect. 9, or under any other section of the Licensing Acts, on the ground that the intoxicating liquors which had been consumed on the premises after closing hours were liquors which had been sold by the appellant to the said Charles Le May, who was then a lodger in the said house, under the powers given to the appellant by sect. 10 of the Licensing Act 1874, and that the fact that liquors so sold to him had been consumed by guests of his, in his own private room, did not render the appellant liable to a penalty under sect. 9 of the Licensing Act 1874, or to any other penalty.

9. We were of opinion that there was nothing in the Licensing Acts which enabled a licensed person to permit a lodger to entertain his friends in a licensed house after the closing hour, as it might open the door to a constant evasion of the spirit of the Acts, and that upon the facts before us the charge laid in the information had been established in point of law. We therefore convicted the appellant, but as we considered that there had been no intention to infringe the law, we inflicted a nominal penalty of one shilling and costs.

10. The question for the opinion of the court is whether our decision was right in point of law.

11. If the court is of opinion that we were right, then the conviction is to stand affirmed, otherwise the conviction is to be quashed.

Dickens for the appellant.—The question here is whether, under the Licensing Acts, a publican can sell liquors, after closing hours, to a lodger, where the liquor is to be consumed in the room in which he lodges by the lodger and his friends, who are his *bonâ fide* guests at the time. Sect. 9 of the Licensing Act 1874 provides that "Any person who, during the time at which premises for the sale of intoxicating liquors are directed to be closed by or in pursuance of this Act, sells or exposes for sale in such premises any intoxicating liquor, or opens or keeps open such premises for the sale of intoxicating liquors, or allows any intoxicating liquors although purchased before the hours of closing to be consumed in such premises, shall for the first offence be liable to a penalty not exceeding ten pounds, and for any subsequent offence to a penalty not exceeding twenty pounds." Sect. 10 provides that "Nothing in this Act or in the principal Act contained shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from selling such liquor at any time to *bonâ fide* travellers or to persons lodging in his house." The justices have found here that the case is a *bonâ fide* one; that all the liquors were supplied to Le May, and paid for by him. My point is that sect. 9 deals entirely with purchases made in contravention of the Act, and sect. 10 says that it shall be no offence to sell liquors to a lodger. To support this conviction it must be shown that sect. 9 forbids a publican to allow a sale of liquors in any case after closing hours. [HAWKINS, J.—If that were the true construction, strictly it would prevent the licensed person himself from drinking the liquor after closing hours.] That is my point. It is no offence to sell liquor to the lodger, and if so sold it may be consumed in the apartments where the lodger is residing, and it can make no difference whether it was consumed by the lodger himself or his friends. The only case I can find at all resembling the present case is *Corbet* v. *Haigh* (42 L. T. Rep. N. S. 185; 5 C. P. Div. 50; 28 W. R. 430); that case was entirely different from the present, as there it was held that there was a clear evasion of the Act, and the conviction was affirmed on that ground. But here there is no pretence for saying that there has been an evasion of the Act.

The respondent did not appear.

POLLOCK, B.—In this case I am of opinion that this conviction must be quashed. The justices, in convicting the appellant, seem to have acted under a very erroneous view of the law, though no doubt a laudable one, as they thought that, if a licensed person might permit a lodger to entertain his friends in licensed premises after closing hours it would "open the door to a constant evasion of the spirit of the Acts." I entirely agree that the justices should watch to see that there has been no evasion of the spirit of these Acts, but here there has been no such evasion. The justices have found the facts, which were that a gentleman named Le May was a lodger in this licensed house; that he had invited a number of his friends to a dinner in this house. The dinner took place, and at it excisable liquors were drunk, and the eating and drinking went on until ten o'clock, the closing time, when the house was closed to the public. After ten o'clock intoxicating liquors were supplied by the appellant, and consumed in the room in which the dinner had been held by Mr. Le May and his guests, but all of such liquors were supplied by

the appellant upon the order and credit of Mr. Le May alone, and were sold to, and paid for by, him, and the persons who consumed the liquors so supplied were the *bonâ fide* guests of Le May, and the whole of the intoxicating liquors so sold to Le May were consumed by him and his guests in the room reserved for him. On these facts it appears to me we cannot consider what may be the temptation to publicans or their lodgers to break the law on other occasions. We must follow strictly the facts as stated in the case, and on those facts the question is, whether there was a supplying of intoxicating liquors within sects. 9 and 10. It seems to me that the liquor was supplied and sold to Le May as being a "person lodging in the house" within the exception of sect. 10, and it is immaterial whether it was drunk by him or his friends. I need not go beyond this in the case. This conviction must be quashed.

Hawkins, J.—I am of the same opinion. When we read the two sects. 9 and 10 together, the case is quite clear. [The learned judge read the sections.] In the present case the conviction charged that the appellant, being a licensed person, did unlawfully allow intoxicating liquors to be consumed on his licensed premises after closing hours, contrary to the provisions of sect. 9 of the statute, the latter part of which imposes a penalty for so doing. Now, sect. 10 provides an exemption in favour of *bonâ fide* travellers and persons lodging in the licensed house. There is no infringement of the Act of Parliament in allowing a person licensed to sell intoxicating liquor to sell that liquor to a lodger after closing hours. What makes it illegal for the lodger, having lawfully bought the liquor, to allow anybody he chooses, being a *bonâ fide* guest, to drink that liquor? I confess I see no reason for its being illegal. Taking the latter part of sect. 9, which prevents a publican from allowing any intoxicating liquors, although purchased before the hours of closing, to be consumed on his premises after closing hours, it seems to me that this was intended to apply to a case of this sort—where a person who has bought liquor before closing hours remains after the closing hours to drink it, such person not being a *bonâ fide* traveller or lodger. The case seems to me be very clear. Here we have a *bonâ fide* entertainment by a *bonâ fide* lodger, with the intention of entertaining his friends, and not endeavouring in any way to evade the Act; there is no contravention of the Act when a lodger in such a case buys liquor which he has a right to buy from a publican who has a right to sell it to him. I think, therefore, that this conviction was wrong. I quite agree that the justices ought jealously to scrutinise such cases with regard to persons pretending to be *bonâ fide* guests, otherwise there would be evasions of the law. But when a publican honestly sells, and his lodger honestly buys, liquor, then when this is consumed by the *bonâ fide* guests of the lodger there has been no breach of the Act. I am of opinion that this conviction should be quashed.

Conviction quashed.

Solicitors for the appellant, *Sole, Turner*, and *Knight*, for *W. C. Cripps* and *Son*, Tunbridge Wells.

Thursday, Jan. 26, 1888.

(Before Smith and Charles, JJ.)

Re Arbitration between Gifford and The Bury Town Council. (*a*)

Arbitration under the Public Health Act 1875—*Appointment of arbitrators, defect in—Whether such defect is cured by proper appointment of umpire—Whether the submission or the award of umpire can be made a rule of court—Making award a rule of court under Order LXI., r.* 15—*Public Health Act* 1875, *s.* 180, *sub-sects.* 1, 2, *and* 10.

The provisions of sect. 180 *of the Public Health Act* 1875, *as to the mode of the appointment of arbitrators under that Act (namely, under their common seal in the case of a local authority or corporation aggregate, and in writing under his hand in the case of any other party), are not directory but mandatory, and must complied be with.*

Where one of the arbitrators is properly appointed, but the other improperly appointed by parol, and where the two arbitrators properly appoint an umpire by a writing under their hands, the original defect in the appointment of the arbitrator vitiates the subsequent appointment of the umpire and also the award, and the defect is not cured or waived by the parties appearing and calling their witness before the umpire, so that neither the submission to arbitration nor the award can be made a rule of court.

Nor is there under Order LXI., r. 15, *any power to make the award a rule of court under such circumstances.*

Motion on behalf of the claimant in an arbitration under the Public Health Act 1875, for an order that the submission to arbitration and the subsequent award of the umpire be made a rule of court.

The claimant, Mr. George Gifford, claimed against the town council of Bury St. Edmunds, compensation for damages done to his farm at Flempton, in the county of Suffolk, by the passage of a sewer through his farm from Bury to West Stow.

Sub-sect. 1 of sect. 180 of the Public Health Act 1875, provides that:

> Every appointment of an arbitrator under this Act when made on behalf of the local authority shall be under their common seal, and on behalf of any other party under his hand, or if such party be a corporation aggregate under their common seal.

And sub-sect. 10 of the same section provides that:

> Before any arbitrator or umpire enters on a reference under this Act, he shall make and subscribe the following declaration before a justice of the peace (that is to say):
>
> I, A. B., do solemnly and sincerely declare that I will faithfully and honestly, and to the best of my skill and ability, hear and determine the matters referred to me under the Public Health Act 1875. A. B.

The town council duly appointed under their seal Mr. Blencowe as their arbitrator, and the claimant appointed Mr. Henry Stanley as his arbitrator, but such appointment was verbal and not in writing as required by the statute, nor did the claimant's arbitrator make the required declaration.

On the 9th July 1886 the two arbitrators duly

(*a*) Reported by Henry Leigh, Esq., Barrister-at-Law.

appointed an umpire (Mr. Driver) by a writing under their hands, Mr. Stanley acting in such appointment of umpire as the agent of and with the consent of the claimant, and the umpire made the required declaration. The arbitrators did not agree, and the matter was left to the umpire, who on the 16th Sept. 1887 awarded to the claimant the sum of 140*l.*

It appeared that the town council were willing to pay the claimant the amount of the award and costs, but they were not willing to pay a bill of costs for about 100*l.* sent in to them by the claimant's arbitrator, Mr. Stanley, and to avoid this payment they now raised the objection that the appointment of the claimant's arbitrator (Stanley) was not in writing, and that he had not made the declaration required by the statute.

The claimant now applied to have the appointment of the umpire, dated the the 9th July 1886, and the subsequent award of the umpire made a rule of court.

Horace Browne for the claimant.—We are obliged to come here to get this award made a rule of court. It is perfectly clear that the want of a writing is immaterial in the appointment of the arbitrator, who in this case did not make the award, as the umpire who made the award was properly appointed in writing and duly subscribed the declaration; and any defect in the appointment of the arbitrator was cured by the proper appointment of the umpire, and by the appearance of both parties before him. Order LXI., r. 15 (*a*), gives the power to make an award a rule of court. In the case of *Re Rolfe* (28 S. J. 165), an application was made to make an award a rule of court; it was argued that this was the proper course to pursue instead of making the submission to arbitration a rule of court, and Bacon, V.C. held that the application was within the very terms of the rule, and that the award must be made an order of court. The old rule was that a submission to arbitration by parol could not be made a rule of court; but here the submission to the umpire is in writing, and why cannot it be made a rule of court under the Common Law Procedure Act 1854? [He was stopped.]

Poyser for the town council.—There is here no proper submission to arbitration at all. The Public Health Act has provided for the manner in which these arbitrations are to be conducted. It has laid down that the appointments must be made in a certain way—if made by a corporation or by a local authority the appointment must be under their common seal, if made by any other party it must be in writing. This is expressly enacted by sub-sect. (1) of sect. 180 of the Act, and there is no dispensing power in this or any other court as to this mode of appointment. There is no power to override sect. 180. This section gives great powers to arbitrators. [Smith, J.—Suppose one appoints by seal, another by a pure slip appoints by parol, and that an umpire is duly appointed and everything duly carried out, then if the award be unfavourable is the party to be able to take advantage of the slip?] Yes; as the provisions of the statute have not been complied with. Here the claimant's arbitrator not only was appointed by parol, but he did not subscribe the declaration as required by sub-section (10) of the section. Stanley valued the damages at 459*l.*, which was not an honest valuation. The section requires the declaration to be signed in order to make the arbitrator less of a partisan. We offered to pay the amount of the award and the costs, but we refused to pay an exorbitant bill of costs for 101*l.* sent in by Stanley, and that is the reason why we are now opposing this application. The whole award is bad, and bad on the face of it, and therefore cannot be made a rule of court. The award sets out that the appointment of the umpire was made on the 9th July 1886, and the award itself is is not dated till Sept. 1887. By sub-sect. (9) of the same section the time for making an award by an umpire under the Act shall not in any case be extended beyond the period of two months from the date of the reference of the matters to him. There is no power in the umpire to enlarge the time, and no power in this court to enlarge it, so that the award is out of time, and bad on the face of it. [Smith, J.—The sole question is, whether this submission and award can be made a rule of court.] It has been held in *Kelleth* v. *Tranmere Local Board* (11 L. T. Rep. N. S. 457; 34 L. J. 87, Q. B.) that the time runs from the appointment of the umpire, and that neither under the Common Law Procedure Acts, nor otherwise, has the court power to enlarge the time. That case was decided on the words of the Act of 1848, and the Act of 1875 re-enacts those words, which makes the case stronger in my favour: (*Re Mackenzie and The Ascot Gas Company*, 17 Q. B. Div. 114; 55 L. J. 309, Q. B.) [Smith, J. refers to *Warburton* v. *Haslingden Local Board*, 48 L. J. 451, C. P.] The Queen's Bench Division will not in any case make an award a rule of court. This award, being bad on the face of it, ought not to be made a rule of court, and the defect in the award extends to the submission, because it would be idly putting parties to expense to make a submission a rule of court when the submission itself is bad from the provisions of the Act not having been complied with.

Browne in reply.—The question of time does not arise at all on this motion. [Smith, J.—You may pass by the question as to the time, and come to the former point as to the submission.] Sub-sect. (15) makes this award binding on all the parties. The corporation come before the umpire, submit to his authority, and call their witnesses before him, and they cannot now object to the proceedings, as any objection they might have had has been waived by them. It is not an antecedent necessity for the submission to have been in writing, if the appointment of the umpire who made the award is in writing: (Russell on Awards, p. 549.) I only ask here that the award may be made a rule of court:

Re Dawdy, 53 L. T. Rep. N. S. 800; 15 Q. B. Div. 426; 54 L. J. 574, Q. B.

The Act of 1875 does not bar the remedy given by sect. 17 of the Common Law Procedure Act

(*a*) Order LXI., r. 15, provides that "No order made on a petition, and no order to make a submission to arbitration, or an award, an order of the court, and no judgment or order wherein any written admissions of evidence are entered as read, shall be passed, until the original petition, submission to arbitration, or award, or written admissions of evidence, shall have been filed in the central office, or, where the proceedings are taken in a district registry, in the district registry, and a note thereof made on the judgment or order by the proper officer."

1854. When the subsequent matter has been done regularly, there is no bar by reason of an original omission.

Smith, J.—This is an application on behalf of the claimant, Mr. Gifford, to make a submission to arbitration a rule of court, or in the alternative to make the award a rule of court. The facts of the case are very short. Mr. Gifford had a claim against the Town Council of Bury for compensation under the Public Health Act 1875, and an arbitration took place under the Act to assess the compensation. Mr. Gifford now asks to have the submission to arbitration made a rule of court. When application was made for that purpose to the officer, he made the objection of the want of a submission in writing. This was the substantial point, and what we have now to decide is whether the submission or the subsequent award can be made a rule of court. To myself this seems to me not to be an award by consent at all, but one made under the provisions of a statute, and it seems to me that, in order to give jurisdiction in the case, the provisions of the statute must be complied with, those provisions being mandatory and not directory. By sect. 180, sub-sect. (1), it is enacted that, "Every appointment of an arbitrator under this Act when made on behalf of the local authority shall be under their common seal, and on behalf of any other party under his hand, or if such party be a corporation aggregate under their common seal." This seems to me to mean that when a corporation appoint an arbitrator under the Act, they must appoint him by seal, and not otherwise; and when any other party appoints he must do so in writing. This seems to me to be mandatory. Then the next sub-section provides that, "Every such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration by the parties making the same." It would be frittering away the statute to nothing to say that these provisions need not be complied with. Now we pass on; so much relates to the appointment of arbitrators. Then sub-sect. (7) says: "Where there is more than one arbitrator, the arbitrators shall, before they enter on the reference, appoint by writing under their hands an umpire, &c." What is the meaning of this? The arbitrators—that is, those arbitrators appointed pursuant to the statute, by seal on the one hand and by writing on the other—shall appoint an umpire. It seems to me that this never was an appointment pursuant to law of the two arbitrators. It is only when there are two arbitrators appointed lawfully pursuant to the statute that they can lawfully appoint an umpire; but here, one was lawfully and the other unlawfully appointed, and consequently their joint appointment of the umpire was not a lawful appointment. Therefore, I am of opinion that neither can the submission, not being pursuant to law, nor the subsequent award, be made a rule of court. Neither ought to be made a rule of court. Another point has been taken. By sub-sect. (10), before an arbitrator or an umpire enters on a reference under the Act he must make and subscribe the requisite declaration, but the claimant's arbitrator never made the declaration. Sub-sect. (2) shows that the submission to arbitration takes place by delivering the appointment to the arbitrators. Any submission to arbitration may be made a rule of court, but it must be a proper submission. In my judgment, this application, as to making the submission a rule of court, should not be acceded to. Now I come to the award. It is said that under Order LXI., r. 15, this award ought to be a rule of court. It seems to me that it ought not. I have never known an award made a rule of court, it is always a submission that is made a rule of court. But I find in *Jones* v. *Jones* (43 L. T. Rep. N. S. 76; 14 Ch. Div. 593) that Jessel, M.R. said: "In cases of submission to arbitration it is very usual, in the Court of Chancery, to make the award an order of court: (Seton on Decrees, 4th edit., p. 403.) But as it is important that, under the Judicature Acts, the practice of all the courts should be, as far as possible, uniform, I have ruled in my court that the proper course is to make the submission a rule of court, according to the practice of the common law divisions." I only speak from my own experience when I say that I have never heard of an award being made a rule of court. I think, therefore, that this application should be refused.

Charles, J.—I am of the same opinion. It seems to me that this being an arbitration under the Public Health Act 1875, the proceedings must follow the enactments of the statute, and in order to see whether the arbitration has been properly conducted we ought to see whether the provisions of the statute have been complied with. Here the appointment of the claimant's arbitrator was not under his hand. Is it essential that it should be so? It has been said that it is sufficient if the umpire be appointed in writing. I cannot take that view of the case, but I think that that is essential, and I am fortified in that view by sub-sect. (2) of the Act. Therefore, I think it is impossible to say that the original submission ought to be made a rule of court. Then it is said we can make the award a rule of court, because there is an appointment in writing of the umpire, and why not treat that as a submission that can be made a rule of court. The answer is clearly, no. The only persons entitled to appoint the umpire are the arbitrators; one of these gentlemen was not an arbitrator at all, and therefore I do not see my way to saying that this award should be made a rule of court. Then we are further urged to make the award a rule of court under Order LXI., r. 15. I think we ought not. If we cannot make the submission a rule of court, we cannot make the award a rule of court. For reasons already given I have come to the conclusion that the claimant's arbitrator was not an arbitrator at all under this Act, and that we ought not to make either the submission or the award itself a rule of court. I would add that Order LXI., r. 15, does seem to contemplate that in some cases an award as well as a submission may be made a rule of court. I have never heard in my experience at the bar of an award being made a rule of court. But whether this is so or not, the present is not a case where it should be done.

Motion refused with costs.

Solicitors for the claimant, *Paterson, Snow, Bloxam*, and *Kinder*, for *Golding* and *Son*, Walsham-le-Willows.

Solicitors for the town council, *Gilbert Robins*, for the *Town Clerk of Bury*.

HOUSE OF LORDS.

Aug. 2, 4, 5, 8, 9, 1887, *March* 5 *and* 6, 1888.

(Before the LORD CHANCELLOR (Halsbury), Lords WATSON, FITZGERALD, HERSCHELL, and MACNAGHTEN.)

PRITCHARD *v.* MAYOR AND CORPORATION OF BANGOR. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Municipal election—Disqualification of candidate — Nomination — Returning officer — Effect of declaration of poll—Mandamus—Petition—35 *&* 36 *Vict. c.* 33, *s.* 2—45 *&* 46 *Vict. c.* 50, *s.* 87.

The duty of a returning officer at a parliamentary or municipal election under sect. 2 *of the Ballot Act* 1872 (35 *&* 36 *Vict. c.* 33) *is "forthwith," upon the completion of the counting, to declare that candidate elected who has received the majority of good ballot papers. He has no power to decide whether any person, who has been duly nominated, is or is not disqualified from being elected.*

At an election for the office of councillor for one of the wards of a borough the appellant and R. were duly nominated as candidates. The appellant objected to R.'s nomination, on the ground that he was ineligible as being at the time an alderman of the borough, but the mayor overruled the objection. There were no other candidates. During the poll, and at its close, the appellant objected that R. was disqualified, and claimed the office himself, whatever might be the result of the poll. The returning officer counted the votes and stated that R. had a majority, but on the following day he issued a public notice stating the number of votes and the objection, and declaring the appellant duly elected. Both the appellant and R. thereupon made and subscribed the declaration required by sect. 35 *of the Municipal Corporations Act* 1882 (45 *&* 46 *Vict. c.* 50) *and attended meetings of the council, but the mayor refused to receive or count the appellant's vote. The appellant applied for a mandamus commanding the mayor to receive and count his vote.*

Held (affirming the judgment of the court below), that the returning officer had no power to decide the question of R.'s disqualification, and that the appellant's remedy was by petition against R.'s return under sect. 87 *of the Municipal Corporations Act* 1882 (45 *&* 46 *Vict. c.* 50) *and not by mandamus.*

Semble, per Lord Watson, that the mayor's jurisdiction with respect to objections to nominations under sched. 3, *part* 2, *rule* 9 *of the Act of* 1882, *is to dispose of formal objections arising upon the face of the nomination paper, and not to dispose of an objection going to the qualification of a candidate.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lindley, and Lopes, L.JJ.) reported in 18 Q. B. Div. 349, who had reversed a judgment of the Queen's Bench Division (Denman and Stephen, JJ.) reported in 56 L. T. Rep. N. S. 434, and had discharged an order for a *mandamus*.

The question arose upon a municipal election in the borough of Bangor, at which the appellant and one Roberts were candidates, under circumstances which appear sufficiently from the headnote above, and are fully set out in the reports in the courts below.

Aug. 2.—The case came on for argument before the Lord Chancellor (Halsbury), Lords Watson, Fitzgerald, and Macnaghten.

The *Solicitor-General* (Sir E. Clarke, Q.C.) and *Douglas* appeared for the appellant, and contended that the returning officer's declaration was final, unless it was questioned by an election petition, provided that the person declared by him to be elected accepts and fills the office, which was the case here. Roberts was disqualified, and his disqualification was notified to the electors, and therefore all votes given to him were bad and thrown away, and the appellant was duly elected. They cited

Reg. v. *Coaks*, 3 E. & B. 249;
Rex v. *Patteson*, 4 B. & Ad. 9;
Homes v. *Turner*, 35 L. T. Rep. N. S. 58; 1 C. P. Div. 670;
Mather v. *Brown*, 34 L. T. Rep. N. S. 869; 1 C. P. Div. 569;
Reg. v. *Winchester*, 7 A. & E. 215;
Reg. v. *Hiorns*, 7 A. & E. 960.

The cases cited on the other side were all decided before the Municipal Corporations Act 1835 (5 & 6 Will. 4, c. 76) except *Staniland* v. *Hopkins* (9 M. & W. 178), which does not conflict with *R.* v. *Patteson* (*ubi sup.*). See also

Reg. v. *Chester*, 25 L. J. 61, Q. B.
Reg. v. *Derby*, 7 A. & E. 419;
Trench v. *Nolan*, 6 Ir. Rep. C. L. 464;
Reg. v. *Tewkesbury*, 18 L. T. Rep. N. S. 851; L. Rep. 3 Q. B. 629.

But the dictum of Blackburn, J. in that case was dissented from by Brett, J. in *Drinkwater* v. *Deakin* (30 L. T. Rep. N. S. 832; L. Rep. 9 C. P. 626). See also

R. v. *Hawkins*, 10 East, 211; 2 Dow. 124.

Sir *C. Russell*, Q.C. and *R. S. Wright*, for the respondents, maintained that Roberts was not in fact disqualified. The fact that he held the incompatible office of alderman did not make him ineligible as councillor. The acceptance of the second office vacates the first. *R.* v. *Patteson* (*ubi sup.*), rightly understood, is in our favour. The wording of the Act of 1882, as to the qualification of a councillor, differs from that of the Act of 1835:

Com. Dig. tit. "Officer," B. 6; K. 5;
Rex v. *Trelawney*, 3 Burr. 1616;
Rex v. *Godwin*, 1 Dougl. 382;
Rex v. *Blissel*, 1 Dougl. 383, n.;
Milward v. *Thatcher*, 2 T. R. 81;
Rex v. *Bond*, 6 Dow. & Ry. 333;
Rex v. *Hughes*, 5 B. & C. 886;
Rex v. *Tissard*, 9 B. & C. 411;
Rex v. *Day*, 9 B. & C. 702;
Staniland v. *Hopkins*, 9 M. & W. 178.

But, in any case, there was in fact a declaration by the returning officer that Roberts was elected when he stated the number of votes given to each candidate. He had no power to make the declaration which he did subsequently, and the only way of testing the disqualification is by petition, not by *mandamus*. It was notorious that Roberts was an alderman, but there was no notice given to the voters that votes given to him would be thrown away. The affidavits upon which the rule was moved show that the objection

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

was supposed to have been disposed of by the mayor at the time of the nomination. Mere knowledge of a disqualification is not enough, unless it is distinctly brought to the notice of the voters. In *Reg.* v. *Coaks* (*ubi sup.*) there was express notice. See also

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The LORD CHANCELLOR (Halsbury).—My Lords: Notwithstanding the extremely able and learned argument of the counsel for the appellant in this case, I believe there is a point preliminary to some very interesting questions which he has argued which will enable your Lordships to dispose of this case without entering upon an inquiry which has, I think, not been unduly protracted from Mr. Douglas's point of view, but one which undoubtedly raises important questions which it is not necessary, and therefore it would be improper, for your Lordships to dispose of. I cannot forbear saying that the form in which it has been sought to have this case decided is singularly inappropriate for arriving at a conclusion. If the law had stood as it once stood upon this subject, where questions of this kind arose, either the remedy of *mandamus* or the remedy of *quo warranto* might be applicable, and would be appropriate for determining such questions. In the case of *mandamus* where the *mandamus* was issued and the persons to whom it was directed had an opportunity of making a return, the return might be questioned either upon insufficiency in law or, since the statute of Geo. 2, by traversing questions of fact raised upon the return, and upon those questions of fact being determined, the whole matter upon the record might be made the subject of proceedings in error. But a proceeding of this kind in which, in the first instance, there is a peremptory *mandamus* issued to which there can be no return except that of obedience to the writ is absolutely inappropriate where questions of fact are still in debate. It is obvious that if some of the matters which are in contest between the learned counsel had been in question, the appropriate tribunal to decide those questions of fact would be a jury who would receive oral evidence and give their verdict. But I think there is a more serious objection than that of the mere inappropriateness of this remedy by reason of the provisions of the Municipal Corporations Act of 1882. I find that, by the 87th section of that Act, the election of any person may be questioned on the ground that he "was at the time of the election disqualified," which is one of the objections made here; or again on the ground "that he was not duly elected by a majority of lawful votes"—that also is a question which has to be determined here if the question is to be ultimately determined in the way in which the appellant seeks that it should be. And the section goes on to say that those questions may be raised upon an election petition, and in no other manner. This, undoubtedly, is an effort to question a municipal election by means of *mandamus*. Now, it is remarkable enough that the framers of this statute thought that a *mandamus* might be used for that purpose, and they have dealt therefore with a *mandamus*, but in this way. They say, in sect. 225, that "an application for an information in the nature of a *quo warranto* against any person claiming to hold a corporate office shall not be made after the expiration of twelve months from the time when he became disqualified after election;" because the framers of the section had, of course, in their minds, that they had already, by the 87th section, prevented any application for a *quo warranto* in respect of an election which had taken place. And, following that, the provision as to *mandamus* is that the *mandamus* contemplated as still existing is only "a *mandamus* to proceed to an election," not to allow a person to make use of the form of *mandamus* for the purpose of doing that which they had already provided should not be done except by election petition. The inappropriateness of the remedy, I think, has led to this somewhat protracted litigation. But, to my mind, the question which your Lordships have to decide may be determined by a simple consideration of the effect of the 2nd section of the Ballot Act as applied to a municipal election. Now, I do not think it can be denied that the functions of a returning officer have undergone, both by statute and according to received custom in various boroughs, some modification from time to time, and I do not think it will be found that the decisions are absolutely uniform as to what his functions consist of. But before the Acts which regulated more strictly what the duties of the returning officer were, there is no doubt that at the time when he held an election he was a judge, who had to determine then and there the qualification of every person who voted. Whether or not he had to determine the question of the qualification of the candidate is a matter upon which I will say a word or two in a minute. However, he undoubtedly exercised judicial functions and was a judge for the purpose I have described. But all these different functions, as it appears to me, have now been regulated by statute; and, confining myself for the moment to the particular returning officer with whom we are dealing, the machinery of the municipal election is defined with great precision, and I think that the functions of the different persons who are to take part in the management and machinery of the election are marked out and defined by very strict boundaries. In the first place there is to be a nomination paper—that nomination paper may be the subject of attack, as it was in this case. The mayor is the person who is to determine whether the nomination paper is good or not. When the mayor has determined that the nomination paper is good, in the case of a borough divided into wards, the mayor is not himself the returning officer, but the person who is appointed for the purpose of being the returning officer is the alderman of the ward for the time being. It is he who is to exercise those functions.

Now, what functions are those which he is to exercise? As we have seen, the determination upon the nomination paper is the function of the mayor—the mayor is to decide whether or not the nomination paper is good. It is almost inconceivable that the returning officer, unless very express words in the statute should convey such a function, is to have the same, or an overruling, power over the nomination paper, and if the nomination paper is so far good, when the mayor has decided that the person therein nominated is to be a candidate at the election, what then is the function of the returning officer? If the statute had left us without any guide I should have thought that it was tolerably apparent that the only thing then to be done is to vote for the person so nominated; and all the functions of examining into the qualification or disqualification of the voters are got rid of by another process; because the burgess roll becomes the absolute and conclusive evidence of who is entitled to vote at the election—so that a voting paper is to be given to every person who is upon the burgess roll, and the returning officer is to do that which is described as the "declaration" of the person who has been elected. Now, sect. 2 of the Ballot Act enacts that "after the close of the poll the ballot boxes shall be sealed up, so as to prevent the introduction of additional ballot papers, and shall be taken charge of by the returning officer, and that officer shall, in the presence of such agents, if any, of the candidates as may be in attendance, open the ballot boxes, and"—do what? "ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidates or candidate to whom the majority of votes have been given." I pause there because the rest of the section has reference to the return to the Clerk of the Crown in Chancery, and therefore is not appropriate to a municipal election. Therefore, my Lords, it appears to me that the function of the returning officer therein spoken of as applicable to a municipal election is to do, and only to do, that which the statute prescribes. The question of the nomination has been disposed of, the question of the validity of the votes has been disposed of, subject of course to any question of scrutiny hereafter by petition; but both of these things have been disposed of in a manner which does not come within the jurisdiction of the returning officer at all. He is to do, therefore, the thing which the statute expressly says he shall do, namely, to count the votes—that is to say, the written papers so put into the ballot boxes, and according to their number to declare which candidate is elected. One function is no doubt given to the returning officer, and that is a judicial function, with regard to the question of the validity of the voting papers as papers, to see whether they comply with the statute, or whether there is any objection to them. That is the only judicial function which he possesses. Now, it is not suggested in the present case that any difficulty arises either as to the validity of the voting papers as voting papers, or as to ascertaining the number of those voting papers, which are alleged to be valid; but it is suggested that we are entitled, and that by *mandamus* the appellant is entitled, to enter into the question whether or not the candidate himself was qualified or disqualified at the time when those voting papers were given. With that point I have already dealt, and it appears to me to be conclusively settled by the 87th section of the Act. But then it is said that the appellant was really the person who was declared to be elected; and upon that subject we have had a very interesting and learned argument. I should agree with it if the declaration here was like the return of a returning officer to Parliament, where the only question is, who has been returned, and the writ is indorsed with the name of the person returned, and it goes into the office of the Clerk of the Crown, bearing the name of the person who has been returned. If it were that case I should agree that the person who was so returned must be assumed to all intents and purposes to be the person who is elected and returned accordingly. But the whole machinery is different, and the machinery here affects the whole function which the returning officer has to perform. What he is to do is not to make a return upon the writ, but he is to count the votes, "and forthwith declare to be elected the candidates or candidate to whom the majority of votes have been given." Now, in strictness, I do not think that the returning officer here complied with that requirement. 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of the poll. In this case, he has, by a written paper, stated who had the majority of votes. Therefore, if your Lordships should be of opinion that the only function of the returning officer was to count the votes and to declare the result of that counting of the votes, and if in this case he did in fact declare what was the number of votes given, it is unnecessary to decide anything further. He has in effect made a declaration that Meshach Roberts was not the elected candidate, and all beyond that is outside his functions and *ultra vires*. He has done that which enables your Lordships to say that Meshach Roberts was the person by law elected; and, therefore, the whole foundation for the argument which your Lordships have heard fails, because Meshach Roberts has upon that hypothesis been declared to be the elected candidate, and the appellant can have no ground for proceeding against him. I have expressly confined myself to dealing with the form of election, and the mode in which this declaration has been made, because I quite recognise the fact that there are serious and important questions behind, which, it appears to me, it would be inappropriate to deal with, just because this decision stands in the way and prevents our going further than to find that Meshach Roberts has been returned, in which event the appellant has no ground of complaint. For these reasons, I move your Lordships that this appeal be dismissed, and that the order of the court below be affirmed with costs.

Lord WATSON.—My Lords: The discussion upon this case has taken a very wide range, but neither the argument which was addressed to us some time ago nor the able addition which has been made to it by Mr Douglas at this time, has convinced me that any cause has been shown for disturbing the judgment of the Court of Appeal. There are a great many questions of interest and importance which have been raised upon these proceedings; but I do not think it necessary to express either concurrence in or dissent from the opinions given by the learned judges of the Court of Appeal upon any of these questions save one, upon which point their opinion has my entire concurrence. It appears to me that the plaintiff, the appellant, has entirely failed to show that he was either formally elected or declared to be elected as a councillor of the municipality of Bangor, in Nov. 1886. In this case, it has been argued that we must look for the powers and duties of the returning officer, in the case of a municipal election, to the provisions of the Act of 1835, which still remain extant so far as they are not superseded by the provisions of the Act of 1882, and those clauses of the Ballot Act which are incorporated with that later statute. It appears to me that the whole question in this case turns upon the terms of the two later Acts, and that the Act of 1835 throws very little light indeed upon the question with which we are now dealing. In the case of a borough divided into wards, the duty of conducting the election is divided between the mayor of the borough and the alderman of the ward. The function assigned to the mayor of the borough is to receive nominations and to determine which of these nominations shall be treated, for the purposes of municipal action, as "valid nominations," that is the statutory expression. I do not think that the Legislature ever empowered him to deal or intended that he should deal with every kind of objection which might be raised to a nomination. I do not think that jurisdiction is given him to dispose of such an objection as is alleged in the present case. The schedule to the Act of 1882, which contains rules, rather points to his disposing of formal objections arising upon the face of the nomination paper—the duty of inquiring, probably, as to whether the nominators have their names on the roll, and whether the paper is in shape. If no objection is made, or if objections are stated and repelled by the mayor, then the nomination becomes a valid nomination. I do not mean to suggest that it is final and conclusive upon questions of disqualification or other similar objections which may be taken to it, but I think it was intended to be conclusive to this effect, that the nomination paper so sustained as valid should form the basis of the election, and that the nominee in that paper should be treated as a person for whom votes could be given for the purposes of the election before the alderman of the ward. Where there are more valid nominations than vacancies in the ward the papers are sent to the returning officer, the alderman, and his duty is very clearly defined by the 2nd section of the Ballot Act. There seems to be no *à priori* probability that the Legislature, who have committed to the mayor the duty of examining and passing for the purposes of the election these nomination papers, should have intended that an officer whose simple duty it was to take the poll and report its results should have the power committed to him either to exercise a jurisdiction with regard to these nomination papers, which is not given to the mayor, or to revise the judgment of the mayor. It would require very express words or very plain implication in the provisions of the statute to raise any such power in a mere polling officer. But the 2nd section of the Act of 1872 does not contain the slightest indication that such a power was intended to be given. Certain judicial duties are committed to the returning officer. He is to decide upon the validity of ballot papers, and his decision remains final, if not challenged and reversed in an election court. But so far as regards the taking of their votes from the electors and the reporting of the result of these, it humbly appears to me that his duties are purely ministerial. He is to count the votes, and when he has done so and has ascertained the number given for each of the candidates he is to make a declaration of the number of the votes and of the persons who have received the greater number. Having done that, he is *functus officio*. Now, in the present case the poll proceeded upon that footing. At the end of it there was no declaration made forthwith, the declaration followed the result of the counting somewhat tardily. I do not mean to express any opinion as to whether if objection were taken to a declaration made at the end of twenty-four hours—a declaration delayed for the purpose of performing some function or other which the returning officer was desirous of usurping—that would be a good statutory declaration. It is immaterial in this case whether it was or was not. If there is no declaration, then there is no completed election of either of these two candidates. If, again, the declaration is to be held as completed, it contains a statement of the actual results of the poll in terms of the statute, and to that extent, being within the powers of the

returning officer, it must, I conceive, receive effect. But so far as it goes further, and professes to deal judicially with the merits of a question which at that time the returning officer had no jurisdiction to entertain, and, I would add, no proper information to enable him to dispose of—so far as it does that it is entirely *ultra vires* and can only be looked upon as a gratuitous expression of the private legal opinion of that gentleman. On these grounds I entirely concur in the judgment which has been moved by the Lord Chancellor.

Lord FITZGERALD.—My Lords: I also concur in the judgment which has been delivered by the Lord Chancellor and generally in the conclusions at which he has arrived, and also with Lord Watson in the very guarded language in which he has expressed his opinion upon the course of this election and its legal results. In order to maintain his position in reference to the remedy which he has sought to put in force Mr. Pritchard, the appellant, was bound to make out certain propositions; first, the ineligibility of his opponent, Mr. Roberts. That point was properly raised by Mr. Pritchard by the objection which he made to the nomination of Mr. Roberts. That was a proper mode of raising the objection. But the statute gave to the mayor the authority of determining in the first instance upon objections made to nominations. If he had rejected Mr. Roberts's nomination, his determination would, so far as that election was concerned, have been final. If, on the other hand, he had determined against the objection that would apparently have been tantamount to a *quasi* judicial decision by the mayor, that the objection on the ground of ineligibility ought not to prevail. The mayor adopted the latter course, and accordingly Mr. Roberts was presented to the electors as a person eligible for election to the office which he sought. The claimant was bound to make out further, in order to bring himself into a majority, that the voters were aware not only of the fact on which the alleged ineligibility of Mr. Roberts arose, but also that they had notice that in consequence the votes given by them for Roberts would be absolutely lost and thrown away. This involved matter of fact which neither the mayor nor returning officer had any authority to investigate; these two questions, the one *primâ facie* disposed of by the mayor, and the other subsequently arising as to whether the votes given for Roberts were lost or thrown away, were questions to be legally and properly determined, in the terms of the statute, upon a petition to be presented under the Act. That jurisdiction is a new one expressly intended to achieve promptness of decision at a small expense. The process prescribed is a very simple one. The statute declares that these questions shall be determined on petition. The remaining proposition which the appellant is bound to make out and without which he could not have the remedy by peremptory *mandamus*, even supposing that the two other questions were determined in his favour, is that he was full of the office, that is, that he had been legally entitled to that office, and that he had done all that was necessary by law to put him in full possession, but was kept out of it by the action of the corporation or of some intruder. It is upon that ground and upon that ground alone that under the circumstances he could have maintained a right to a *mandamus*. A peremptory *mandamus* may be given where the office is legally full and the person lawfully entitled is kept out of it by some action of the corporate body or of some intruder. I quite concur in the observations made by Lord Watson, and I would now conclude if it were not that I wish (I am speaking now for myself only as an individual member of the House) to guard myself against any supposition that I concur in the strictures which have been pronounced in the Court of Appeal upon *Reg.* v. *Coaks* (3 E. & B. 249). That case represents a decision in my judgment of very high authority, and it appears to have governed the practice for a great number of years. I regard it still in that light; and if we had now to determine the naked question whether Roberts was disqualified or not, whether he was eligible or ineligible (whichever way you choose to put it), I should regard *Reg.* v. *Coaks* as a direct authority upon the question, if there has not been any such alteration in the law made by the Act of 1882 as renders it inapplicable to the present case—a question upon which I am not at all satisfied and desire to express no opinion. I by no means agree in some of the criticisms upon that case which were pronounced in the Court of Appeal. Lord Esher, M.R. says: "It seems to me that the judges decided that case upon a view that by the special verdict, with regard to this proposition, the case was practically stated out of court." Another of the Lord Justices makes this observation: "I am of opinion that that question" (that is, the question of disqualification) "was never considered by the court at all." I cannot adopt this view. *Reg.* v. *Coaks* was sought to be passed by in the Court of Appeal upon another ground, which I must not be taken as adopting, namely, that by operation of law the acceptance of an inconsistent office, *i.e.*, the office of councillor, Roberts vacated the office of alderman. Upon that I express no opinion. Upon the whole I concur in the judgment which is about to be moved by the Lord Chancellor.

Lord HERSCHELL.—My Lords: I have not been convinced by the able argument of Mr. Douglas, who, I think, has urged all that could be said in favour of the appellant's view, that the judgment of the court below ought to be reversed. I think that his entire argument depends upon his establishing that at the date of the election for the borough of Bangor on the 1st Nov. 1886, the appellant, Mr. Pritchard, was elected or declared elected, councillor for that borough. If he was not so elected, or declared elected, I do not think that he is in a position to apply for a *mandamus* to receive his vote. If Mr. Roberts, the other candidate, was elected and declared elected, then it is perfectly clear that his election cannot be questioned by means of a proceeding of this kind. Now, the question of whether or not Mr. Pritchard was elected and declared elected depends upon the powers possessed by the presiding alderman as returning officer, and the exercise by him of those powers on the occasion in question. As regards his powers the chief reliance of the appellant has been placed upon the decisions which were pronounced under the Statute of 1835, the earlier Municipal Corporations Act; and an attempt has been made by analogy to extend those decisions and to prove them to be applicable to the legislation which governed this election. It appears to me that the legislation which was in operation at the time when this election took place

differs most materially from the legislation which governed municipal elections at the time when the decisions upon which reliance has been placed were pronounced. Under the Statute of 1835, the mayor and assessors presided at all municipal elections, and there was nothing in the nature of a nomination or preliminary proceeding prior to the day of election, but on the day of election every voter was entitled to vote for such person as he in effect at that time himself nominated, by means of delivering in a voting paper containing the name of the candidate for whom his vote was tendered; and sect. 35 prescribed what was to be done by the mayor and assessors after the poll was at an end in the case of a contested election. The provisions relating to the election of councillors now depend upon subsequent legislation, and the system seems to me to be a very different one. Several days before the election there are to be nomination papers, signed by two burgesses and assented to by eight others, delivered in to the mayor, and the mayor is to entertain any objections to the validity of those nomination papers. Upon objection in writing he may either allow or disallow it. If he disallows the objection, the nomination is to be valid, and cannot be questioned, as I understand the provisions of the 3rd schedule of the Act, in any subsequent proceeding. If he allows the objection his determination is subject to review upon an election petition. Now, those provisions appear to me to indicate that it could not have been intended that the mayor should entertain such a question as the qualification of a candidate; because it is impossible to suppose that the Legislature provided that a question of that sort should on, it may be, very imperfect information, and without legal assistance, be finally and conclusively and for ever determined by the mayor. I think that the objections to the nomination papers referred to in the Act do not include any such question as to the qualification of a candidate. But when the mayor has once investigated the objections arising to any nomination paper and upheld its validity, then the candidate is validly nominated, and those valid nominations are to be published in the manner prescribed by one of the rules contained in the 3rd schedule to the Act. Turning then to sect. 56, "If the number of valid nominations" (which obviously referred to the nomination held valid by the mayor) "exceeds that of the vacancies, the councillors shall be elected from among the persons nominated. If the number of valid nominations is the same as that of the vacancies the persons nominated shall be deemed to be elected." As I apprehend, therefore, if a person who was disqualified were nominated before the mayor and his nomination paper were perfectly regular and fulfilled all the conditions required by the Act and were accepted by the mayor, then he would be deemed to be elected notwithstanding that he was disqualified. But of course his election would in such a case be open to question by means of an election petition. If the number of valid nominations exceeds that of the vacancies there must, of course, be an election, and the conduct of that election is committed to the alderman selected for the purpose. But until the day of the election, as I understand it, the alderman who is made the returning officer, possesses no functions whatsoever in relation to the election. All that he is to deal with is the conduct of the election amongst the persons who are nominated in the manner that I have described. Then the Ballot Act, which, of course, was not in operation under the Act of 1835, prescribes the duties of the returning officer, and, as it seems to me, prescribes them with great exactness. I quite agree that if it had been the settled and well-established practice prior to the passing of the Ballot Act that the returning officer was the proper functionary to determine such questions as those which we are now considering, it might have been possible to read the Ballot Act as prescribing certain of his functions, and yet leaving him possessed of those which at common law had been held to be inherent in the office of a returning officer. But certainly no precedents have been cited to show that there was any such well-established practice as it is possible to read into the Ballot Act with its minute prescription of duties. Turning to the Ballot Act, it prescribes that the returning officer "shall, in the presence of such agents, if any, of the candidates as may be in attendance, open the ballot boxes and ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidates or candidate to whom the majority of votes have been given." I think that the fact that he is "forthwith" to declare it points strongly to his having no judicial duties such as it has been suggested he possesses which have to be exercised before he is in a position to declare it. But beyond that the section provides that "the decision of the returning officer as to any question arising in respect of any ballot paper shall be final, subject to reversal on petition questioning the election or return." Now, it seems to me that the expression of that particular judicial function and the provision that it shall be final subject to reversal on a petition, indicates that that is the only judicial function which the returning officer is intended to exercise. According to the argument for the appellant his decision also as to the qualification of a candidate is equally final, and is only subject to reversal on a petition questioning the validity of his return. It seems to me to be impossible to give any reason for inserting that particular provision, which would not have been good for the purpose of inserting a similar provision in connection with all other matters which stood in the same position as the decision with regard to ballot papers. Therefore I come without doubt to the conclusion that the returning officer has no functions beyond those which are defined by the Ballot Act. Mr. Douglas has argued that such a conclusion will lead to great inconvenience, and that there are distinct advantages in the returning officer having the power to pronounce an opinion, and give effect to his opinion, upon the qualification of a candidate. I can quite conceive that there may be cases in which it would be advantageous that the returning officer should have such a power where the disqualification was a matter absolutely clear and beyond question; but if I look at the balance of convenience, it seems to me to be enormously the other way. The question of qualification or disqualification must frequently depend upon nice questions of law, and often upon difficult and disputed questions of fact. If the returning officer has the power in one case he has it in every case. It seems to me that so far from its being expedient

to hold that he has this power in every case, if it were a matter of doubt one's inclination would be entirely the other way. I can conceive nothing more disadvantageous than the conclusion, unless one was forced to it, that these questions are in every case committed to the determination of the returning officer, and that he can declare elected a person who has not received the majority of votes because he has come to the conclusion that for some reason or other one of the candidates is disqualified. Having arrived at the conclusion that the returning officer has no power beyond that to which I have referred, what remains? In the present case he did not "forthwith declare," but he did shortly after the election make public the fact and record it that he had found the majority of votes to be given, not to the appellant, but to Mr. Roberts. It seems to me that in so doing he declared Mr. Roberts elected, and that the addition of an expression of his opinion as to the law, which he had no power in point of law to express at all, did not as a matter of fact affect what he had done in declaring that Mr. Roberts had obtained the greater number of votes, from which it follows, as it seems to me, that in point of law he was the candidate elected. But even if, as I have said, this is to be regarded as a nullity and no declaration at all, then Mr. Pritchard has not been elected, and not having been elected it is certainly not competent for him to institute such a proceeding as this. If Mr. Roberts was elected, then by virtue of the provisions to which the Lord Chancellor has already called attention, and which I need not repeat, the question which is sought to be raised in these proceedings could only be determined by means of an election petition. I think that it was intended to put an end to the difficulties which had often arisen as to the proper mode of procedure, whether in a particular case it was to be by *mandamus* or by *quo warranto*, and to create a simple mode of procedure which in the case of an election could, shortly after the election, settle the questions in dispute. Upon these grounds it seems to me that the appeal must fail. Upon what may in some sense be called the main question—that of the eligibility of Mr. Roberts as a candidate—I do not intend to express any opinion. I certainly must not be understood as expressing any dissent from the view which has been expressed by the Court of Appeal. I should like to say one word with regard to the case of *Reg.* v. *Coaks*, to which Lord Fitzgerald has referred. I quite agree with him that it is not necessary on the present occasion to come to any conclusion as to whether that case was rightly decided, or whether, if rightly decided, it is applicable, having regard to the altered legislation with which we have to deal. But it seems to me that so far as regards the question whether an alderman is capable of standing as a candidate for the office of councillor the case of *Reg.* v. *Coaks* was not a considered decision of the Court of Queen's Bench. According to the report of the case to which our attention has been called, it was assumed, and was necessarily assumed, that the candidate was ineligible because it had been so determined in another proceeding, as I understand, with reference to the particular case and the particular individual. The decision, therefore, if it be a decision of the Court of Queen's Bench with regard to the eligibility or the non-eligibility of an alderman was pronounced in an earlier case of which no report appears to be forthcoming except one contained in the local papers of the period; and so far as we have learnt from the information which has been afforded to us, the case really was not argued there, because the learned counsel who appeared to contend in favour of the eligibility of the alderman intimated that they should have great difficulty in doing so, and practically abandoned the case, upon which, of course, the decision followed against them. We are ignorant of the circumstances under which that took place. No doubt they were counsel of very great eminence, but that appears to have been the mode in which the decision in *Reg.* v. *Coaks* was arrived at. I have thought it desirable to state what my view is of the position of the case of *Reg.* v. *Coaks*, but it is not necessary; and I do not desire to express any opinion as to whether it was well decided or whether it is applicable to the present case.

Lord MACNAGHTEN.—My Lords: The case has been very ably argued by Mr. Douglas; but, notwithstanding his argument, I do not think it is necessary or expedient to go back further than the Act of 1882. The cases before that Act either illustrate principles which, nowadays at any rate, require no illustration, or, being decided on a different statute differently worded, are, perhaps, as likely to mislead as to afford a safe and sure guide. The Act of 1882, with so much of the Ballot Act as is applicable to the case, forms a complete code and prescribes in language not I think susceptible of doubt what the duties of the returning officer are. In municipal elections the returning officer, when not the mayor, is relieved from some of the duties cast on the returning officer in parliamentary elections. He has nothing to do with the nomination or the preparations for the election. He has to decide any question arising in respect of any ballot paper, and so far his decision is made final, but subject to reversal on an election petition. Beyond that he has to ascertain the result of the poll by counting the votes, and he is forthwith to declare to be elected the candidate to whom the majority of votes have been given. Now, in this case, the returning officer added up the votes and brought out the correct result. He had no doubt of the arithmetical result. He did not think it necessary to go through the process again. It then became his duty to declare the candidate with the highest number of votes elected. He had no power to do anything else. Instead of that he goes home without making any declaration. Then apparently on the strength of a somewhat singular opinion (if he states it correctly) which was taken before the nomination, and was to the effect that the nomination of Mr. Roberts would be void, and one which it would be the duty of the returning officer to reject, he makes a return which both parties claim as in their favour. He states the number of votes given for each candidate, which of itself, taken in connection with the terms of the Act, makes it plain—that is, "declares" which of the two was elected. The rest of the placard, issued by the direction of the returning officer, is, in my opinion, unwarranted by the Act, idle, and in-

efficacious. I am inclined to think that the final declaration of the numbers by the proper officer is in itself a declaration of the election of the person who has the highest number, and that it is not rendered nugatory because the returning officer chooses to tack on to it a private opinion of his own which is in the teeth of the Act, and announces a result which does not and cannot follow from the only facts which it was his duty to ascertain. For these reasons, without expressing any opinion on other points which have been argued and which, if raised, ought to be raised and determined on an election petition, and without expressing either approval or disapproval of the case to which Lord Fitzgerald has referred, I concur in the motion which has been proposed.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Belfrage* and *Co.*, for *R. S. Chamberlain*, Llandudno.

Solicitors for the respondents, *Bloxams* and *Ellison*, for *J. B. Roberts*, *Roberts*, and *Jones*, Bangor.

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, Nov. 10, 1887.

(Before Lord ESHER, M.R., BOWEN and FRY, L.JJ.)

BONELLA (app.) *v.* THE TWICKENHAM LOCAL BOARD OF HEALTH (resps.); HOLMES (app.) *v.* THE SAME. (*a*)

Local Government Acts—Sewers—Vesting in local authority—Sewers sufficient at time of vesting—Compulsory alteration of drainage — Works executed by local authority—Liability of frontagers—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 13, 15, 18, 150, 207.

A street, which had been laid out by the owners of a building estate, was sufficiently sewered at the time when it vested in the local authority then formed for the district, which was in the year 1868. *Subsequently in the year* 1884 *it became necessary to alter the drainage plan of the district, and thereupon the local authority gave notice, under sect.* 150 *of the Public Health Act* 1875, *to the frontagers in the street to make a new sewer, and on their default themselves constructed such sewer and sought to charge the frontagers with the cost thereof:*

Held (affirming the judgment of the Queen's Bench Division), that the original sewer was not a sewer made by the owners for their own profit, and had therefore vested in the local authority under the Public Health Act; that the local authority must be taken to have been satisfied with the sewer, they having signified nothing to the contrary within a reasonable time; that under these circumstances they must themselves repair or enlarge the sewer as it became necessary, and that consequently the expenses of doing so were not chargeable upon the frontagers.

THIS was an appeal from a judgment of the Queen's Bench Division (Huddleston, B. and Smith, J.), reported at 56 L. T. Rep. N. S. 486, upon a case stated by justices.

The case is fully set out in the report in the court below, and for the purposes of this report it is only necessary to state the following facts:

The appellants Bonella and Holmes were the owners of two pieces of land abutting upon a street called the Avenue, within the district of the respondents, who were the urban sanitary authority for the district of Twickenham. The street in question and the lands abutting thereon had formed part of an estate belonging to the Conservative Land Society, and had been by that society, some time prior to the year 1868, laid out as a street and sewered for the drainage of the houses in the street; and at that time the existing sewer, which discharged into the Thames, was sufficient for the drainage.

In 1868 the respondents' board came into existence as the urban sanitary authority of the district.

In 1884 the respondents, having received notice from the Thames Conservators to discontinue the discharge of sewage into the Thames, gave notice to the frontagers in the street in question, under sect. 150 of the Public Health Act 1875, to make a new sewer which should have an opposite gradient and outfall. The frontagers made default in the construction of such sewer, and thereupon the respondents constructed it themselves, and sought to recover from the appellants their proportion of the expenses by summary proceedings before the justices. The justices made the orders for payment, but the Queen's Bench Division quashed such orders.

The respondents appealed.

Lumley Smith, Q.C. and *J. P. Grain* for the respondents.—The original sewer, made prior to 1868, was made by the owners of the estate for their own profit within the exception in sect. 13 of the Public Health Act 1875, and therefore it has never vested in the local authority. [Lord ESHER, M.R.—Can it be said that the sewers of a building estate are made for the profit of the owners?] Yes; they are made to develop the estate, and to make the houses saleable. But, even if this is not so, the local authority would still have power under sect. 150 to call upon the frontagers to a street not repairable by the inhabitants at large to resewer it when it is not sewered to their satisfaction. There is no limit of time at which the dissatisfaction of the local authority must be expressed, and it need not be expressed until the requirements of the district make the sewer in the street insufficient for the drainage of the street from whatever cause. [Lord ESHER, M.R.—That argument would lead to a very heavy burden upon the frontagers to a private street, making them liable to resewer their street whenever it became necessary to alter the drainage plan of the district.]

Bosanquet, Q.C. (*Edwyn Jones* and *A. J. Powell* with him) referred to *Fulham Board* v. *Goodwin* (35 L. T. Rep. N. S. 907; 1 Ex. Div. 400). [He was stopped.]

Lord ESHER, M.R.—In this case, when the local board of Twickenham was constituted, and when the provisions of the Public Health Act as to sewers came into operation in their district, there existed a sewer under this street which had been

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

made by the company mentioned in the case for the purpose of draining the houses in the street. We are of opinion that that sewer did not come within the exception in sect. 43 of the Public Health Act 1848, or within that in sect. 13 of the Public Health Act 1875, as we do not think that it was a sewer made by any person for his own profit, or by any company for the profit of its shareholders. Therefore it was a sewer which vested in the local board at the time when the local board was constituted and the provisions of the Act became applicable. It seems to me that it then immediately became the duty of the local board to see whether in their opinion the sewer was then sufficient for the purpose for which it was then used, namely, for the drainage of the street. They would have had power at that time, I think, if they had not been satisfied with the sewer, to deal with it under the provisions of the Public Health Act 1848, which are now re-enacted by sect. 150 of the Public Health Act 1875; and I think they would have been entitled to have a reasonable time allowed them during which to make up their minds whether the sewer was sufficient or whether they would act under the provisions I have mentioned. But if after the lapse of a reasonable time it appears that they have done nothing, and have expressed no views upon the subject, then I think it must be taken that, for the purposes of the application of those provisions, they were satisfied with the sewer as it existed as sufficient for the purposes for which it was used; and I think that when once they are so satisfied they cannot afterwards put in force the provisions of sect. 150. In my opinion the board can only enforce those provisions so as to charge the expenses of sewering to the frontagers within the reasonable time which they are entitled to have during which to make up their minds that they are dissatisfied with the existing sewer. Now, if they are no longer able to have recourse to the provisions of sect. 150, what is their duty with regard to the sewer? The sewer being vested in them, it is their duty to keep it in repair, or if at any time from any circumstances it becomes no longer sufficient for the purposes for which it existed, then their duty is to close it, or alter the course of it, or enlarge it; this they have power to do under sect. 18, and if circumstances arise which entitle them to act under that section, I think it then becomes their duty so to act. In such a case the expenses of the necessary alteration are payable out of the general district rate, and not by the frontagers of the particular street, according to the provisions of sect. 207. That seems to me to be the true construction of these enactments, and that was, I think, the construction put upon them by the court below, with whose decision I agree. It seems to me that in thus deciding we are following the same line of reasoning as that applied in the case of *Fulham Board* v. *Goodwin* (*ubi sup.*). It is true that that case was decided upon another statute, and therefore is not strictly in point; but I think that a line of reasoning similar to that applied to that case is applicable to this statute, because it is the only reasoning which seems to make the statute reasonable. Any other construction would, I think, make the operation of the statute so oppressive that it is impossible to suppose that the Legislature can have intended any such thing. For these reasons I think that the judgment of the court below was right, and should be affirmed.

Bowen and Fry, L.JJ. concurred.

Appeal dismissed.

Solicitors for appellants, *Spaull, Miller, Smith,* and *Bell.*

Solicitors for respondents, *Ruston, Clark,* and *Ruston.*

Friday, Jan. 13, 1888.

(Before Lord Esher, M.R., Fry and Lopes, L.JJ.)

Reg. on the prosecution of Richard Morley *v.* J. King and Licensing Justices for Manchester. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION (CROWN SIDE).

Wine and Beerhouse Act 1869 (32 *&* 33 *Vict. c.* 27), *s.* 19—*Application for wine licence in respect of premises licensed to sell beer—Discretion of justices — Mandamus — Return of obedience — Pleading to return—Order LIII., r.* 9.

Where to a writ of mandamus calling upon justices to hear and determine an application for a wine licence, the justices make a return that they have heard and determined such application, it is open to the applicant to plead in answer to the return that the justices have declined to decide whether the case came within any of the four grounds specified in sect. 8 *of the Wine and Beerhouse Act* 1869.

According to the true construction of sect. 19 *of the Wine and Beerhouse Act* 1869, *it is lawful for the justices to refuse an application for a certificate for the sale of wine to be consumed on the premises in respect of a house which on the* 1*st May* 1869 *had a licence for the sale by retail therein of beer to be consumed on the premises, upon other than one of the four grounds mentioned in sect.* 8 *of the Act.*

Mandamus to the defendants to hold a further adjournment of their general annual licensing meeting, and at such adjournment to hear and determine an application by the prosecutor for a certificate to hold an Excise licence to sell by retail wine to be consumed on or off his said premises.

Return. That the defendants, the justices, did hold within a reasonable time after the service of the writ an adjournment of the general annual licensing meeting, and at such adjourned meeting heard and determined the application of the prosecutor for a certificate, as by the writ they were commanded.

Reply. (1) That the defendants had not heard and determined the matter of the application pursuant to the statutes in such case made and provided. (2) "A licence for the sale of beer by retail to be consumed on the premises under the Acts recited in the Wine and Beerhouse Act 1869, was in force on the 1st May 1869, and has been ever since renewed with respect to the house in the said writ of *mandamus* mentioned, which the prosecutor occupied at and before the said general annual licensing meeting, &c., and he thereby became, by virtue of the statute 32 & 33 Vict. c. 27, s. 19, and other statutes relative thereto, entitled to make application to the defen-

(*a*) Reported by Adam H. Bittleston Esq., Barrister-at-Law.

dants at such meeting for a certificate for the sale of wine to be consumed on such premises, and he duly made such application accordingly, and it thereby became unlawful for the defendants to refuse such application for a certificate, except upon one or more of the four grounds set forth in 32 & 33 Vict. c. 27, s. 8, but the defendants, well knowing the premises and that none of the said four grounds entitled them to refuse such certificate to the prosecutor, nevertheless wholly refused to hear and determine his said application on such four grounds or either of them, and refused such application on some other ground contrary to the statute."

Rejoinder. That the plea was bad on the ground that the matters therein alleged did not entitle the prosecutor to the said certificate, or disentitle the defendants from refusing such certificate, except upon one or more of the said four grounds therein mentioned, and on the ground that the matters stated in the said reply show that the defendants have complied with the said writ, and that their return thereto is true.

Joinder of issue.

At the trial before Charles, J., without a jury, it appeared that an Excise licence to sell by retail beer to be consumed on or off the premises in question was on the 1st May 1869 held by the then occupier. It was afterwards annually renewed, and was ultimately in Nov. 1879 transferred to the prosecutor, and was annually renewed by him.

In Aug. 1887 he applied to the licensing justices for a certificate for a retail wine licence, in pursuance of the Act 23 Vict. c. 27, ss. 7 and 8, and Acts amending the same.

The justices refused the application.

The learned judge gave judgment for the prosecutor, holding that, upon the proper construction of 32 & 33 Vict. c. 27, s. 19, the justices in refusing the application were limited to the four grounds specified in 32 & 33 Vict. c. 27, s. 8.

The defendants appealed.

By the Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27), s. 19:

Where, on the 1st of May 1869, a licence under any of the recited Acts is in force with respect to any house or shop for the sale by retail therein of beer, cider, or wine to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine to be consumed on the premises in respect of such house or shop, except upon one or more of the grounds in respect of which an application for a certificate under this Act in respect of a licence for the sale of beer, cider, or wine not to be consumed on the premises may be refused in accordance with this Act.

Henn Collins, Q.C. and *R. S. Wright* for the justices.—There is a preliminary objection in this case. The justices having made a return that they have heard and determined the application in compliance with the *mandamus*, that return is conclusive, and the reply is bad.

Bosanquet, Q.C. and *Paterson* for the prosecutor.—If justices decline to entertain a question that is within their jurisdiction and decide some other question that is not within it, they are subject to a *mandamus*. That they have gone through the form of hearing and determining the application is nothing, if they have not in fact determined the only questions that were open to them upon such an application. [FRY, L.J.—Is it open to you to reply to a plea of obedience to the *mandamus* by setting out facts to show that there has been no real obedience? Lord ESHER, M.R.—The replication—that is, the plea to the return—says that the justices declined to decide whether the case came within any of the four grounds of refusal mentioned in sect. 8, but assumed a jurisdiction to decide upon some other ground which they had no jurisdiction to entertain.] They cited *Reg.* v. *Justices of Pirehill North* (51 L. T. Rep. N. S. 205, 534; 14 Q. B. Div. 13) and were stopped by the Court.

Lord ESHER, M.R.—We are all of opinion that this pleading properly raises the point whether the justices have or have not jurisdiction to determine on any other than one of the four grounds of refusal mentioned in sect. 8.

Henn Collins, Q.C. and *R. S. Wright* for the justices.—The question turns upon the construction of sect. 19 of the Wine and Beerhouse Act 1869. In the present case the licence in force on the 1st May 1869 was a beer licence. There was no wine licence, and therefore there could not be a renewal of that. Having a beer licence on that day, the justices could not refuse to renew it, except on one of the four grounds mentioned in sect. 8. But a man who holds a beer licence is not intended to be put in a better position than anyone else as regards obtaining a cider or wine licence. It is submitted that the words of the section are clear. The learned judge who tried the case thought that sect. 10 of the Act of 1861 put the holder of a beer licence in a better position as regards obtaining a wine licence than other people; but it is submitted that that is not so.

Bosanquet, Q.C. and *Paterson* for the prosecutor.—The justices were not entitled to refuse to the holder of a beer licence a certificate for the sale of wine, except on one of the four grounds mentioned in sect. 8. The question is, whether the words of sect. 19 are to be read, where a licence is in force for the sale of beer, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine; or whether the right to a certificate for the sale of cider or wine depends upon there being a licence in force for the sale of cider or wine respectively. It is submitted that the former is the natural and grammatical sense of the words, as Charles, J. has held.

Lord ESHER, M.R.—In this case a mandamus issued to magistrates to hear and determine an application by the prosecutor for a certificate to hold an excise licence to sell by retail wine, to be consumed on or off the premises. To that the magistrates pleaded, by way of return, that they had obeyed the writ, having heard and determined the application. Upon that the prosecutor replied, and in that replication he begins by traversing the fact, and says that the magistrates had not heard and determined, and then he goes on to say that they had refused to determine his application upon one of the four grounds set forth in 32 & 33 Vict. c. 27, s. 8, and had determined it upon some other ground. Upon that the magistrates rejoin; and to my mind the rejoinder does not traverse the reply, but endeavours to get rid of it, and to say, admitting the facts in the reply, they are no answer to the return of the magistrates. Is it true to say that when magistrates

return that they have obeyed the writ, no answer can be made to the return? That question was before this court in the case of *Reg.* v. *Justices of Pirehill* (*ubi sup.*), and we held that some answer could be given to such a return, according to the true construction of 9 Anne, c. 20; and the judgment in that case went on further to say that although the statute had been replaced by rules and orders, that right still remained. It was there pointed out that unless that was so, the magistrates, upon a mere matter of pleading, might oust the jurisdiction of the court for the time, and put the parties to the expense of raising the question otherwise, when it might be conveniently determined upon that proceeding. I therefore think that some answer can be made to such a return. To what extent that answer may go is another question. If the reply says that the magistrates have heard and determined, but that their determination is wrong in fact or in law, that would be no answer. But if there is a traverse of the fact that the magistrates have heard and determined at all, I should say that that would be a good answer. If the reply does not say that the magistrates have declined to exercise their jurisdiction at all, but says that they have declined to exercise it except with regard to questions which were not within their jurisdiction, that is in effect saying that they have not heard and determined the matter at all. If in the present case the magistrates declined to enter into any of the four grounds mentioned in 32 & 33 Vict. c. 27, s. 8, but did decide the case upon another matter as to which they had no jurisdiction, I should think that in the reply it was permissible to raise the question whether that was a sufficient hearing and determining of the application; and if, upon the true construction of the statute, the magistrates only had jurisdiction to decide upon one of the four grounds mentioned in sect. 8, I should think the reply good and the return bad. Then, if that is the true construction of 9 Anne, c. 20, and of the rules and orders, the question which is raised by these pleadings, and which has now to be determined, is whether it is true to say that the magistrates were confined to the four grounds of refusal mentioned in 32 & 33 Vict. c. 27, s. 8. The true construction of the replication is that the magistrates did not enter into any of those four grounds, but decided the case on another matter. The words are "nevertheless wholly refused to hear and determine his said application on such four grounds, or either of them, and refused such application on some other grounds, contrary to the statute." That is not traversed in the rejoinder; and it must therefore be taken that the justices refused to entertain the application. If the last words of the replication are to be construed as alleging that the magistrates did entertain the application, but wrongly entertained it, that only amounts to an allegation that, whereas their return that they have heard and determined is untrue as regards the jurisdiction which they had, it is true as regards a jurisdiction which they had not. The only question, therefore, is, had the magistrates jurisdiction to refuse the application on any ground except one of the four grounds specified in 32 & 33 Vict. c. 27, s. 8? If they have, they have exercised a jurisdiction which they had; if they had not, they have exercised a jurisdiction which they had not. We have to say what is the true construction of sect. 19 of the Wine and Beerhouse Act 1869. I know that another section, viz., sect. 10 of 24 & 25 Vict. c. 91, has been discussed; but I cannot think that that section assists the argument on either side. That section is limited to simply declaring what was the true construction of a former statute. What does a declaratory statue, a statute which is merely declaratory of a former statute, do? It does nothing except declare that the true construction of the former enactment is that which the Legislature says it is. A declaratory statute makes no new enactment; but gives the construction of an old one. Therefore, we have only to consider the true construction of sect. 19. On the one side, it is said that, if a man, on the 1st May 1869, had a licence to sell cider, or a licence to sell beer, or a licence to sell wine, he is entitled, not only to have a renewal of the licence which he then held, but also to have both the other licences, unless that right is ousted by failure to fulfil any of the four requirements of sect 8. On the other side, it is said that, if a man, on the 1st May 1869, had only one of the three licences he is entitled to a renewal of that licence, but he is not entitled to have either of the other two which he had not before; and that, consequently, the magistrates have a discretion as to granting him either of the other two. Which of these two contentions is right depends upon what is the true construction of sect. 19. It is said that we ought to construe the section according to its ordinary grammatical meaning unless that would lead to some manifest absurdity or contradiction. That argument assumes that the ordinary grammatical meaning is in favour of the respondent. If it is desired to avoid all possibility of discussion as to the meaning of a sentence, conjunctions ought not to be used at all; instead of the conjunction, all that part of the preceding sentence which is intended by the conjunction to be made applicable to the succeeding words should be repeated. But when conjunctions are used, there is a distinction between the conjunction "or" and the conjunction "and;" the former dividing, the latter joining. In sect. 19 it is the disjunctive conjunction "or" which is used. Then the section is to be divided into separate sentences, which the Legislature have joined together by a disjunctive conjunction in order to avoid a troublesome repetition of the preceding words. The first sentence of the section will be: "Where, on the 1st May 1869 a licence under any of the recited Acts is in force with respect to any house or shop for the sale by retail therein of beer to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer to be consumed on the premises in respect of such house or shop, except upon one or more of the grounds," &c. The second sentence will be in the same words as the first, substituting cider for beer; and the third sentence will be in the same words substituting wine for beer. The section deals with the sale of beer, cider, or wine; to each of those separately you have to apply all the words of the section. When the section is thus resolved into separate sentences, its true construction is apparent. If a man held a beer licence on the 1st May 1869, and after the passing of the Act he applies for a renewal of it, his application

cannot be refused except for one of the four reasons mentioned in sect. 8. But the fact that he held a beer licence at that date does not assist in any way a subsequent application by him for a certificate for the sale of cider or wine. In my opinion, sect. 7 is not opposed to this construction. A man who holds a licence for the sale of beer only in order to obtain a wine licence must give the notices mentioned in sect. 7 in the case of a new application. I think that the words of sect. 7 are to be read distributively like those of sect. 19. If I am wrong in that, can anyone say that the construction of sect. 7 is so clearly the other way as to make it conclusive of the construction of sect. 19? Sect. 7, therefore, either does not assist the argument of the respondent, or it tells against it. In my view, sect. 7 tells against that argument. Then, how does this case stand? The house in question was, on the 1st May 1869, and is still licensed to sell beer. The occupier now applies to the magistrates for a licence to sell wine. The magistrates are not bound by the question whether he does or does not come within the four objections specified in sect. 8. They have the same discretion with regard to this wine licence as they have with regard to any new licence. What is that discretion? It is not bound by any rules; it is absolute. Under the circumstances they have not exceeded but have acted within their jurisdiction. The judgment of Charles, J. must therefore be reversed. The magistrates have considered the matter and come to a conclusion. Whether we should have come to the same conclusion is a question which is not before us.

FRY, L.J.—The argument on behalf of the justices has been put upon two grounds. First, it is said that they have made a return to the *mandamus* of unqualified obedience, and that, upon such a return being made, the only question is as to its truth, which is matter for trial. But the appellants have not rested their case upon an unqualified return of obedience. The prosecutor pleaded to the return that the justices had not heard and determined the application, and then went on to state that they have not refused his application upon one of the four grounds mentioned in sect. 8 of the Act, upon which alone it was competent for them to refuse it. To that the appellants replied that the plea was bad in law and bad in substance, on the ground that the matters therein alleged did not entitle the prosecutor to the certificate, or disentitle the defendants from refusing such certificate, except upon one or more of the four grounds therein mentioned. Therefore the reply raised the point of law very neatly, and showed that the justices had determined the case upon a ground outside their jurisdiction, if they are confined to the four grounds specified in sect. 8. After that reply they cannot say that they have made a return of unqualified obedience, and that that is a conclusive answer to the writ. The question, therefore, is whether the justifices were confined to the four grounds specified in sect. 8. That depends upon the construction of sect. 19. There are two things that we must consider. First, how matters stood at the time of the passing of the Act; and, secondly, its general scope and object. At the time of the passing of the Act matters stood briefly thus: There were two classes of licences—one class of licences for public-houses, the granting of which was in the discretion of the justices, and another class which were granted by the Excise to every person who applied, provided they could satisfy certain conditions. The second class included beer licences, cider licences, and wine licences to persons who kept refreshment rooms. Now, that being the general condition of things at the time of the passing of the Act of 1869, we find that the preamble to that Act, after reciting the previous Acts of Parliament, states that it is expedient to make better provision with regard to the granting of licences for the sale of beer, cider, or wine, and the Act gives effect to that by vesting a power in the justices to grant those licences, which had been previously granted by the Excise, and by giving the justices a discretion with regard to them similar to that which they already had with regard to the granting of licences to public-houses. In my opinion, the object of sect. 19 was to save what might be called the right of those persons who, at that time, were in possession of one of the three classes of licences dealt with—persons who had a beer licence, or a cider licence, or a wine licence. Those were the three classes of persons whose interests the Legislature desired to protect; and in order to do so, and to give a kind of annuity for life to any person falling within one of those three classes, it was enacted that the magistrates should continue the holder of any of those three licences in the possession of such licence for life, subject to his complying with certain specified conditions. But it was not intended to give to the holder of one of the three licences any right to have either of the other two, except upon the same terms as were open to the whole of Her Majesty's subjects. No peculiar right or privilege was conferred upon the holder of a licence except with regard to the particular class of licence which he held. That seems to me to be the general intention of the section. As to the particular words used, I entirely agree with what has been said by the Master of the Rolls. I think that the right construction of them is that where a licence is in force for the sale of beer, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer; where a licence is in force for the sale of cider, it shall not be lawful for the justices to refuse an application for a certificate for the sale of cider; where a licence is in force for the sale of wine, it shall not be lawful for the justices to refuse an application for a certificate for the sale of wine. When you get three hypotheses mixed together in a section of an Act of Parliament, nothing is more common than *reddendo singula singulis*, to read each hypothesis as applying only to that part of what follows which refers to the particular hypothesis. I entirely agree that we are to presume the Legislature to use the English language in its ordinary sense; but to put on sect. 19 the construction that was put upon it in the court below would be, in my opinion, to read the words in other than their ordinary sense. I think that the true view of the construction of the section is that which I have expressed. It was strongly pressed upon us that sect. 10 of the Act of 1861 was intended to give some special rights to beersellers. I do not look at the section in that way. I think that the only meaning of that section is to declare that the mere fact of keeping a beerhouse does not pre-

vent a man from keeping a refreshment-house. A licence for the sale of beer does not preclude him from obtaining a licence for the sale of wine, if the justices in their discretion choose to grant it him.

LOPES, L.J.—In this case the first question is, whether a return of unconditional compliance, with a writ of *mandamus* to justices, can be questioned by pleading to it. I am of opinion that it can in certain cases. If the pleading to the return set up that the justices had determined the matter wrongly, it would be bad; but if it shows that they have not determined the matter at all upon the only grounds on which they had jurisdiction to determine it, it is good. If in this case the pleading to the return shows that the justices have declined to consider whether the applicant has brought himself within the four conditions mentioned in sect. 8, it is good. Looking at the whole pleadings, I think that what happened here is, that the justices did hear and determine the application, but did not hear and determine it with reference to the four grounds of refusal specified in sect. 8. I think that the question whether they had jurisdiction to refuse the application upon any other than the four grounds mentioned in sect. 8 is properly raised by the pleading in reply to the return of unqualified obedience. The question whether they had such jurisdiction depends upon the construction of sect. 19 of the Wine and Beerhouse Act 1869. Speaking for myself, with regard to the grammatical meaning of the words there used, I should have thought that it was clear, if Charles, J. had not decided as he has done. What the Legislature intended to do by the section was to provide for vested interests. Existing licences, whether for beer, for wine, or for cider, were to be renewed, except for one of the four grounds specified in sect. 8. It seems to me impossible to come to the conclusion that the true construction of that section is that a man who had any one of the three liquor licences had a vested interest in the other two. It appears to me, therefore, that the judgment of Charles, J. should be reversed.

Appeal allowed.

Solicitors for the justices, *Peacock* and *Goddard*, for *Higson* and *Son*, Manchester.

Solicitors for the prosecutor, *Radford* and *Frankland*, for *Bowden* and *Walker*, Manchester.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Monday, Jan. 16, 1888.

(Before MATHEW and SMITH, JJ.)

WINDER (app.) *v.* THE GOVERNOR AND GUARDIANS OF THE KINGSTON-UPON-HULL INCORPORATION FOR THE POOR (resps.). (*a*)

Poor law—Pauper lunatic—"Person entitled to receive any payment as member of benefit or friendly society"—Member of trade union—Repayment of relief to guardians—Agreement to apply funds of trade union to provide benefits for members not enforceable—Trade Unions Act 1871 (34 & 35 *Vict. c.* 31), *s.* 4—*Divided Parishes and Poor Law Amendment Act* 1876 (39 & 40 *Vict. c.* 61), *s.* 23.

A member of a trade union is not "a member of a benefit or friendly society, and as such entitled to receive any payment," within the meaning of the 23rd section of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 *Vict. c.* 61), *inasmuch as the Trade Unions Act* 1871 (34 & 35 *Vict. c.* 31) *expressly declines to enable any court to entertain proceedings to enforce an agreement to apply the funds of a trade union to provide benefits for members; and therefore the guardians cannot under that section obtain from a trade union the repayment of expenses incurred in the relief of a pauper lunatic member.*

THIS was a case stated by the stipendiary magistrate for the borough of Kingston-upon-Hull, upon the hearing of a complaint preferred by the Governor and Guardians of the Kingston-upon-Hull Incorporation for the Poor, the respondents, against the secretary of the Hull Number One Branch of the United Society of Boilermakers and Iron Shipbuilders, the appellant, for that the appellant was liable under the provisions of 39 & 40 Vict. c. 61, s. 23, and 42 Vict. c. 12, s. 1, for the payment of the sum of 1*l.* 11*s.* 7*d.*, a balance due to the respondents for the maintenance in the Hull Borough Asylum of one Thomas Brewer, deceased, and late a member of the aforesaid society, and that the appellant had declined (after due demand) to pay the sum, which complaint was duly heard before the stipendiary magistrate, the appellant appearing and resisting the order.

The facts proved or admitted before the stipendiary magistrate were as follows:—

The United Society of Boilermakers and Iron Shipbuilders was not registered under the Friendly Societies Acts, but was duly registered as a trade union under the Trade Union Acts 1871 and 1876, and the appellant was secretary to the Hull Number One Branch of the said society.

Prior to and on the 11th Jan. 1887, and therefrom to the time of his decease, which occurred on the 17th April 1887, Thomas Brewer was a member of the Hull Number One Branch of the said society.

A copy of the rules of the society was put in and admitted to be correct.

Rule 1, sect. 3, was as follows:

The objects of this society are the establishment of a fund for the relief of its members in sickness with medical and surgical aid, assistance to members out of employment, protection of trade or disputes connected therewith, accidents, old age, for the interment of its deceased members and their wives, and for regulation between workmen and masters.

Rule 10 related to the duties of a branch secretary, and sect. 1 provided (*inter alia*) that he should look after the payment of all members on donation, sick, funeral, and superannuations, and enter on his order to the treasurer all items for which the sum is drawn.

Rule 21 related to sick benefit, and sect. 1 was as follows:

Any member being entitled to benefit according to rule 22 and claiming the sick allowance as undermentioned, he or his friend shall send a note to the secretary in writing according to the form at the end of these rules, also his place of residence, that he may be visited, within twenty-four hours from the time of his indisposition, also a note from the surgeon in attendance within three days, stating the nature of his complaint; neglecting to do so he shall have no claim only for one day previous to the notice.

The secretary shall then order the stewards to visit the sick member, but if such sickness or lameness is brought on by drinking intoxicating liquors or other

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

improper conduct he shall not be entitled thereto. The sick benefits are as follows: for the first twenty-six weeks the sum of 10*s.* per week, for the second twenty-six weeks the sum of 5*s.* per week, and after that period the sum of 4*s.* per week as long as such sickness continues.

On the 10th Jan. 1887 the said Thomas Brewer was admitted an inmate of the Hull Borough Asylum, and forthwith became chargeable to the respondents as a pauper lunatic, and remained as such and was maintained therein by the respondents up to the date of his decease on the 17th April 1887. During the period above mentioned the respondents had expended for and on account of Thomas Brewer, for his maintenance or otherwise in the asylum, the sum of 9*l.* 2*s.* 2*d.*

From other sources the respondents had been paid the sum of 7*l.* 10*s.* in part payment of the sum of 9*l.* 2*s.* 2*d.*, leaving a balance due to them of 1*l.* 11*s.* 7*d.*

The respondents had duly declared the relief to have been given on loan.

At the time of his decease Thomas Brewer had no one dependent upon him, and on the 4th Jan. 1887 the appellant had given a certificate in writing to the effect that Thomas Brewer was entitled to receive from the society under its rules the sum of 10*s.* per week for the first twenty-six weeks then next ensuing after the date of the certificate.

The necessary notices in compliance with the statute had been served upon the appellant, and he had after due demand refused and neglected to pay to the respondents the said sum of 1*l.* 11*s.* 7*d.*

It was contended before the stipendiary magistrate on the part of the appellant that he was not legally liable, and that the respondents were not entitled to recover from him the sum of 1*l.* 11*s.* 7*d.* on two grounds: (1) because lunacy could not be held to be sickness; and (2) because the society was a trade union and regarded as such under the Trade Union Acts, and that it was not a benefit or friendly society within the meaning of the statute.

The stipendiary magistrate was of opinion (1) that lunacy was sickness within the meaning of the society's rules, and (2) that the society was such a society as was contemplated by the statute under which the proceedings had been taken and that it fell within the provisions of the statute, and upon these grounds made the order asked for.

The question for the opinion of the court was, whether upon the facts stated the stipendiary magistrate could legally and properly make the order. If the court should be of opinion in the affirmative, then the said order was to stand affirmed; but if otherwise, to be quashed.

The Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61), s. 23, enacts:

Where any pauper shall be entitled to any annuity or periodical payment, the trustee or other person bound to make payment of the same to the pauper may from time to time pay to the board of guardians of any union or parish, out of the instalments which have become due, the cost incurred in the relief of such pauper accrued since the last instalment, and such payment shall be a legal discharge to such trustee or other person for so much money as shall have been so paid.

Where the guardians incur any expense in the relief of a pauper lunatic, being a member of a benefit or friendly society, and as such entitled to receive any payment, they may recover from him as a debt, or from his executors, administrators, or assigns, in case of his death, the sum so expended by them as aforesaid, and the managing body of such society, after notice from the clerk to the guardians served previously to the money being paid over, shall be required to pay the same to such guardians and shall be exonerated on payment thereof from any further liability.

Where any trustee, manager, or other person shall decline to make any payment the guardians may apply to the justices in petty sessions assembled, and such justices may, if satisfied that it is right under all the circumstances to do so, make an order upon him to pay the requisite amounts then due to the guardians at once, and to pay from time to time in future as the liability in respect of relief arises thereafter.

Provided that this clause shall not have effect unless and until the guardians or their relieving officer shall have declared the relief to be given on loan, nor in respect of any relief granted contrary to the rules and orders made under the authority of the statutes in that behalf.

The Poor Law Amendment Act 1879 (42 Vict. c. 12), sect. 1, enacts:

The provisions contained in the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61), s. 23, shall not apply to any moneys which a pauper or pauper lunatic having a wife or other relative dependent upon him for maintenance may be entitled to receive as a member of any friendly or benefit society, but such moneys shall, subject to any deductions for keeping up his membership required by the rules of such society or any branch thereof from which such pauper or pauper lunatic is entitled to receive such moneys, be paid or applied by the trustees, committee, or other officers of such society or branch to or for the maintenance of such wife or relative, and where a pauper or pauper lunatic having no wife or relative dependent upon him is entitled to any such moneys, no such claim shall be made under the said Act by the guardians of any union or parish, or against any branch thereof, for the expenses incurred in his relief, unless and until the guardians or their relieving officer shall have declared the relief to be given on loan, and shall have within thirty days thereof notified the same in writing to the secretary or trustees of the society or branch of which the pauper or pauper lunatic is a member, and as such entitled to receive any payment.

The 4th section of the Trade Union Act 1871 (34 & 35 Vict. c. 31) provides that,

Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely,

1. Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ or be employed

2. Any agreement for the payment by any person of any subscription or penalty to a trade union;

3. Any agreement for the application of the funds of a trade union, (*a*) To provide benefits to members; or (*b*) To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union; or (*c*) To discharge any fine imposed upon any person by sentence of a court of justice; or,

4. Any agreement made between one trade union and another; or

5. Any bond to secure the performance of any of the above-mentioned agreements.

But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful.

R. S. Wright for the appellant.—The order of the stipendiary magistrate is wrong and must be quashed. The 23rd section of the Divided Parishes Act only authorises such an order in the case of a pauper lunatic who is "a member of a benefit or friendly society, and as such entitled to receive any payment." Here the pauper lunatic was a member of a trade union, and a trade union is not a benefit or friendly society, and, if it were, a member is not as such "entitled" within the meaning of the section to receive any payment

from it. The 4th section of the Trade Union Act 1871 (34 & 35 Vict. c. 31) expressly enacts that nothing in the Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing any agreement for the application of the funds of a trade union to provide benefits to members; and, that being so, it cannot be said that a member is "entitled" within the true meaning of the word to any payment, since his title, even if it can be called at all by that name, cannot be enforced in any court of law. In *Rigby* v. *Connol* (42 L. T. Rep. N. S. 139; 14 Ch. Div. 482) a member of a trade union, the rules of which provided that the money arising from the subscriptions of its members should be applicable in various ways for their benefit, refused to pay a fine imposed for breaking one of the rules, and was expelled, and it was held that his action against the committee and trustees claiming to be entitled to participate in the benefits was brought to enforce an agreement between a member of a trade union "to provide benefits to members," and that he was therefore not entitled to any relief. Again, in *Duke* v. *Littleboy* (43 L. T. Rep. N. S. 216) the central body of a society, some of the rules of which provided for benefits to members while others were in restraint of freedom of trade, brought an action against a branch to restrain it from dividing certain funds in its possession, but it was held that the action could not be maintained, as it was brought to enforce an agreement between members of a trade union to provide benefits to members. The pauper in this case therefore was, on the authority of those cases, not legally entitled to receive any payment from the union, and it is clear that the word "entitled" means "legally entitled," because the section everywhere uses words pointing to legal title only, as for instance, "the trustee or other person *bound* to make payment," "such payment shall be a *legal discharge* to such trustee," and "shall be exonerated on payment thereof from any further *liability*." It follows that the section does not give any jurisdiction to the stipendiary magistrate to make the order, and that the order being *ultra vires* must be quashed. In the second place, lunacy is not "sickness" within the rules of the society [MATHEW, J.—Before going into that question we will hear the argument for the respondents upon the first point.]

C. Dodd for the respondents.—The provisions of the Trade Union Act 1871 (34 & 35 Vict. c. 31) were not intended to have any such effect as that contended for by the appellant. In construing the Act it is necessary first to look at its object, and then to read it with reference to that object. The object of the Act is explained by Jessel, M.R., in his judgment in *Rigby* v. *Connol* (42 L. T. Rep. N. S. 139; 14 Ch. Div. 482). "That Act," he says, "no doubt was passed primarily with a view to preventing the treasurers and secretaries and officers of these societies from robbing them: that was the chief object. It was discovered that some of these men, abusing the confidence reposed in them, took advantage of the law which made these societies illegal, by appropriating their funds and property to their own use. That, no doubt, was one of the principal objects, and therefore the Act was passed to get at these men. Another object was this: there was a great difficulty in suing and getting their property from third persons, and one object of the Act was to enable these societies to sue in respect of their property, and also to enable them to hold property, such as a house or office; but it was not intended that the contracts entered into by the members of the society should be made legal contracts *inter se*, so that courts of justice should interfere to enforce them. If that had been intended the result would have been this: that an agreement between a number of workmen once entered into, compelling them to work in a particular manner, or to abstain from working in a particular manner, would have been enforceable according to law, and to a certain extent would have reduced some portion of the workmen to a condition of something like serfdom and slavery." Looking at the 4th section with reference to this object, we find that it provides that nothing in the Act is "to enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of" certain agreements. It is submitted that the word "directly" is used purposely and with meaning, and that the order of the magistrate in this case is an indirect mode of enforcing the agreement which by the proviso at the end of the same section is to be deemed a lawful agreement. In *Wolfe* v. *Mathews* (47 L. T. Rep. N. S. 158; 21 Ch. Div. 194) members of a trade union within the Act sought for an injunction to restrain other members from applying the funds in a manner contrary to an agreement to provide benefits to members, and Fry, J. held that such an injunction would not be a direct enforcement of the alleged agreement, and that the court might entertain the proceeding. In the same way the member in this case had a real lawful agreement with the trade union, and was legally entitled to certain benefits, and although he could not himself directly enforce the payment of them by reason of the statute, yet that payment can be indirectly enforced by persons in the position of the respondents. Again, it is to be observed that the words "benefit or friendly society" in the 23rd section of the Divided Parishes Act are perfectly general and include any society the object of which is to provide benefits for its members, and consequently this trade union. This has been decided in the case of *The Merthyr Tydvi, Guardians* v. *The Cambrian Lodge* (45 W. R. 220), where a pauper lunatic was a member of a friendly society which was unregistered, and the guardians sought to recover a payment due to him from the society. The magistrate thought the Act applied only to a registered society, and refused to make the order; but it was held that it was immaterial whether the society was registered or unregistered. That case, it is submitted, disposes of the argument of the appellant, because it was a necessary part of the decision that the member, although he could not have brought an action to recover the payment due to him, was yet held to be entitled to receive it within the meaning of this section. He also cited

Hornby v. *Close*, 17 L. T. Rep. N. S. 563; L. Rep. 2 Q. B. 153.

R. S. Wright was not called upon to reply.

MATHEW, J.— I am of opinion that this appeal must be allowed, and that the order of the stipendiary magistrate must be quashed. The question turns upon the construction of the 23rd section of the Divided Parishes and Poor Law

Amendment Act 1876 (39 & 40 Vict. c. 61), which provides that, where any pauper shall be entitled to any annuity or periodical payment, the trustee or other person bound to make payment of the same to the pauper may from time to time pay to the board of guardians of any union or parish, out of the instalments which have become due, the cost incurred in the relief of such pauper accrued since the last instalment, and such payment shall be a legal discharge to such trustee or other person for so much money as shall have been so paid, and where the guardians incur any expenses in the relief of a pauper lunatic, being a member of a benefit or friendly society, and as such entitled to receive any payment, they may recover from him as a debt, or from his executors, administrators, or assigns, in case of his death, the sum so expended by them as aforesaid, and the managing body of such society, after notice from the clerk to the guardians served previously to the money being paid over, shall be required to pay the same to such guardians, and shall be exonerated on payment thereof from any further liability. At the time when this Act was passed there were several different classes of societies in existence from which periodical payments were payable to their members. Against some, claims for these payments could be enforced; against others, they could not. Did the Legislature, in using the words "a member of a benefit or friendly society, and as such entitled to receive any payment," intend to include in that phrase the members of all these different societies, or only of those against which claims could by law be enforced? Let us examine the language of the section. In the first part of the section the person who is to make the payment is "the trustee or other person bound to make payment of the same." Again, when the payment has been made, "such payment shall be a legal discharge to such trustee." These words seem to me to point to a legal liability, and to indicate that those societies alone are meant against which claims can be legally enforced, and that the word "entitled" in the next part of the section means "entitled as of right." The phraseology of this part of the section makes the matter still more clear, and is strictly applicable to cases where a legal liability exists, and not to cases where the claims are not enforceable. The guardians, for instance, may "recover from him as a debt" the sum so expended by them, and the managing body of such society "shall be exonerated on payment thereof from any further liability." The rest of the section also is entirely consistent with this interpretation. It would, I think, be an extremely strong measure to say that in the case of those charitable institutions which have lists of members to whom periodical payments are made, and who, although the payments are purely voluntary, are yet in a certain sense entitled to receive them, the guardians could go to those charged with the administration of the funds, and ask that an order of this kind should be made against them on the ground that the person in respect of relief to whom the order was sought was on the list of persons entitled to receive payments from them. But further it has been argued that, admitting that the member of the trade union might himself be unable to enforce the claim directly, that fact does not decide the case, because here it is sought to enforce it indirectly only and not directly, and therefore the 4th section of the Trade Union Act 1871 does not apply, and the court has jurisdiction to entertain the proceeding. I do not think that the Legislature had this intention in using the word "directly." It appears to me that the guardians are really seeking to enforce the agreement in the name of the pauper, and that if we allowed this to be done the Act would be entirely defeated, since it would be possible, in every case of an agreement with a trade union not enforceable by law, to make an assignment of the claim, and then it could be enforced. For these reasons I think that the decision of the stipendiary magistrate was wrong, and that it must be reversed.

SMITH, J.—I am of the same opinion. The main point which we have to decide is as to the proper construction of the 23rd section of the Poor Law Amendment and Divided Parishes Act 1876 (39 & 40 Vict. c. 61). What is the meaning of the words "entitled to receive any payment?" Do they mean "entitled to receive a payment provided as a voluntary or charitable gift," or do they mean "entitled as of right?" I cannot help thinking that they mean "entitled as of right." If we go through the section we find words used which are commonly used to express legal relationships, and are not otherwise applicable. What other interpretation can be put upon such phrases as "legal discharge" and "further liability?" The question is, whether the guardians have the power to obtain under the statute a kind of garnishee order against the society. In my judgment that is not the meaning of the section, unless the pauper can sue the society and recover the amounts from them. On that point I agree entirely with what my learned brother has said. I think that the cases cited show that the pauper could not have sued the society for any of these benefits, and I am, therefore, of opinion that the court below was wrong, and that the appeal must be allowed.

Order quashed.

Solicitors for the appellant, *Collyer-Bristow, Withers, Russell*, and *Hill*, for *Laverack*, Hull.

Solicitors for the respondents, *Bell, Brodrick*, and *Gray*, for *Reed, Winter*, and *Henson*, Hull.

Dec. 14 *and* 15, 1887.

(Before WILLS and GRANTHAM, JJ.)

ARROWSMITH (app.) v. DICKENSON AND ANOTHER (resps.). (a)

Poor law—Relief—Liability of children by former husband to maintain a pauper mother married to, and living with, a second husband, who is also a pauper—43 Eliz. c. 2, s. 7—Poor Law Amendment Act 1834 (4 *&* 5 *Will.* 4, *c.* 76), *ss.* 56, 57.

The respondents were the sons of a pauper woman by a former husband. This woman had been married to her present and second husband, and was living with him. Both the wife and her present husband were in receipt of outdoor relief at the rate of 3*s. a week each, and such relief was paid weekly in one sum of* 6*s. to the husband. The respondents were single men living with their stepfather, and paying him for their food, and were each earning about* 22*s. a week.*

Held, that, under 43 *Eliz. c.* 2, *s.* 7, *the respondents*

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

were liable to relieve and maintain, and to contribute to the maintenance of, their mother, and that they were not exempted from this liability by sect. 56 of the Poor Law Amendment Act 1834 (4 & 5 *Will.* 4, *c.* 76).

CASE stated by justices of the peace for the county of Chester, under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, s. 33.

1. Upon the hearing of a certain complaint preferred by the appellant, on behalf of the Guardians of the Poor of the Northwich Union in the county of Chester, against the respondents, under the statutes 43 Eliz. c. 2, s. 7; 59 Geo. 3, c. 12, s. 26; 4 & 5 Will. 4, c. 76, s. 56, and 31 & 32 Vict. c. 122. s. 36, or some of them (*a*), for that Ann Egerton was poor and impotent, and unable to work or maintain herself, and was then residing in the Northwich Union aforesaid, and was then chargeable to the common fund of the said union, and was likely so to continue, and that they were the sons of the said Ann Egerton, and were of sufficient ability at their own charges to relieve and maintain the said Ann Egerton, we dismissed the said complaint.

2. The following facts were either proved before us or admitted by both parties: (1) That the respondents were the sons of the said Ann Egerton by a former husband, and that she was married to her present and second husband, Samuel Egerton, about thirty years ago, and was living with him. (2) That the said Ann Egerton and her present husband were both in receipt of outdoor relief at the rate of 3*s.* a week each from the Northwich Union aforesaid. (3) That such relief was paid weekly in one sum of 6*s.* to the said Samuel Egerton. (4) That the said Samuel Egerton was the stepfather of the said James Dickenson and Thomas Dickenson, but no blood relation. (5) That the respondents were both single men, each earning about 22*s.* a week, and residing with their stepfather and paying him for their food.

3. On the part of the appellant, it was contended: That the respondents were of sufficient means and ability, and that an order should be made on them, under the statutes above referred to, or some of them, to contribute towards the relief given by the said union to their mother. That the relief given by the said union, to the said Ann Egerton, was distinct from the relief given to the said Samuel Egerton. That the proviso at the end of sect. 56 of 4 & 5 Will. 4, c. 76, as follows—"Provided always that nothing herein contained shall discharge the father and grandfather, mother and grandmother of any poor child from their liability to relieve and maintain such poor child in pursuance of the provisions of a certain Act of Parliament, passed in the 43rd year of the reign of Her late Majesty Queen Elizabeth, intituled 'An Act for the relief of the poor," combined with the last words of sect. 57 of the same Act, viz. "and such child or children shall for the purposes of this Act be deemed a part of such husband's family accordingly"—did not operate to relieve the respondents from liability under the statute 43 Eliz. c. 2, s. 7.

4. On the part of the respondents, it was contended: That the above statutes only refer to and bind blood relations: (*R.* v. *Dempson*, 2 Str. 955.) That the above statute 4 & 5 Will. 4, c. 76, s. 56, enacts that relief given to, or on account of, the wife shall be considered as given to the husband of such wife, and that, therefore, in this case if we ordered the respondents to contribute towards the relief given to the said Ann Egerton, such contribution must be considered as given to her husband, the said Samuel Egerton, who was not one of the persons towards whose relief the respondents were under any liability to contribute. That the respondents were not of sufficient ability or in the class intended to be included in the said statute 43 Eliz. c. 2, s. 7.

5. We, being of opinion that the relief of 6*s.* was one relief given to the said Samuel Egerton, and that no authority had been shown to us, by force of which we could order a man to contribute towards relief given to his stepfather, and that the said proviso at the end of the above sect. 56 of 4 & 5 Will. 4, c. 76, did not name "children" amongst those who should "not be discharged from their liability to "relieve and maintain;" that the said words at the end of the said sect. 57 were special and not general, and only referred to the particular circumstances set out in the preceding part of that section, gave our determination against the appellant, in the manner before stated; at the same time we were of opinion that the respondents were within the purview of the Act 43 Eliz. c. 2, s. 7.

6. The questions of law, therefore, upon which this case is stated for the opinion of the court are: (*a*) Whether or not the said out-door relief given by the said union is one relief, and is under 4 & 5 Will. 4, c. 78, s. 56, to be considered as given to the said Samuel Egerton. (*b*) If it is one relief and so given, whether the respondents are, nevertheless, under the statute 43 Eliz. c. 2, s. 7, or the subsequent statutes above referred to or any of them, liable to contribute towards such relief while their mother the said Ann Egerton remains the wife of the said

(*a*) By 43 Eliz. c. 2, s. 7: The father and grandfather, and the mother and grandmother, and the children of every poor old, blind, lame, and impotent person, or other poor person, not able to work, being of a sufficient ability, shall, at their own charges, relieve and maintain every such poor person in that manner, and according to that rate, as by the justices of the peace of that county, &c.

By 4 & 5 Will. 4, c. 76, s. 56: From and after the passing of this Act, all relief given to or on account of the wife, or to or on account of any child or children under the age of sixteen, not being blind or deaf and dumb, shall be considered as given to the husband of such wife, or to the father of such child or children, as the case may be, and any relief given to or on account of any child or children, under the age of sixteen, of any widow, shall be considered as given to such widow; provided always that nothing herein contained shall discharge the father and grandfather, mother and grandmother, of any poor child from their liability to relieve and maintain such poor child in pursuance of the provisions of a certain Act of Parliament, passed in the 43rd year of the reign of Elizabeth, intituled, "An Act for the relief of the poor."

By sect. 57 of the same Act: Every man who shall marry a woman having a child or children at the time of such marriage, whether such child or children be legitimate or illegitimate, shall be liable to maintain such child or children, as a part of his family, and shall be chargeable with all relief, or the cost price thereof, granted to or on account of such child or children until such child or children shall respectively attain the age of sixteen, or until the death of the mother of such child or children; and such child or children shall, for the purposes of this Act, be deemed a part of such husband's family accordingly.

Samuel Egerton, and living with him. (*c*) If so, whether they are persons contemplated by the said statute 43 Eliz. c, 2, s. 7.

Marshall for the appellant.—The respondents are the sons of the pauper by a former husband, and by 43 Eliz. c. 2, s. 7, the children of every "poor person not able to work," being of sufficient ability, are liable to maintain their parent, unless they are relieved from that liability by s. 56 of the Poor Law Amendment Act 1834 (4 & 5 Will. 4, c. 76). It is clear that there is no such exemption in the section. Sect. 56, which provides that relief given to the wife shall be considered as given to the husband of such wife, has reference only to questions of settlements and removals, and the proviso at the end of the section follows the former part, and deals only with the same subject, and does not deal with the liability of children to maintain their parents. Sect. 56 is a legislative exposition of what relief to children shall be relief to the parents, so as to make the latter removable:

Reg. v. *St. Mary, Islington*, 6 L. T. Rep. N. S. 606; 31 L. J. 233, M. C.; 3 B. & S. 46.

In *Reg.* v. *Shavington-cum-Gresty* (20 L. J. 194, M. C.; 17 Q. B. 48) Lord Campbell, C.J., referring to sect. 56 of 4 & 5 Will. 4, c. 76, said: "The object of the Legislature in introducing that provision was not to exclude it from being relief to the children as well as the parents, but to render parents removable with their families when they had become chargeable."

Joseph Smith for the respondents.—By 43 Eliz. c. 2, s. 7, the father and grandfather, mother and grandmother and children are liable to maintain such poor person. There are thus five classes of relations specified. By 4 & 5 Will. 4, c. 76, s. 56, relief given to a wife or a child under the age of sixteen is to be considered as relief given to the husband of such wife or the father of such child. This section may have relation to removability, but it also had the effect of relieving certain persons from liability as to the maintenance of poor persons. The Legislature expressly added a proviso to the section, specifying those whose liability should continue, but children are not amongst them; hence, we may assume that it was the intention of the section to relieve children of their liability. Though the section may relate to removals, the proviso at the end undoubtedly relates to relief and maintenance, and such proviso cannot be restricted to the former part of the section, as we have the proviso dealing with persons not mentioned in the former part, namely, grandfathers and grandmothers. The two cases cited for the appellant are not authorities on the present point, as they did not decide the question of the meaning of this proviso. Here the relief is one relief, and the relief given to the wife is relief given to the husband, and the respondents are in no way liable to contribute towards the relief of their step-father, which they would in fact do if they were bound to contribute towards his wife's maintenance.

WILLS, J.—I am of opinion that this appeal must be allowed. According to the facts, this woman being unable to maintain herself, had children who were called upon to perform their obligation under the statute of Elizabeth, and maintain their mother. They say that she has married a second husband, and that this husband is now in receipt of relief. The obligation under 43 Eliz. c. 2, to maintain is positive and unhesitating, and though in form the Act is penal, and the children are to pay to the parish officials the sums for which they have been assessed for the maintenance of their parents, still that is not the substance of the Act. The object of the Act is, not to reimburse the parish for the sums which they have paid for the relief of the parents, but the object is to prevent destitute persons becoming chargeable to the rates at all, by imposing on the children the obligation of maintaining those destitute parents. The mode of carrying this into effect is to be determined by the justices, but that is only the machinery; the underlying duty is to maintain the parents. It is said that this system of legislation has been altered by an Act whose object was to prevent families being broken up and children and parents removed to different places, because there is a proviso which perhaps does not cover the whole ground over which it should go to make the section complete. I agree that that is a defect. But the question is, whether this proviso is really wanted at all; if the clause has the meaning attributed to it, then, in my opinion, the proviso is not wanted, and it is an instance of what often happens in Acts of Parliament, that provisoes are inserted, *ex majore cautelâ*, to meet cases that may never arise. It is a strange way of construing an Act, to look at the proviso first and then at the section, and then interpret the section by the proviso. The proper mode is to look at the section first, and then construe the proviso by it. Now sect. 56 of 4 & 5 Will. 4, c. 76, only means that, if any relief at all is given to the wife, it shall be deemed to have been given to the husband; but the object of the Legislature was to prevent parochial relief being given to persons, by enforcing the natural obligation on children to support their parents, and though the parish may give the money or the food, yet this does not turn what is not parochial relief into parochial relief. Suppose parochial relief properly so called given to the wife "be considered as given to the husband," whatever operation this may have in questions of settlement, it cannot operate to relieve the children of their obligation to maintain their mother. I need not now consider the effect of the proviso on the preceding words of the section, but I have no doubt it is an instance of a proviso inserted from precaution, and it ought to have gone further and included children. It seems to me that it does not affect the previous part of the section, but even if it did, the enactment in sect. 56 does not alter the liability under the Act of Elizabeth.

GRANTHAM, J.—I am of the same opinion.

Appeal allowed. Case remitted to justices. Respondents to pay costs.

Solicitor for appellant, *Fletcher*, Northwich.

Solicitors for respondents, *J. Burton*, for *Thomas Cooper*, Congleton.

Thursday, Dec. 15, 1887.

(Before POLLOCK, B. and HAWKINS, J.)

RICHARDS (app.) *v.* BANKS (resp.). (*a*)

*Revenue—Licence — "Sweets" licence — "Foreign Wine" licence—"Best Pale Sherry, British"—Sale of, by holder of licence to retail "sweets and made wines," who has no foreign wine licence—*23 *Vict. c.* 27, *ss.* 3, 19, 21—23 *&* 24 *Vict. c.* 113, *s.* 21—4 *&* 5 *Will.* 4, *c.* 77, *s.* 11.

B., the respondent, was the holder of a licence to retail sweets and made wines, but he was not licensed for the sale of foreign wine. The appellant, an officer of Inland Revenue, visited B.'s shop, and asked for a bottle of the best sherry, and was supplied with a bottle which was labelled "Best Pale Sherry, British," for which he paid 2*s. The cork of the bottle was sealed and bore upon the seal the word "Sherry." B. was summoned, under sect.* 19 *of* 23 *Vict. c.* 27, *for "selling foreign wine by retail without a proper licence."*

The Justices dismissed the information.

Held, that B. had committed the offence, under sect. 19 *of the Act, of selling "foreign wine by retail without a proper licence," because the "Best Pale Sherry" is a foreign wine, and that character is not taken away from it by putting the word "British" underneath it.*

CASE stated by justices for the city of Manchester, under sect. 33 of the Summary Jurisdiction Act 1879, for the purpose of obtaining the opinion of the court on a question of law which arose before them as hereinafter stated.

1. At a court of summary jurisdiction in and for the city of Manchester, on the 6th July 1887, an information exhibited by George Richards, an officer of Inland Revenue (hereinafter called the appellant), against Thomas Banks (hereinafter called the respondent), under the Act 23 Vict. c. 27, s. 19, charging that the respondent, on the 12th day of February, A.D. 1887, at the parish of Manchester, in the city aforesaid, did sell certain foreign wine by retail, to wit, one reputed quart bottle of sherry, without having a proper licence in force duly authorising him in that behalf, contrary to the form of the statutes in that case made and provided, whereby and by force of the said statutes the respondent had, over and above any other penalty to which he might be or have become liable, forfeited the sum of 20*l.*, was heard and determined by us, the said parties respectively being then present, and upon such hearing we dismissed the said information.

2. The appellant being dissatisfied with our determination as being erroneous in point of law, duly applied to us, in writing, to state and sign a case setting forth the facts of the case, and the grounds of our determination, for the opinion of this court, and we do hereby state and sign this case accordingly.

3. Upon the hearing of said information, the following facts were proved or admitted, that is to say: That the respondent was, on the 12th Feb. last, the holder of a licence to retail sweets and made wines, at No. 34, Cavendish-street, in the parish and city of Manchester, aforesaid, and that he was not licensed for the sale of foreign wine. That on the said 12th Feb. the appellant visited his shop and asked for a bottle of the best sherry and was supplied with a bottle, which was labelled (a copy of which label is hereunto annexed), "Best Pale Sherry, British," for which he paid 2*s.* The cork of the bottle was sealed, and bore upon the seal the word "Sherry." The bottle was afterwards labelled and sealed by the appellant for the purpose of identification, and transmitted to the Principal of the Inland Revenue Laboratory at Somerset House for examination. The contents of the said bottle, sold as aforesaid, were analysed at the Inland Revenue Laboratory, by two chemists of great experience, who gave evidence that the liquid was in fact foreign sherry containing 33·7 per cent. of proof spirit, and having an actual specific gravity of 993·24.

5. It was contended on the part of the appellant that the liquor sold by the respondent to him was wine within the meaning of sect. 19 of the Act 23 Vict. c. 27, and that by selling it, and not having first obtained a proper licence to sell the said wine, the respondent had incurred the penalty imposed by the section.

6. It was contended on the part of the respondent that the definition of foreign wine was contained in the following provision of the 21st section of the Act 23 & 24 Vict. c. 27, "All liquor which shall be sold or offered for sale by any person as being foreign wine, or under the name by which any foreign wine is usually designated or known, shall, as against the person who shall so sell or offer the same for sale, be deemed and taken to be foreign wine," and that in that case the bottle being labelled clearly and distinctly as British sherry in the manner described, was sold as British wine to the appellant, and that the appellant knew it was sold to him as British wine and not as foreign wine.

7. It was further contended for the respondent that, as the liquid sold was not altogether foreign wine, there was no restriction by any Act of Parliament hitherto passed as to the alcoholic strength British wine can be made, and that the liquor sold by the respondent to the appellant was within the definition of "sweets" or "made wines," as set out in the 21st section of 23 & 24 Vict. c. 113.

8. We were of opinion that the liquor, although in fact containing a large proportion of spirit, was not sold as being foreign wine, and therefore that it was not to be regarded as a sale of wine by the respondent without having a proper licence in force duly authorising him in that behalf, within the meaning of sect. 19 of the said Act, under which the penalty was sought to be recovered, and consequently gave our determination against the appellant in the manner before stated.

9. The question of law arising upon the above statement for the opinion of the court is: Whether, upon the above facts, our determination, as above stated, was right in law.

The *Attorney-General* (with him the *Solicitor-General* and *R. S. Wright*) for the appellant.—The question in this case is, whether the respondent ought to have had a 50*s.* licence or a 25*s.* licence, for selling a foreign wine. As a matter of fact he sold foreign wine, and sold it under certain circumstances which the justices have thought that the definition of the statutes,

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

which included, under the name of "sweets," certain "British wines," enabled the present respondent to sell foreign wines without the foreign wine licence. That is the short point. It must be taken, on the evidence before the justices, that foreign wine was sold; it was sworn to as being foreign sherry, and no evidence was given to the contrary. It being taken to be in fact foreign wine, my points are twofold: first, that it cannot be sold at all without a 50*s.* licence; and secondly, that it does not cease to be a breach of the statute for selling it, and it does not cease to be an offence against the statute, because you put "Best Pale Sherry, British," upon the label; otherwise there would be a ready means of evading the licensing laws, by affixing a label with some small word of that kind upon it, and then by selling foreign wine under those circumstances. The first statute dealing with the case, which is a licence for the sale in fact of foreign wine, is 23 Vict. c. 27, s. 3. Then comes sect. 19: the offence in this section is for selling any wine without having a proper licence. So that, by these sections, we have got foreign wine, the right to sell foreign wine, and a penalty for selling by retail without having a proper licence, and it makes no difference what it is called or how it is labelled. Then we come to sect. 21, and here there is no suggestion that you can sell foreign wine as British for a lesser sum—it is only that you are to take out a licence for foreign wine. If you sell foreign wine without taking out a licence there is a penalty, and if you sell any liquor as foreign wine, it shall be taken or deemed to be foreign wine, and the result is the same. It must be shown for the respondent that on the evidence before the justices this was not in fact foreign wine. It was sworn that it was foreign sherry, and no evidence to the contrary was given, and the justices have stated that they decided against the Crown because it was not sold as foreign wine, by virtue of this label "British." It does not matter whether there was a label or not, or what it was called. The "Sweets" licence, under which this sale took place, only allows the sale of "sweets." Under such licences persons are allowed to sell only things which are not foreign wines—British made wines in fact: "Sale of Foreign Wine Licence, 50*s.* Sale of Sweets Licence, 25*s.*" This section is for the protection of the public, that, if you are going to call "sherry" that which is not sherry, as against you, you shall not be allowed to say, I was not selling sherry. The public shall have, at any rate, the protection of a higher licence.

Wharton for the respondent.—We do not admit the fact that foreign wine was, in fact, sold, because, although evidence was given that this liquid was in fact foreign wine containing a certain percentage of spirit of a certain specific gravity, it was submitted by me, and I was stopped by the justices, that no analyst was in a position to say what was foreign sherry and what was not. The mere fact that it was foreign, if manufactured abroad, could not be ascertained by analysis. It is not sufficient for the Excise authorities to say that this is foreign wine, and give the specific gravity of the proportion of spirit, but they must also show that it is not a liquid which we are entitled to sell by virtue of our licence. [HAWKINS, J.—What is British sherry?] The definition is contained in 4 & 5 Will. 4, c. 77, s. 11 (being the only section of that Act which is unrepealed), "and for declaring who shall be deemed a retailer of sweets . . . every person who shall sell or send out any liquor made by infusion, fermentation, or otherwise, from fruit or sugar or from fruit or sugar mixed with other materials, commonly called sweets or made wines, or any mead or metheglin, in any less quantity than in a whole cask containing fifteen gallons, shall be deemed and taken to be a retailer of sweets, and shall take out a licence accordingly." That is the only definition of sweets as it applies to the "retail" dealer in sweets. The definition read by the learned Attorney-General, contained in 23 & 24 Vict. c. 113, s. 21, has reference only to wholesale dealers in all sweets, but the definition I have read applies to a retailer of sweets. It was the duty of the Excise authorities not to give evidence simply that this was foreign sherry, but to give evidence that the liquid we sold was that which did not come within this section. [HAWKINS, J.—Do you call "British" sherry a sweet?] Certainly, "British wines" and "sweets" are synonymous. With regard to sect. 19, under which we were summoned, it has no connection with sect. 3 of the same Act. Sect. 19 is a general section to enable the Excise authorities to prevent the Revenue being injured in cases where a person has rendered himself liable to be punished for an infringement of morals under the Licensing Acts; it refers to every case under any Act where a person sells wine without a licence. It entitles the Excise officer to come forward to prosecute for the protection of the Revenue, and the burden of proof is upon the Excise authorities, and they must prove strictly that the defendant comes within the section, and that he has infringed the section by selling wine without a proper licence; and they are bound to show not simply that the person has sold foreign wine, but the burden of proof is upon them to show that the licence which the person held does not include the liquid which he sold: they are bound to show that this licence which enables us to sell liquid coming within the definition in sect. 11 of 4 & 5 Will. 4, c. 77, did not come within that definition.

POLLOCK, B.—I do not think this case admits of any reasonable doubt. The facts are, that the respondent upon a certain day, being the holder of a licence to sell sweets and made wines, and not being licensed for the sale of foreign wine, sold to a person who visited his sho , and asked for a bottle of the best sherry, a bottle which was labelled "Best Pale Sherry"—that is what we had before us. I am rather inclined to agree with Mr. Wharton, that, though there was evidence given by analysts, there was no finding upon it, and there would be great difficulty in resting our judgment upon a statement made by an analyst, and upon those bare facts. The question is, did or did not the person who so sold that particular bottle, which was asked for as the best sherry, and which was labelled "Best Pale Sherry," with the addition of the word "British," come within sect. 19, upon which the charge was founded, charging him with selling "certain foreign wine by retail, to wit, one reputed quart bottle of sherry, without having a proper licence?" I think he did. In the first place, we must import into this case the common knowledge of mankind as to what "Best Pale Sherry" is. It is a foreign

wine, and though there may be a foreign wine which may have appended to the label the word "British," and is a British article, mixed or what not, still sherry is a foreign wine. Now come to the statutes. I need hardly refer to the first section which the Attorney-General referred to, that is sect. 3, except for the purpose of showing that the Legislature intended that a person who desired to sell foreign wine by retail should take out a particular licence, and that sect. 7 also shows that the Legislature had in mind the existence of foreign wines sold by retail. Then, when we get to sect. 19, we find a penalty for selling any wine by retail without having a proper licence. So far the case is clearly made out for the Crown. Then comes a section, sect. 21, which I think is immaterial, but, so far as it goes, it goes against the respondent, because it provides that "all liquors which shall be sold or offered for sale by any person, whether licensed under this Act or not, as being foreign wine, or under the name by which any foreign wine is usually designated or known, shall, as against the person who shall so sell or offer the same for sale, be deemed and taken to be foreign wine." Therefore, if that part of the story as told about the sale of this wine is material, namely, what it was called on the label on the bottle which was asked for, it seems to me to fix the respondent strongly as having offered and sold foreign wine. Because the best pale sherry is certainly a foreign wine of a common character, and that character is not taken away from it by putting the word "British" underneath it. Then exemption is claimed by a clause in an earlier Act of Parliament, that is sect. 11 of 4 & 5 Will. 4, c. 77, which says that "every person who shall sell or send out any liquor made by infusion, fermentation, or otherwise, from fruit or sugar, or from fruit or sugar mixed with other materials, commonly called sweets or made wines, or any mead or metheglin, in any less quantity than in a whole cask containing fifteen gallons, shall be deemed and taken to be a retailer of sweets." I should like to ask, what is the evidence that this person sold any liquor which was made by "infusion, fermentation, or otherwise, from fruit or sugar, or from fruit or sugar mixed with other materials, commonly called sweets or made wines, or any mead or metheglin." There is no evidence of that whatever. It seems to me that the decision of the magistrates was wrong, and that this appeal must succeed.

HAWKINS, J.—I am also of the same opinion. By sect. 19 it is provided that "Every person who shall sell any wine by retail, whether to be consumed on the premises or not, without having a proper licence in force duly authorising him in that behalf, shall, over and above any other penalty to which he may be liable, forfeit the sum of twenty pounds." It is quite clear that the defendant, or the respondent upon the present occasion, had no licence to sell foreign wine. It is equally clear now that he did sell a wine that is usually known as foreign wine, namely, sherry, and if the question were put whether or not he really thought it was British wine I think there would be evidence to show that he sold it as foreign wine, because, though the label on the bottle had the word "British" on it, he does not point it out to his customers, and say, Now this is only British wine; though the name of "sherry" has been given to it, it is made of one of those sweet compounds which is called made-wine. He does not say that; but, being asked for a bottle of the best sherry, which everybody knows is not made in England, he produces a bottle of what he calls British best pale sherry; he has, in truth, actually sold that which everybody knows is called a foreign wine. The section pointed out to us, sect. 21, is this: [The learned Judge read the section.] Here nobody doubts that "sherry" is the name by which one kind of foreign wine is usually designated, and that it is known as a particular class of foreign wine. The respondent has sold it as sherry, and as against him it must be taken to be foreign wine, whether it was so or not, and whether he knew it to be so or not. If he sells the best pale British sherry manufactured in England, in the future he must not sell it as sherry, that is all.

Appeal allowed, with costs. Case remitted to the justices with the opinion of the court that they ought to have convicted.

Solicitor for the appellant, *The Solicitor of Inland Revenue.*

Solicitor for the respondent, *Geo. Rideal*, Manchester.

Friday, April 20, 1888.

(Before CAVE and SMITH, JJ.)

HORSELL (app.) v. THE SWINDON NEW TOWN LOCAL BOARD (resps.). (a)

Local government—Urban sanitary authority—Validity of bye-law—Prohibition of use of buildings unfit for human habitation—Public Health Act 1875 (38 & 39 *Vict. c.* 55), *ss.* 23, 25, 157, 182, 183.

An urban sanitary authority made the following bye-law under the Local Government Act 1858 (21 & 22 *Vict. c.* 98) (*all bye-laws made under which are deemed to be bye-laws under the Public Health Act* 1875 (38 & 39 *Vict. c.* 55), *if not inconsistent with any of the provisions of that Act*): "*No new house shall be occupied until the house drainage has been made and completed, nor until such house has been certified by the local board, or their officer authorised to give such certificate, after examination, to be in every respect fit for human habitation in their or his opinion.*"

Held, on case stated, that the bye-law was reasonable and not inconsistent with any of the provisions of the Public Health Act 1875, *and therefore valid.*

THIS was a case stated by justices of the county of Wilts under the statutes 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, for the purpose of obtaining the opinion of the court on questions of law which arose before them, as therein stated.

The facts set out in the case were, so far as material, as follows:—

On the 22nd Dec. 1887 the appellant appeared before the justices on a summons issued upon the information of the respondents by Henry Joseph Hamp, of Swindon, in the county of Wilts, their surveyor duly authorised in that behalf, charging the appellant, for that he, on the 5th Dec. 1887, at the parish of Swindon, in the county of Wilts, did unlawfully commit a breach of bye-law

(a) Reported by H. D. BOSSEY, Esq., Barrister-at-Law.

No. 26 of the bye-laws of the Swindon New Town Local Board, duly made and confirmed, by causing or permitting to be occupied a certain dwelling-house recently built by the appellant, and situate in or adjoining a proposed new street there situate within the district of the said board, before and without obtaining a certificate from the said local board, or their officer authorised to give such certificate, that the said dwelling-house was in every respect fit for human habitation in their or his opinion.

At the hearing of the information the following facts were proved or admitted before us:

The appellant is an assistant overseer residing at Swindon New Town, in the county of Wilts, and within the local board district of the respondents, and had built several houses at Swindon New Town.

The respondents are the Urban Sanitary Authority for the district of Swindon New Town. The respondents as such urban authority, in execution of powers conferred on them by the Local Government Act 1858 (21 & 22 Vict. c. 98), s. 32, made certain bye-laws, which were duly confirmed on the 27th July 1864.

The wording of the 26th bye-law is as follows:

No new house shall be occupied until the house drainage has been completed, nor until such house has been certified by the local board, or their officer authorised to give such certificate, after examination, to be in every respect fit for human habitation in their or his opinion.

The evidence adduced before us showed that the appellant had then recently built in the said street a row of several houses (of which the house now in question was one), and that he had sent in to the respondents plans of such houses, but the said plans had been disapproved by the respondents on account of the alleged insufficiency of the drainage thereof; the appellant had, notwithstanding such disapproval, proceeded with the building of the said houses, and had caused or permitted the house in question to be occupied, without obtaining, as required by the said bye-law, a written certificate from the respondents, or their officer authorised to give such certificate, that the said dwelling-house was, in their or his opinion, in every respect fit for human habitation. The appellant had applied for such certificate, but the respondents and their said surveyor (who was the authorised officer of the respondents) had, after examination by such surveyor, refused to give such certificate, because of the alleged insufficiency of the drainage, and there being no water supply to the said house.

It was contended on behalf of the appellant, that the said bye-law No. 26, or so much thereof as the appellant was charged under, was bad in law, and void on the grounds: (1) that it was unreasonable; (2) that it was repealed by sect. 315 of the Public Health Act 1875, being inconsistent with the provisions of that Act.

We were of opinion: 1st, that the bye-law in question was a good and valid bye-law, and that it was, therefore, unnecessary for us to go into the merits of the case as to whether the said house was or was not in every respect fit for human habitation; 2nd, that an offence within the meaning of so much of the said bye-law as was set out in the information and summons had been committed. The counsel for the appellant stated that he was prepared to go into evidence on the merits, but, inasmuch as the question had been raised as to the validity of the bye-law, we suggested that he should confine himself to the question of the reasonableness and validity of the bye-law.

We convicted the appellant of the offence charged in the information and summons, and adjudged him to pay 5*s.* and costs.

The question for the opinion of the court is, whether the above-mentioned bye-law No. 26, or so much thereof as was set out in the information or summons, is a valid and subsisting bye-law.

If the court should be of opinion that the whole of the bye-law is valid and subsisting, the conviction was to stand; but if the court should be of opinion that the bye-law was not valid, the conviction was to be quashed.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides as follows:

Sect. 4. In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them; that is to say, "Sanitary Acts" means (*inter alia*) the Acts mentioned in Part I. of Schedule V. to this Act.

Sect. 23. Where any house within the district of a local authority is without a drain sufficient for effectual drainage, the local authority shall, by written notice, require the owner or occupier of such house, within a reasonable time therein specified, to make a covered drain or drains emptying into any sewer which the local authority are entitled to use, and which is not more than one hundred feet from the site of such house; but if no such means of drainage are within that distance, then emptying into such covered cesspool or other place not being under any house as the local authority direct, and the local authority may require any such drain or drains to be of such materials and size, and to be laid at such level, and with such fall as on the report of their surveyor may appear to them to be necessary.

Sect. 25. It shall not be lawful in any urban district newly to erect any house or to rebuild any house which has been pulled down, to or below the ground floor, or to occupy any house so newly erected or rebuilt, unless and until a covered drain or drains be constructed of such size and materials, and at such level and with such fall as on the report of the surveyor may appear to the urban authority to be necessary for the effectual drainage of such house; and the drain or drains so to be constructed shall empty into any sewer which the urban authority are entitled to use, and which is within one hundred feet of some part of the site of the house to be built or rebuilt; but if no such means of drainage are within that distance, then shall empty into such covered cesspool or other place, not being under any house, as the urban authority direct. Any person who causes any house to be erected or rebuilt or any drain to be constructed in contravention of this section shall be liable to a penalty not exceeding fifty pounds.

Sect. 157. Every urban authority may make bye-laws with respect to the following matters (that is to say): (1) With respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof. (2) With respect to walls, foundations, roofs, and chimneys of new buildings, for securing stability and the prevention of fires, and for purposes of health. (3) With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings. (4) With respect to the drainage of buildings, to water-closets, earth-closets, privies, ashpits, and cesspools in connection with buildings, and to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation. And they may further provide for the observance of such bye-laws by enacting therein such provisions as they think necessary as to giving of notices, as to the deposit of plans and sections by persons intending to lay out streets, or to construct buildings, as to inspection by the urban authority, and as to the power of such authority (subject to the provisions of this Act) to remove, alter, or pull down any work begun or done in contravention of such bye-laws.

Sect. 182. All bye-laws made by a local authority under, and for the purposes of this Act shall be under their common seal; and any such bye-law may be altered or repealed by a subsequent bye-law made pursuant to the provisions of this Act; provided that no bye-law made under this Act by a local authority shall be of effect if repugnant to the laws of England, or to the provisions of this Act.

Sect. 183. Any local authority may by any bye-laws made by them under this Act impose on offenders against the same such reasonable penalties as they think fit, not exceeding the sum of five pounds for each offence, and in the case of a continuing offence a further penalty not exceeding forty shillings for each day after written notice of the offence from the local authority; but all such bye-laws imposing any penalty shall be so framed as to allow of the recovery of any sum less than the full amount of the penalty. Nothing in the provisions of any Act incorporated herewith shall authorise the imposition or recovery under any bye-laws made in pursuance of such provisions of any greater penalty than the penalties in this section specified.

Sect. 315. Any bye-law made by any sanitary authority under the Sanitary Acts, which is inconsistent with any of the provisions of this Act, shall, so far as it is inconsistent therewith, be deemed to be repealed.

Sect. 326. All bye-laws duly made under any of the Sanitary Acts by this Act repealed, and not inconsistent with any of the provisions of this Act, shall be deemed to be bye-laws under this Act.

Sect. 343. The Acts specified in the first and second parts of Schedule V. to this Act are hereby repealed. Schedule V., Part I., contains the Local Government Act 1858 (21 & 22 Vict. c. 98).

A. Glen for the appellant.—The justices were wrong in the decision at which they arrived, the bye-law being inconsistent with the provisions of the Public Health Act 1875, and therefore of no effect. It was not the intention of the Legislature that the urban sanitary authority should have the power of deciding finally and without appeal such questions as whether a house is fit for habitation. It is clearly the policy of the Act to leave the decision of such questions of fact with the justices. In the 97th section, for instance, it is provided that where the nuisance proved to exist is such as to render a house or building in the judgment of the court unfit for human habitation, the court may prohibit the using thereof for that purpose until, in its judgment, the house or building is rendered fit for that purpose. [CAVE, J.—That section is in the part of the Act dealing with nuisances, and applies to a case where a house is already inhabited. To my mind it is absurd that such a question as this should be submitted to justices, who have no special knowledge of such matters. Surely, the persons to whom the health of the district is submitted, and who have a competent staff of officials at their command, are the persons best fitted to decide such a question.] The Act only gives the urban sanitary authority power to make reasonable bye-laws. [CAVE, J.—How do you say this bye-law is inconsistent with the Act?] It is inconsistent because, as construed, it gives the authority power to prevent new houses from being occupied until the drainage which, in their opinion, is necessary has been put in. Now, the 25th section provides for this state of circumstances, and provides a penalty for any infringement of the section, and it was never intended that local authorities should be able to make bye-laws treating these matters in an entirely different method from that specifically prescribed by the Act. This is the opinion of Hawkins, J., who in *Rudland* v. *The Mayor, &c. of Sunderland* (52 L. T. Rep. N. S. 617) says: "I also doubt whether the authority has power to make these provisions with respect to matters which have been specifically provided for by the 150th section, since they amount to imposing on landowners an absolute duty to do certain things under pain of incurring a penalty, while that section merely provides that if they decline to do them there shall be no penalty, but the authority shall themselves do them and recover the expenses." It is submitted that, as the local authority had in the present case specific power to recover a penalty under the 25th section, it was inconsistent with the statute that they should make a bye-law in addition empowering them to prevent the house from being occupied. Further, the bye-law makes the fitness of the house for human habitation a matter of opinion, and on that ground also the bye-law is invalid on the authority of *Munro* v. *Watson* (57 L. T. Rep. N. S. 366). The appellant was entitled to have an opportunity of going into the question of the sufficiency of the drainage and water supply before an independent tribunal.

Gore, for the respondents, was not called upon.

CAVE, J.—I am of opinion that the justices were right and that this appeal must be dismissed. The 157th section of the Public Health Act 1875 (38 & 39 Vict. c. 55) gives an urban authority power to make bye-laws with respect to the following matters: (that is to say), with respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof; with respect to the structure of walls, foundations, roofs, and chimneys of new buildings for securing stability and the prevention of fires, and for purposes of health; with respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings; and with respect to the drainage of buildings, to water-closets, earth-closets, privies, ashpits, and cesspools in connection with buildings, and to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation. Then by the 315th section any bye-law made by any sanitary authority under the Sanitary Acts (a category under which this bye-law comes), which is inconsistent with any of the provisions of this Act, shall, so far as it is inconsistent therewith, be deemed to be repealed. We have, therefore, to look at this bye-law, and see whether it contains any provision which is inconsistent with any of the provisions contained in the Act of Parliament itself. The bye-law provides that no new house shall be occupied until the house drainage has been made and completed, nor until such house has been certified by the local board, or their officer authorised to give such certificate after examination, to be in every respect fit for human habitation, in their or his opinion. Is this provision inconsistent with the provisions of the 157th section? When we look at that we find that specific power is given by the section to the urban authority to make bye-laws with respect to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of the use for such habitation. The bye-law we are considering, therefore, so far from being repugnant to the provisions of the 157th section, is perfectly in accord with it. Is it then in itself un-

reasonable or contrary to any other provision in the Act? I cannot see how it can be said to be unreasonable. To my mind, on the contrary, it appears to be in all respects reasonable. Urban sanitary authorities were expressly constituted for the purpose of looking after the health of the district subject to their jurisdiction, and for this purpose were enabled by the Act to surround themselves with a staff of officers for the furtherance of that end. The very purpose of the appointment of a surveyor and of a medical officer, and of their other officials was to promote the sanitary welfare of the district, and it is a matter of notoriety that great care is taken and considerable expense incurred to secure that object, and, as a rule, the work of these bodies is very well done. Is there then anything unreasonable in a body constituted for these purposes, and invested by the Legislature with these powers, making a regulation that no new house should be occupied until the house drainage has been made and completed, nor until such house has been certified by the local board or their officer authorised to give such certificate to be in every respect fit for human habitation? I should say, on the contrary, that it is a very fit and proper provision for the local board to make in order to provide against houses being inhabited which are unfit for human habitation. I cannot see anything more suitable to ensure the end they have in view than that they should authorise their officer to give a certificate that a new house is fit for habitation, and should provide that until that certificate is given the house should not be occupied. It is not then inconsistent with the 157th section of the Act, and it is not, in my opinion, unreasonable. But it is said that it is inconsistent with other provisions contained in the Act. I do not find on examining the provisions to which my attention has been called that that is so. Reference has been made to the 23rd and 25th sections. The 23rd section provides that, where any house within the district of a local authority is without a drain sufficient for effectual drainage, the local authority shall by written notice require the owner or occupier of such house, within a reasonable time therein specified, to make a covered drain or drains, emptying into any sewer which the local authority are entitled to use, and further provides that the local authority may require any such drain or drains to be of such materials and size, and to be laid at such level, and with such fall, as on the report of their surveyor may appear to them to be necessary. That section, therefore, enables an urban sanitary authority to enforce draining in the case of houses already inhabited. Then the 25th section provides that it shall not be lawful in any urban district newly to erect any house, or to rebuild any house which has been pulled down to or below the ground floor, or to occupy any house so newly erected or rebuilt, unless and until a covered drain or drains be constructed of such size and materials, and at such level, and with such fall, as on the report of the surveyor may appear to the urban authority to be necessary for the effectual drainage of such house; and further, that any person who causes any house to be erected or rebuilt, or any drain to be constructed in contravention of the section, shall be liable to a penalty of not exceeding fifty pounds. Under that section, therefore, the decision as to the size, materials, and level of the drains of newly erected houses is left with the urban sanitary authority, and any failure to carry out what appears to them on the report of their surveyor to be necessary leads to a penalty of 50*l*. If then the Legislature has trusted the authority to decide in a matter where a sum of 50*l*. is at stake, there is nothing unreasonable or inconsistent in supposing that it has *à fortiori* trusted them to decide a matter in which a comparatively small amount is at stake. There could, in my opinion be nothing more inconvenient than that there should be an appeal from an urban sanitary authority, surrounded by a body of competent officers such as their surveyor and medical officer of health, to a bench of justices necessarily varying from time to time, and possessing no special knowledge of the subject in dispute. Moreover, a further consideration is, that the expense of such appeals would be enormous, since it would be necessary, in order to enable the justices to decide the matter properly to bring before them the evidence of engineers and surveyors and other skilled witneses. For these reasons it seems to me that it was the intention of the Legislature to commit the decision of these matters to the urban sanitary authority, and to leave in their hands the power of inflicting a penalty when any person refuses to comply with their decision, and to offend against the laws of health. In my opinion, therefore, the bye-law is reasonable, and I do not think that it is in any way inconsistent either with the 157th section or with any of the other provisions of the Public Health Act 1875.

Smith, J.—I am of the same opinion. The bye-law is, I think, both authorised by the statute and reasonable, and it is not in antagonism with any of the sections which have been cited.

Appeal dismissed.

Solicitors for the appellants, *Moon* and *Gilks*, for *Townsend* and *Jones*, Swindon.

Solicitors for the respondents, *Clarke, Woodcock*, and *Ryland*, for *Kinneir* and *Tombs*, Swindon.

Friday, Feb. 10, 1888.

(Before Mathew and Smith, JJ.)

Reg. *v.* The Directors of the Great Western Railway Company. (*a*)

Coroner — Inquisition — Verdict of manslaughter against directors of a company—Insufficient description—Power of this court to amend or quash inquisition—Coroners Act 1887 (50 & 51 *Vict. c.* 71), *s.* 20 (1).

By sect. 20 (1) *of the Coroners Act* 1887 *it is enacted as follows: "If, in the opinion of the court having cognisance of the case, an inquisition finds sufficiently the matters required to be found thereby, and, where it charges a person with murder or manslaughter, sufficiently designates that person and the offence charged, the inquisition shall not be quashed for any defects, and the court may order the proper officer of the court to amend the inquisition," &c.*

A coroner's jury by their inquisition found that "the directors of the Great Western Railway Company did feloniously kill and slay T. G." A rule nisi having been obtained for a certiorari

(*a*) Reported by R. A. Bennett, Esq., Barrister-at-Law.

to remove the inquisition for the purpose of quashing it, on the ground that it was bad on the face of it for not sufficiently describing the persons charged:

Held, that the above section has no application to the jurisdiction of this court, but only to that of the Criminal Court before which the persons charged are tried; and that, consequently, the original jurisdiction of this court to quash an irregular inquisition remains unaffected, and the court has no power to order the same to be amended.

RULE directed to G. P. Greenfell, one of the coroners of the county of Cornwall, the Director of Public Prosecutions, and the next of kin of T. J. George, deceased, to show cause why a writ of *certiorari* should not issue to remove into the Queen's Bench Division an inquisition taken before the said coroner on the 30th Jan. 1888, and why the said inquisition, when removed, should not be quashed on the ground that it was bad on the face of it for not describing the persons charged by name.

The inquisition in question found, "that the directors of the Great Western Railway Company on the 20th Jan. in the year aforesaid, did feloniously slay one Theophilus John George, against the peace of our Lady the Queen, her Crown and dignity."

Poland, for the Director of Public Prosecutions, showed cause.—It must be taken that the inquisition as it stands is informal. It is absolutely essential to an inquisition or indictment that the person charged should be named by his Christian and surname, if known; or if the name cannot be ascertained, then he must be described as a person whose name is to the jurors unknown. The coroner cannot issue any process on this inquisition (50 & 51 Vict. c. 71, s. 5), nor is there any longer power to amend in the coroner's court, the inquest being at an end. The coroner cannot issue a warrant to arrest the directors of the Great Western Railway Company, nor any one director. The question is then whether, under sect. 20 of the Coroners Act 1887, this court has power, when the inquisition is brought up, to amend it by inserting the names of the directors. The section only gives the power to amend to the court having cognisance, that is the court before whom the case is brought for trial, as for instance the assizes. But here the difficulty is that the directors cannot be brought to the assizes, since no warrant can issue. If the jurisdiction of this court to bring up or quash an irregular inquisition is not affected by sect. 20, which appears to deal solely with trial at the assizes, it is admitted that in the interests of justice this inquisition ought to be quashed.

Asquith, for the next of kin of the deceased, showed cause.—It is submitted that this court has cognisance of the case, when the inquisition is removed into this court, and therefore, has power to make the amendment permitted by sect. 20.

Sir *H. James*, Q.C. and *R. S. Wright*, for the directors of the Great Western Railway Company, were not called upon.

MATHEW, J.—I am of opinion that this rule must be made absolute. There can be no question that this inquisition is, on the face of it, irregular, and should be quashed. The question which we have to determine is whether sect. 20 of the Coroners Act 1887 affects and impairs the power of the Court of Queen's Bench to quash an inquisition which is irregular on the face of it. I am clearly of opinion that it does not. What the section contemplates is an amendment by the criminal court before which the inquisition may come when the person charged is brought up for trial. We have nothing to do with the power of that court. It is our duty here to exercise the established authority of this court and quash this inquisition.

SMITH, J.—I am of the same opinion. I entirely agree that our original jurisdiction to quash informal inquisitions is not touched by the statute; but I wish to say further that, if it were, I am by no means satisfied that an amendment could be made in this case, under sect. 20, by any court. The section says, where an inquisition charging a person with murder or manslaughter "sufficiently designates" that person. I am by no means certain whether charging a body of directors like these, without naming them, sufficiently designates the person charged within the meaning of this section.

Rule absolute.

Solicitor for the prosecution, *The Solicitor to the Treasury.*

Solicitors for the next of kin of deceased, *Bolton* and *Co.*, for *W. Dale*, Penzance.

Solicitor for the directors of the Great Western Railway Company, *R. R. Nelson.*

Thursday, April 19, 1888.

(Before CAVE and SMITH, JJ.)

BETTS *v.* ARMSTEAD. (*a*)

Sale of Food and Drugs Act 1875 (38 *&* 39 *Vict. c.* 63), *s.* 6—*Bread—Adulteration of—Guilty knowledge, whether necessary under sect.* 6.

Proof that the vendor had no knowledge that the article which he sold was adulterated is no defence to a prosecution under the 6th section of the Sale of Food and Drugs Act 1875 (38 *&* 39 *Vict. c.* 63).

CASE stated by justices under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49.

The appellant, who was the inspector of nuisances for the town of Nottingham, preferred an information against the respondent under sect. 6 of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), for having unlawfully sold to the prejudice of the purchaser, the appellant, a two-pound loaf of bread which was not of the nature, substance, and quality demanded by the purchaser, on the hearing of which at Nottingham, on the 2nd Dec. 1887, the justices dismissed the summons.

The facts stated in the case were as follows: The appellant bought of the respondent's sister, at a shop situate at 78, Dunkirk-road, a loaf of bread. This loaf was submitted to the public analyst for the borough of Nottingham, from whose certificate it appeared that the loaf contained alum in the proportion of forty-eight grains to the four-pound loaf. The public analysis was not called for by the respondent, and no other

(*a*) Reported by ALFRED H. LEFROY, Esq., Barrister-at-Law.

analysis was put in evidence. The respondent and two of the men in his employ gave evidence that there was not, and had never been, any alum on the respondent's premises, that no alum had been used in the manufacture of the bread, that they were not aware that there was any alum in the flour from which the bread had been made, and that if any alum was in the bread it must have been in the flour when purchased by the respondent.

It was contended for the appellant that proof of the knowledge of the adulteration on the part of the respondent was not necessary in order to convict him under sect. 6 of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), whilst for the respondent it was contended, on the authority of *Core* v. *James* (25 L. T. Rep. N. S. 593; L. Rep. 7 Q. B. 135), that a baker ought not to be convicted of selling bread adulterated with alum in the absence of proof that he was aware of such adulteration; and where, as in the present case, it was proved that he had not used any alum, and was not aware that there was any in the flour from which the bread was made.

The justices were of opinion that the contention for the respondents was correct in law, and dismissed the information. The question for the opinion of the court was, whether the respondent, having proved that he had no knowledge that the article of food contained alum, was liable to be convicted of having sold bread "to the prejudice of the purchaser which was not of the nature, substance, and quality demanded."

Stanger for the appellant.—The justices ought to have convicted the respondent. Want of knowledge is no excuse under sect. 6 of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), and the respondent is liable to be convicted even without knowledge. Several grounds of defence are stated in sects. 6 and 8 of the Act, but want of knowledge is not among them. Sect. 25 of the Act states another ground of defence to avail himself of which the defendant must show a written warranty to the effect that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and must prove that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it. In the cases of *Rook* v. *Hopley* (38 L. T. Rep. N. S. 649; 3 Ex. Div. 209) and *Harris* v. *May* (12 Q. B. Div. 97), proceedings were instituted under sect. 6, and the defence taken was under sect. 25, and in each case it was proved that the defendant had no knowledge that the article which he sold was adulterated, and that he sold it in the same state as when he purchased it, but in both cases the defendants were convicted, as the documents relied on were held not to be written warranties.

The respondent did not appear.

CAVE, J.—I am of opinion that the justices came to a wrong conclusion in this case. Sect. 6 of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63) says, "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds." It has been proved in this case that the respondent on the 9th Nov. 1887, sold to the prejudice of the appellant a two pound loaf of bread which contained alum, and which was not of the nature, substance, and quality of the article demanded by him, and which therefore came within sect. 6 of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63). It was contended that the justices ought to read "knowingly" into the 6th section. I think not, it was not the intention of the Legislature; it appears from the other sections that it was intended to exclude this word from the 6th section. By the 5th section it is provided that no person shall be liable to be convicted under the 3rd or 4th sections of this Act if he can prove absence of knowledge. Where the Legislature desired to limit the offence, and not to make those persons liable who sold without knowledge that they were selling matter forbidden by the Act, it has expressed itself in clear terms. If the word "knowingly" is to be imported into the 6th section it should also be imported into sections 3 and 4.

SMITH, J.—I am of the same opinion. I agree with everything which my brother Cave has said. In sects. 3 and 4 of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63) I find that the first offence renders a person liable to a fine, and every subsequent offence is a misdemeanour, and punishable with imprisonment for any period not exceeding six months with hard labour; for this reason the Legislature has declared that a person charged under these sections who succeeds in showing that he had no guilty knowledge shall not be convicted. The same reason does not apply to sect. 6. The case must be remitted to the justices for rehearing with the opinion of the court.

Appeal allowed.

Solicitors for the appellant, *Sharpe, Parkers, and Co.*, for *S. G. Johnson*, Nottingham.

Thursday, March 8, 1888.

(Before HUDDLESTON, B. and MANISTY, J.)

REG. *v.* THE GUARDIANS OF THE BARNET UNION.(a)

Poor law—Settlement and removal—Infant child—Age of nurture—Lunatic mother—Separation of mother and child.

The rule that a child within the age of nurture cannot be separated from its mother by an order of removal may, at the discretion of the court, be dispensed with where on account of the exceptional circumstances of the case the child is not receiving, and is not likely to receive, from the mother the proper care and nurture which it is the object of the rule to provide for it.

THIS was a rule obtained upon the application of justices of Middlesex, members of the committee of visitors of the Middlesex County Lunatic Asylum, situate at Colney Hatch, calling upon the guardians of the Barnet Union to show cause why a writ of *mandamus* should not issue, directed to them, calling upon them to admit the infant child of Rachel Widgersohn, a pauper lunatic confined in the Colney Hatch Asylum, into the workhouse of their union.

(a) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

It appeared that Rachel Widgersohn was a Polish Jewess and a single woman, and had no settlement in any parish.

She had become chargeable to the Whitechapel Union and was admitted into its workhouse, and removed thence as a pauper lunatic to the Middlesex County Lunatic Asylum at Colney Hatch under the provisions of the statute 16 & 17 Vict. c. 97.

While maintained there as a pauper lunatic she was, in the month of Oct. 1887, delivered of a female child in a part of the asylum situate in the parish of Fryern Barnet, within the Barnet Union.

The guardians of the Barnet Union having declined to admit the child into their workhouse, application was now made that a writ of *mandamus* should issue, directed to them, commanding them to do so.

It was stated upon affidavit by the medical superintendent of the asylum that Rachel Widgersohn, the mother of the child, was at the date of her admission into the asylum suffering from the form of mental disease known as mania, and that, although better at the time the affidavit was made, she would probably always suffer from weakened intellect resulting from mania; and, further, that she was not nurturing the child and was not capable of nurturing it, or likely to be able to nurture it, or to maintain it or take proper care of it.

Poland, for the guardians of the Barnet Union, showed cause.—The *mandamus* ought not to issue, since the child is within the age of nurture and cannot on that account be removed from the mother. It was so held in *Reg.* v. *The Inhabitants of Birmingham* (5 Q. B. 210). There a woman having children by a first marriage married again, and the husband being unable to support them the family became chargeable to the parish in which they were then residing. The mother consented, and wished that the children then in the workhouse, and being within the age of nurture, should be removed to the parish in which they were born, but the order for their removal was quashed. Lord Denman, C.J. in that case said: "It is true that some cases have arisen under statutes in which it has become necessary to break in upon a rule established, not for the mother's benefit, but for the protection of the child, that they shall not be separated during the age of nurture. Here no such necessity exists, and we ought to crush the attempt to break through a rule which the judges in all times have uniformly regarded as binding." In this case also no necessity exists for breaking in upon the rule, and therefore the order ought not to be made. The mother will, in all probability, be in time discharged as cured under the 80th section of the statute 16 & 17 Vict. c. 97, and be removed under that section to the workhouse of the Whitechapel Union, to which she is chargeable, and mother and child will in that case be together, in accordance with the ordinary rule. The child will be as well cared for in the Whitechapel Union workhouse as in that of the Barnet Union, and in the former it will have the additional benefit of the mother's care on her recovery. It cannot, therefore, be said that its removal to the Barnet Union will be in any sense for the benefit of the child, which is the principle on which the court is bound to act.

Lumley Smith, Q.C. and *Alexander Glen*, for the prosecutors, in support of the rule.—The rule that mother and child shall not be separated during the age of nurture only applies where the mother is able to afford the child nurture. In *Reg.* v. *The Inhabitants of Combs* (5 E. & B. 892) three legitimate children, two above the age of seven years but below the age of sixteen years, and one under the age of seven years, were resident with their mother, a widow, in a parish other than that of their settlement. The mother neglected her children, and was unable to support them. They were then taken to the workhouse of the parish in which they were residing. After the children had remained in the workhouse separate from the mother for three months an order was obtained for their removal to the parish in which they were settled. It being found that the admission of the children into the workhouse was with the consent of the mother, and most beneficial to the children, it was held by Lord Campbell, C.J., Wightman, and Crompton, JJ., Coleridge, J. dissenting, that although the child under the age of seven could not have been removed if the effect had been to separate it from the mother so as to deprive it of the benefit of nurture, it was removable, the mother being unable to afford it nurture, and the separation being *bonâ fide* for the benefit of the child. In this case the mother is not only unable to afford the child nurture, but, as she is suffering from mania, might be absolutely dangerous to the child. It is submitted that the case is analogous to that of husband and wife, who are separable in cases of lunacy, notwithstanding the rule to the contrary. In *Reg.* v. *The Guardians of the Preston Union* (49 L. T. Rep. N. S. 104; 11 Q. B. Div. 113) a wife having become insane and chargeable to the union in which her husband dwelt was taken from his house to the workhouse of the union, and the medical officer thereof certified under 25 & 26 Vict. c. 11, s. 20 that the lunatic was a proper person to be kept in a workhouse. An order was then made by justices for her removal alone to another union containing her husband's last place of settlement. The husband consented to the removal order, but the wife was mentally incapable of consent. Under these circumstances it was held that the order of removal did not contravene the policy of the law with regard to the separation of husband and wife and was good. Such orders are now commonly made: (*The Guardians of the Ipswich Union* v. *The Guardians of the West Ham Union*, 58 L. T. Rep. N. S. 419; 20 Q. B. Div. 407.) The same considerations apply in the present case. Where, in the one case, the consortium of husband and wife is necessarily put an end to, and in the other case the mother is unable to give nurture to her child, the respective rules ordinarily applying are in abeyance. That being so, the maintenance of the child devolves upon the Barnet Union in accordance with the case of *Reg.* v. *The Directors of the Poor of the Parish of St. Pancras* (7 A. & E. 750). In that case a woman left a parcel containing a child at the Foundling Hospital, but went away before the contents were ascertained and was not again found, and it was held that the parish of St. Pancras, within the ambit of which the hospital was situate, was bound to maintain the child. Lord Denman, C.J. there says: "The maintenance of the child as casual

poor was upon the parish, unless the burden was thrown elsewhere." Here the child was born within the Barnet Union, and the burden not being thrown elsewhere that union is bound to maintain the child.

HUDDLESTON, B.—I have no doubt as to what our decision ought to be in this case. The mother of this unfortunate child, whose admission into the workhouse of the Barnet Union we are asked to order, became lunatic within the Whitechapel Union, and was, consequently, removed to the Middlesex County Lunatic Asylum at Colney Hatch. Under these circumstances the 95th section of the statute 16 & 17 Vict. c. 97, came into operation, and she became chargeable to the parish from which she was sent, that is, to the Whitechapel Union, unless, and until the Whitechapel Union could establish that she was settled in some parish outside their union. On inquiry, however, it turned out that she was a foreigner, and had not acquired any settlement; and so by the operation of the section I have mentioned she was and is chargeable to the Whitechapel Union. After her removal in this manner to the Colney Hatch Asylum, which is a large building covering a considerable space of ground, situate in several parishes, not all belonging to the same union, she gave birth to the child which is the subject of the present inquiry, in a part of the asylum situate in the Barnet Union, the child being, there is no reason to doubt, a bastard child. Now, if the mother were dead the child would clearly be chargeable to the union in which it was born. Here, however, the mother is still living, and the question consequently arises whether the child, being within the age of nurture, can, under the special circumstances of this case, be contrary to the usual rule separated from its mother. There are many decided cases which go to show that children under the age of nurture are not to be separated from their mother, and in *Reg.* v. *Birmingham* (5 Q. B. 210) it is laid down in the clearest manner that the rule cannot be dispensed with by the mother's consent, since it is established, not for the benefit of the mother, but for the benefit of the child. But it is also clear that exceptional circumstances may arise which may in certain circumstances override the rule. This was the case in *Reg.* v. *The Inhabitants of Combs* (5 E. & B. 892), where the mother being unable to afford the child nurture, and the separation being *bonâ fide* for the benefit of the child, it was held that the child might be separated from her. The rule, therefore, is not so rigid as not to admit of exception. We must, therefore, look at the circumstances of this case and see whether they are of such an exceptional nature that the rule ought to be dispensed with. The child was born last October, and is therefore only a few months old and urgently requires the care of a mother if it can have it. But the mother, as the affidavits show, is suffering from mania, and even if she recovers will probably always suffer from weakened intellect arising therefrom. Further than that, it is stated that she does not nurture the child and is not capable of nurturing it, or likely to be able to nurture it, or maintain it or take proper care of it. In such a case there can to my mind be but little difficulty in exercising the discretion which we undoubtedly have. If the circumstances of this case are such that the rule which forbids us to separate a child from its mother fails to operate, then the ordinary law must prevail, and it will become chargeable to the union in which it has a settlement by its birth. The principle by which we must be guided in deciding this matter is that laid down in *Reg.* v. *The Inhabitants of Birmingham* (5 Q. B. 210), and we must inquire whether it is for the benefit of the child that it should not be separated from its mother. I cannot see that it is so. Putting aside the possibility that the mother might in a fit of frenzy do the child harm, or even cause its death, I cannot see how the child is to be benefited by remaining with a mother who is not capable of nurturing it, and cannot even take proper care of it. If then it is not for the benefit of the child that it should remain with its mother, it is not chargeable to the Whitechapel union, but to the union in which it is settled by birth. For these reasons I am of opinion that the rule must be made absolute for a writ of *mandamus* directing them to admit the child into the workhouse of their union.

MANISTY, J.—I am of the same opinion, and for the same reasons.

Rule absolute.

Solicitors for the prosecutors, *Beal, Phillips,* and *Beal.*

Solicitors for the defendants, the Guardians of the Poor of the Barnet Union, *Houghton* and *Byfield.*

CROWN CASES RESERVED.

Saturday, April 21, 1888.

(Before Lord COLERIDGE, C.J., MANISTY, HAWKINS, MATHEW, and SMITH, JJ.)

REG. *v.* STEPHENS. (*a*)

Criminal law—Embezzlement—Separate charges included in one indictment—Evidence of motive and intention—Admissibility of evidence on all charges in support of conviction on each charge—Acquittal on one of the charges—Presumption as to intention.

An indictment charged a prisoner with having as a booking clerk of certain steamship owners embezzled the moneys of his masters on three separate occasions, the charges being contained in three counts of the same indictment. In support of the first count it was proved, amongst other things, that the prisoner received money for the carriage of animals by steamer which it was his duty to pay over to his masters' cashier; in support of the second count, that he was supplied with a number of tickets for issue to passengers by his masters' steamers, which purported to be numbered consecutively, but were not examined before they were delivered to him. The tickets were tied up in bundles, and were in the prisoner's charge, he alone having a key of the case in which they were kept. Certain tickets, bearing numbers corresponding to the numbers of certain of the tickets in one of the bundles delivered to the prisoner, assuming such bundle to have been complete, were put in evidence, which tickets were stamped in a manner similar to other tickets which the prisoner had issued to passengers by one of the steamers, and which were notched as they would have been had they been used by passengers on board such

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

steamer, and evidence was given that the prisoner had not handed over to the cashier any money in respect of such tickets. Evidence was also given in support of the third count, but upon this count the jury found the prisoner not guilty, while they convicted him upon the first and second counts. The jury were directed, as to the first count, that they might take into consideration the evidence given as to the prisoner's conduct in relation to the matters charged in the second and third counts; and as to the second count, that, if they were of opinion from the whole of the evidence that the prisoner had issued the tickets for money in the ordinary way, and taken the money he had received for his own use, making false entries in his books to conceal it, they might find him guilty.

Held, that the jury were justified in presuming from the evidence in support of the second count that the prisoner had issued tickets and received money for them, which he had appropriated; and that they were at liberty, in order to arrive at a conclusion upon any one of the charges, to take into consideration the evidence given in support of the other charges, notwithstanding the fact that upon one of such charges they found a verdict of not guilty.

CASE reserved by the Recorder of Plymouth upon an indictment tried before him at the January quarter sessions for the borough.

The prisoner was indicted in the first count for embezzling from his masters, Henry John Waring and another, the sum of 11*l.* 8*s.* on the 26th Oct. 1887.

The second count charged him with embezzling from his masters on the 5th Nov. of the same year the sum of 10*s.*

The third count charged him with embezzling from his masters on the 12th Nov. in the same year the sum of 12*s.* 6*d.*

The evidence showed that the prisoner was a booking clerk in the employment of Messrs. Waring and Co., who were the agents for the Clyde Shipping Company, whose steamers call at Plymouth, and sail thence, amongst other places, to Belfast, Waterford, and Glasgow.

It was proved with respect to the charge contained in the first count that on the 26th Oct. 1887 the prisoner was paid on behalf of Messrs. Waring and Co., by a farm bailiff named Small, 27*s.* for the carriage of two bullocks by steamer from Plymouth to Belfast, and gave a receipt on a form taken from a book provided by Messrs. Waring and Co. for the purpose.

Evidence was given that no entry was made by him on the counterfoil of the receipt of the transaction such as it was his duty to make, and that the receipt itself was torn out of the end of the receipt book, and not from the part of the book from which receipts were usually taken, and where the absence of an entry on the counterfoil would have been at once noticed by the storekeeper.

It was proved that it was the prisoner's duty to pay the sum at once to the cashier of Messrs. Waring and Co., but that at the end of a fortnight he had not done so, and when spoken to by the cashier admitted he had received the amount, and when he was asked why he had not paid it over made no answer.

With respect to the second count, it was proved that it was the duty of the prisoner to issue tickets to passengers about to proceed by steamer, and receive the money for them; that he was supplied with tickets similar to those used on railways, and a case in which they were placed similar to those used on railways, from which the tickets could be drawn one by one from the bottom. The tickets supplied to the prisoner were numbered consecutively. A packet of 250 tickets from Plymouth to Waterford, numbered from 1750 to 2000, and a packet of 250 tickets from Plymouth to Glasgow, numbered 8750 to 9000, were given to him in the course of the year 1887. These tickets were not examined by the witness before being delivered to the prisoner, but were delivered tied up as they were received from the manufacturers.

It was proved that the tickets were in charge of the prisoner, who alone had a key of the case, but other persons had access to the booking office.

It was proved that it was the duty of the prisoner after the departure of a steamer to enter in a book supplied to him for the purpose under the appropriate headings the name of the steamer, its destination, the numbers of the first and last ticket issued, the number of tickets issued, and the money received for them.

Soldiers and sailors when travelling usually paid for their tickets by Government warrants, and it was the duty of the prisoner to enter in the appropriate columns of the same book the number on each warrant, the number of passengers covered by the warrant, the number of each ticket issued in respect of them, and the value of the tickets, and also to write on the back of the ticket the fact that it was issued against a warrant, with the number of the warrant.

It was further the duty of the prisoner at the end of each week to make up the book and pay over to one of the partners, Mr. Ward, the total money received, and to hand to him the warrants.

It was the duty of the prisoner when issuing each ticket to date it by means of a machine kept for the purpose in the office, in which he had to alter the month when required, having separate letters for that purpose, and to alter daily the date to correspond with the day of the month. It was shown that all tickets so dated by the prisoner in the month of November were dated Nou. instead of Nov.

From the book above referred to, which was put in evidence, it appeared that on the 6th Nov. 1887, a steamer named the *Copeland* sailed from Plymouth to Waterford, and entries in the prisoner's handwriting stated that he issued seven tickets, numbers 1861 to 1867 inclusive, and that the three tickets 1865, 1866, and 1867 were issued against warrants.

On the 14th Nov., in consequence of information received from the head office at Glasgow, Mr. Ward asked the prisoner to show him the next ticket in the case for Waterford, and it proved to be numbered 1871.

The tickets numbered 1861 to 1870 were all produced, they were all dated Nou. 6 in an exactly similar manner, and all had in them a notch such as they would have had if they had been used by passengers on board the steamer. On the back of the tickets 1866 and 1867, but not on the back of 1865, was a note in the hand-

writing of the prisoner that they were given as against warrants, and on the back of ticket No. 1870 was a similar note signed with the prisoner's initials.

The value of each ticket from Plymouth to Waterford was ten shillings, the amount carried over in the book as the total received was that which would have been received if seven tickets only, and three of them against warrants, had been issued, and at the end of the week the prisoner handed over to Mr. Ward the amount of cash, which would have been correct if such seven tickets only had been issued.

The prisoner was asked on the 14th Nov. if he had any other money of the company, and he said that he had not.

With respect to the offence charged in the third count, it was proved that, according to the entries in the prisoner's handwriting in the book above mentioned, a steamer named the *Skerryvore* sailed on the 12th Nov. from Plymouth to Glasgow; that fourteen tickets had been issued, numbered 8893 to 8906 inclusive; and that fourteen tickets entered in the book as numbered 8892 to 8905 were issued against warrants.

It also appeared, according to an entry in the prisoner's handwriting on the same page, that two tickets, numbered 8890 and 8891, had been issued for a steamer that left Plymouth on the 9th Nov., and by previous entries that other tickets had been issued for a steamer leaving Plymouth for Glasgow on the 3rd.

It was proved that when the ticket case was examined on the 14th Nov., the next ticket from Plymouth to Glasgow was numbered 8910. Seventeen tickets, numbered 8893 to 8909, were produced before me, all having a mark similar to that which they would have received if used by passengers.

Of these tickets, that numbered 8893 was dated Nov. 3, the two tickets numbered 8894 and 8895 were dated Nov. 9, and the fourteen following tickets were dated Nov. 12.

It was proved that the value of each ticket from Plymouth to Glasgow was 12*s.* 6*d.*, and that the prisoner had entered in the book the proper amount for fourteen tickets, and had at the end of the week accounted to his masters on that footing.

It was objected on behalf of the prisoner that there was no evidence to go to the jury on the second and third counts, because no evidence had been given that the prisoner personally issued the tickets, or that if he did so he received any money for them, and that if he issued the tickets to friends without being paid he might be guilty of larceny, but could not be guilty of embezzlement.

The Recorder directed the jury as to the first count (*inter alia*) that if they thought that the prisoner had received the sum of 27*s.*, and that he had failed to pay it over when he ought to have done so, they might take into consideration the evidence that had been given as to the prisoner's conduct in relation to the matters referred to in the second and third counts in order to determine whether this was accidental or done fraudulently.

He directed them as to the second count that if they were of opinion from the whole of the evidence that the prisoner had issued the tickets for money in the ordinary way, and that he had then taken the money he had so received for his own use and made false entries in the book to conceal it, they might find him guilty, and that the fact that he would have been guilty of dishonesty if he had given the tickets to friends without receiving money for them was some evidence that he had issued them in the regular way.

He directed them as to the third count that as it appeared from the dates on the tickets that only fourteen tickets were in fact issued on the 12th Nov. and he had duly accounted for fourteen tickets, they would probably hesitate to find him guilty on that count, which was for embezzling money received on the 12th, although they might think that the fact of the numbers of the tickets being wrongly entered in the book pointed to some previous irregularities in the issuing of the tickets.

The jury found the prisoner guilty on the first and second counts and not guilty on the third count.

The question for the consideration of the court was, whether there was any evidence to support the finding of the jury on the second count, and, if not, whether the finding of the jury on the first count ought to stand.

Duke, on behalf of the prisoner, contended that the jury had been misdirected in being told that they might consider evidence given in support of the second and third counts in coming to a conclusion upon the offence alleged in the first count. That, although it was permitted to join the three offences in one indictment, still such offences were distinct, and must be treated as separate felonies:

Reg. v. *Holt*, 8 Cox C. C. 411; Bell's C. C. 280; 30 L. J. 11, M. C.

In *Reg.* v. *Francis* (30 L. T. Rep. N. S. 503; 12 Cox C. C. 612; L. Rep. 2 Cr. Cas. Res. 128; 43 L. J. 97, M. C.) it was held that on an indictment for attempting to obtain money by falsely pretending a ring was composed of diamonds, which was in fact composed of crystals, evidence was admissible of a false pretence on a prior occasion that a chain which was plated was gold. But in *Castro* v. *The Queen* (43 L. T. Rep. N. S. 80; L. Rep. 5 Q. B. 501; 14 Cox C. C. 457) James, L.J. in the course of his judgment said: "It being the law that a man might be tried at the same time upon several charges contained in several counts of that same indictment, to my mind no valid reason can be given for drawing a distinction between a trial and an action upon an indictment charging several misdemeanours and separate trials and convictions upon separate indictments;" which statement was founded on *O'Connell and others* v. *The Queen* (11 C. & F. 155; 1 Cox C. C. 413). The counts in the present indictment are therefore by law separate indictments. [MATHEW, J.—Then you say, do you not, that if he is acquitted on one count he must be acquitted upon all, for if acquitted on one the evidence given in support of that count becomes inadmissible in support of the other counts?] Here, if the third count on which the prisoner was acquitted had not been contained in the indictment, the evidence would clearly have been inadmissible on the first and second counts, and therefore the evidence as to each count should have been confined to those questions upon which it was admissible. In *Reg.* v. *Woolley* (4 Cox C. C.

251) the proper course of procedure is laid down by Platt, B. [HAWKINS, J.—In *Reg.* v. *Francis* (43 L. J. 99, M. C.) Blackburn, J. said: "The question in *Reg.* v. *Holt* was, whether the prisoner had the authority or not which he said he had. The piece of evidence objected to seems to me quite immaterial on that point, and how the reception of a perfectly immaterial piece of evidence caused the court to quash the conviction I confess I do not understand."] The evidence upon each count was clearly distinguishable. [Lord COLERIDGE, C.J.—How could the jury dismiss from their minds evidence which was properly admissible on certain counts while they were dealing with other counts?] Here, on the other hand, they were expressly told to consider such evidence. In *Reg.* v. *Gibson* (56 L. T. Rep. N. S. 367; 16 Cox C. C. 181; 18 Q. B. Div. 510) it was held that a misdirection avoided the verdict. [Lord COLERIDGE, C.J.—But there the jury were directed to consider evidence which was inadmissible altogether.] The next point is, that there was no evidence that the prisoner had issued the tickets. [SMITH, J.—He had the case and the key, and *primâ facie* was the only person who could have got at them.] There was no proof that the prisoner had sold them, or that the particular tickets produced were ever in his possession. [Lord COLERIDGE, C.J.—You cannot say that since the packets of tickets are found to have been numbered, and it was for the jury to say whether all the tickets which should have been in each packet given him were there.] In *Reg.* v. *Keena* (L. Rep. 1 Cr. Cas. Res. 113; 11 Cox C. C. 123) the state of facts was very similar to those here, and it was held that sect. 71 of 24 & 25 Vict. c. 96, does not justify an allegation of embezzlement of money when a cheque only was embezzled and there was no proof that the prisoner had ever cashed the cheque; so here there is no proof that the prisoner ever received any money for the tickets. In *Reg.* v. *Fuidge* (9 L. T. Rep. N. S. 777; 9 Cox C. C. 430; 33 L. J. 74, M. C.) it was held that where two charges of false pretences were included without leave in one indictment, and the court received evidence on both charges, that the part of the indictment relating to the second charge should have been quashed, and that, as evidence upon that charge would not then have been admissible, the conviction could not be supported; so here the conviction was bad, because the jury considered in dealing with the first and second charges the evidence given upon the third charge upon which they acquitted him, which evidence was therefore inadmissible.

Thorn, for the prosecution, was not called upon.

Lord COLERIDGE, C.J.—I am of opinion that this conviction should be affirmed, and that there was no misdirection by the learned Recorder. The indictment contains three separate charges of embezzlement of three separate sums on three separate occasions from the same masters, and, of course, separate evidence would have to be given upon each charge. Now, inasmuch as if you could only indict a person in respect of one embezzlement in an indictment it might easily be said to have arisen out of a mistake in his accounts, although there might really have been a number of other cases against him, the Legislature very properly enables three separate charges to be included in the same indictment. If, therefore, any evidence tendered in the course of the trial was relative to any one of the charges, it was admissible in consequence of the express enactment of the Act of Parliament; and in this case it is admitted that the evidence tendered in support of the first count was admissible and rightly admitted, and that the Recorder could not have rejected it, had he been told that it would not go to prove the second or third counts. The evidence was clearly admissible when it was given, and it went to the jury, who had the three charges left to them and were told that they must consider the three cases separately. They acquitted the prisoner on the third count, but found him guilty on the first and second counts. With regard to the second count it is objected that there was no evidence to support it; but it was proved that bundles of tickets, which we must take to have been properly and consecutively numbered from the statement of the Recorder, were given into the custody of the prisoner, that he was the proper person to have the custody of them, and that they were put in a case of which he had a key, and, it is to be presumed, of which no one else had a key. Certain of the tickets appear to have gone away, and there was evidence as to all of them that they had passed into the prisoner's possession; there was also evidence that they had passed out of his possession, whether for money or not we do not know, and as to some of them it was proved that they were not issued as against warrants. Now, in order to find the prisoner guilty of embezzlement, it was necessary to prove that he had received money on behalf of his masters and that he had misappropriated it. It is said that there was no such evidence, but it is conceded that, if there was any evidence at all, it must have gone to the jury. Now, how can it be said there was no evidence? That there was a receipt of money by the prisoner it is said is merely a presumption, and no doubt it was merely a presumption. It is difficult to conceive a case in which there can only be ocular demonstration, and if the contention on behalf of the prisoner were right it would always be possible, whenever ocular demonstration was wanting, to say that the inference the jury drew might have been wrong, and that if it was wrong there was therefore no proof of the offence. But that is a fallacy, for it is for the jury to consider whether the inference they draw is correct or not. There are no facts here to show or raise an inference that money never passed into the prisoner's possession; and, on the other hand, there are facts from which reasonable men might draw the presumption that money did pass, and the jury drew that presumption; and to say that it is a mere presumption unsupported by evidence is a fallacy. The passage which was cited from Lord Stowell (*a*) is extremely valuable

(*a*) The passage cited was from the judgment of Lord Stowell when Sir William Scott, in *Evans* v. *Evans* (1 Hagg. Cons. Rep. 605), viz: "It has been asked, and very properly asked, 'Do not courts of justice admit presumptive proof? Do you expect ocular proof in all cases?' I take the rule to be this: If you have a criminal fact ascertained, you may then take presumptive proof to show who did it; to fix the criminal, having then an actual *corpus delicti*. Show me then, in this case, that a crime has been committed, and I shall not be at a loss to fix the criminal: but to take presumptions in order to swell an equivocal fact, a fact that is

as a passage of legal literature; but, when it is cited in order to show that a clerk did not receive money for tickets he was bound to sell, is to mistake its application. It is said that the Recorder was wrong in saying to the jury in effect this, "You must look at it all together, and deal with each charge separately. There are three charges, and, according as you find the first charge made out or not, you must find the prisoner guilty or not guilty; and you must do the same with regard to the second and third charges." It seems to me that he went on to say, "You must consider the whole case, and take the whole of the evidence on all three counts as if it was given on each count;" and that he was perfectly right in so doing, because the Act of Parliament, in allowing the three charges to be included in one indictment, made him right. I should also have thought he was right in what he did without the help of the Act of Parliament, because the conduct of the prisoner on each occasion was cognate to the inquiry, and took place within a reasonable time, and was, I think, fairly taken into consideration by the jury in considering whether he was guilty upon any one of the charges. The direction was therefore right, and the conviction should, in my opinion, be upheld.

MANISTY, J.—I am of the same opinion, and shall not say anything upon any of the points dealt with by my Lord, with the exception of one, which is the allegation that there was a misdirection in telling the jury that they might take into consideration the evidence given in support of the second and third counts in considering the first count. There were three counts, charging three embezzlements. As to the third count, the evidence was not sufficient to convict the prisoner. Now, in the first place, was the evidence admissible? I take it as a general rule that evidence ought to be confined to the particular issue upon which it is given; and here it is said there are three issues. But the general rule is subject to several exceptions, one of which is with the view of explaining the object and intention of the prisoner, and cannot be better stated than it is stated in Roscoe's Digest of Evidence, at p. 94, where it is said: "There are cases in which much greater latitude is permitted, and evidence is allowed to be given of the prisoner's conduct on other occasions, where it has no other connection with the charge under inquiry than that it tends to throw light on what were his motives and intention in doing the act complained of. This cannot be done merely with the view of inducing the jury to believe that, because the prisoner has committed a crime on one occasion, he is likely to have committed a similar offence on another; but only by way of anticipation of an obvious defence, such as that the prisoner did the act of which he was accused, but innocently and without any guilty knowledge, or that he did not do it because no motive existed in him for the commission of such a crime, or that he did it by mistake." Numbers of instances are given in illustration of this statement, and I do not think I can refer to any case which puts it more clearly than that of *Reg.* v. *Richardson* (2 F. & F. 343). It was a case of embezzlement, and the evidence was to the effect that it was the prisoner's duty to make out weekly accounts of the payments made by him, by entering them in a book, and adding them up at the end of each week. On three several occasions within six months the prisoner entered the payments made by him correctly, but, in adding up the items, made the totals 2*l.* greater than they really were for which he received credit. At the trial evidence was tendered that, on a series of occasions before and after those mentioned in the indictment, precisely similar errors had been made by the prisoner, and it was held that to explain motives and intentions the evidence was admissible. That is the principle which runs through all the cases. The evidence is admitted not to prove the guilt of the prisoner, but to prove motive. The case was tried before Williams, J., whose summing-up is very short, and very much to the point: "There is no principle of law which prevents that being put in evidence which might otherwise be so, merely because it discloses other indictable offences. Now, it is clear that on this indictment the defence must be that these are mere errors in the castings; and such defence naturally arising, any lawful means may be resorted to whereby such defence may be anticipated, and proved to be ill-founded, and evidence which is admissible for such a purpose is not the less so because it tends to prove the commission of other felonies by the prisoner. To hold that this evidence is admissible, is in accordance with the principle laid down in numerous cases, that to explain motives or intention evidence is admissible, although it does not otherwise bear upon the issue to be tried." It is not with a view of proving guilt, but of proving the intention with which the act was done, that you anticipate it; and it therefore appears to me that this evidence was admissible, even if it was given on the second or third counts. Suppose there to be only one count, then, without other cases being charged in the indictment, you may by other admissible evidence prove that which the prisoner has done on other occasions with a view to prove whether he is guilty on that one count. I am therefore of opinion that this conviction should be affirmed.

HAWKINS, J.—I am of the same opinion, and think that the conviction ought to be affirmed. I desire to add that, in my opinion, even if there had been no second or third count at all, the evidence offered was admissible on the issue raised upon the first count of the indictment. One of the essential ingredients of an indictment for embezzlement is, that the conversion of the money should be fraudulent. The evidence was equally admissible if the second or third counts were struck out, for the jury were told they were entitled to consider it, in order to show whether it was an accidental misappropriation or not. I do not like to call it an exception to the general rule, for I consider it was evidence directly applicable to the issue in order to prove fraud, and I am clearly of opinion that the conviction was right, and ought to be affirmed.

MATHEW, J.—I am of the same opinion. In order to establish the guilt of the prisoner on the first count, the irregularity of the prisoner's

absolutely ambiguous in its own nature, into a criminal fact, is a mode of proceeding of a very different nature, and would, I take it, be an entire misapplication of the doctrine of presumptions."

conduct was pointed out, and in order to anticipate the defence, evidence of similar irregularities was given. In my opinion it is perfectly clear that the evidence was admissible.

SMITH, J.—I agree that the conviction must stand in this case. There are three charges of embezzlement contained in one indictment, and under such circumstances there was no misdirection on the part of the Recorder in telling the jury they might lawfully consider the conduct of the prisoner in relation to the matters referred to in all the counts, when considering any one of them in order to determine whether the prisoner had failed to pay over money accidentally or fraudulently. It was not incumbent upon him to tell them that when they were considering the first count they must throw out of their consideration all the evidence which had been given upon the other counts; and I am therefore of opinion that the conviction must stand.

Conviction affirmed.

Solicitor for the prosecution, *Treharne*, of Plymouth.

Solicitors for the prisoner, *Coode, Kingdon*, and *Cotton*, for *Square* and *Co.*, of Plymouth.

Saturday, April 21, 1888.

(Before Lord COLERIDGE, C.J., MANISTY, HAWKINS, MATHEW, and SMITH, JJ.)

REG. *v.* OWEN.(*a*)

Criminal law — Practice—Evidence — Indictment for indecent assault—Conviction for common assault—Admissibility of evidence of prisoner in support of conviction—Criminal Law Amendment Act 1885 (48 *&* 49 *Vict. c.* 69), *s.* 20.

Upon an indictment for an indecent assault upon a woman, in which was also contained a count for a common assault, the prisoner elected to give evidence in pursuance of the provisions of sect. 20 *of the Criminal Law Amendment Act* 1885, *and being sworn admitted that he had put his arm round the woman, but denied that he had indecently or otherwise assaulted her. The jury acquitted him of the indecent assault, but convicted him of a common assault.*

Held, that the effect of the Criminal Law Amendment Act 1885 *is to render admissions, which would not have been admissible previously, admissible in evidence against prisoners if made by them on oath under sect.* 20 *of the Act; and that the prisoner having voluntarily given evidence in respect of the charge of indecent assault, his evidence was admissible upon the whole of the indictment.*

THIS was a case reserved at the Easter Quarter Sessions for the county of Worcester, when one William Owen, aged eighty-one, was tried on the following indictment:

Worcestershire to wit.—The jurors for our Lady the Queen upon their oath present that William Owen, on the twenty-fourth day of February in the year of our Lord one thousand eight hundred and eighty-eight, one Julia Bevan unlawfully and indecently did assault and her the said Julia Bevan then did beat, wound, and ill-treat, and other wrongs to the said Julia Bevan then did, to the great damage of the said Julia Bevan, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Second count: And the jurors aforesaid upon their oath aforesaid do further present that the said William Owen, on the day aforesaid, in the year aforesaid, in and upon the said Julia Bevan unlawfully did make an assault, and her the said Julia Bevan then did beat, wound, and ill-treat, and other wrongs to the said Julia Bevan then did, to the great damage of the said Julia Bevan, against the peace of our Lady the Queen, her crown and dignity.

Misdemeanour.

Julia Bevan swore that the prisoner put his arms round her and pressed her to him, that he took hold of her and tried to get her on his knee, that he tried to put his hand up her clothes, but she, being stronger than he was, prevented him putting his hand above her boots; that he took hold of her and tore her dress; that all this was done against her will and without her consent, and she in no way consented thereto.

Charles Bevan, her husband, swore that he called on the defendant next day and accused him of indecently assaulting his wife, that the defendant said he was very sorry, that he had only put his hands on her.

For the defence, the prisoner and a man named John Drew were called; the former was called under the provisions of the statute 48 & 49 Vict. c. 69, s. 20 (the Criminal Law Amendment Act),(*a*) and being sworn, admitted that he had put his arm round Julia Bevan, but denied that he had indecently or otherwise assaulted her.

No objection to his evidence was taken by the counsel for the prosecution.

The jury were directed that in any case there was clear evidence of a common assault; that the question of an indecent assault depended on whether the jury believed the prosecutrix or the defendant; if they believed the prosecutrix there was ample evidence in law to convict the defendant of an indecent assault, but it was for them to say if they thought an indecent assault or only a common assault had been committed.

The jury acquitted the prisoner of indecent assault, but convicted him of a common assault.

Counsel for the prisoner then urged that the conviction could not be sustained, as the evidence of the prisoner was only admissible on the charges specified in the 20th section of the statute 48 & 49 Vict. c. 69, and no other, and that by law this evidence in case of a common assault was inadmissible. That, as the Court for Crown Cases Reserved had held in the case of *Reg.* v. *Gibson* (L. Rep. 18 Q. B. Div. 537) if any evidence on a charge not legally admissible is allowed to go to the jury the conviction cannot be sustained.

The objection was overruled and the conviction held good on the following grounds: (1) That as the offences were misdemeanours, and more than one misdemeanour might be included in one indictment if the evidence was legally admissible on either misdemeanour, the convic-

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

(*a*) Sect. 20 enacts that "every person charged with an offence under this Act . . . . shall be competent but not compellable witnesses on every hearing at every stage of such charge, except an inquiry before a grand jury"

tion could be sustained. (2) That the case of *Reg.* v. *Gibson* did not apply to cases where evidence was legally admissible on one count of the indictment and inadmissible on the other, but only to cases where the evidence was in no case legally admissible on the indictment. (3) That the prisoner not being legally compellable to give evidence, but giving evidence voluntarily on his own behalf, could not thereby render his conviction on one of the counts of the indictment impossible. (4) That without the prisoner's evidence there was in law sufficient evidence to enable the jury to convict of a common assault on the evidence for the prosecution alone, and that being so, whatever the evidence called for the defence, whether admissible or not the conviction was good.

The question of law for the opinion of the court was, Can a prisoner on an indictment for indecent assault which contains a count for a common assault after the prisoner is called as a witness for the defence under the statute 48 & 49 Vict. c. 69, s. 20, be legally convicted of a common assault only?

Harington, for the prisoner, submitted that the conviction was bad, inasmuch as it had been founded upon evidence which was inadmissible, the prisoner's evidence having been used to convict him of a charge of common assault, in respect of which charge the Criminal Law Amendment Act did not make it admissible. In *Latham and others* v. *The Queen* (33 L. J. 199, M. C.) Blackburn, J. said: "Where there are two counts in an indictment, they are to all intents and purposes two separate indictments; and although the same jury are sworn to find the truth on both, it is as if two juries were trying two indictments;" and that view was followed by the House of Lords in *Castro* v. *The Queen* (6 App. Cas. 229). The mere fact of joining two charges in the same indictment will not render evidence inadmissible on one charge, but admissible on the other, admissible on both, and *Reg.* v. *Fuidge* (9 Cox C. C. 430; 9 L. T. Rep. N. S. 777; 33 L. J. 74, M. C.) shows that if evidence is admitted on a part of an indictment which is bad, the conviction on the whole indictment is bad. Here, had the two charges been contained in separate indictments and heard by separate juries, the evidence of the prisoner would have been inadmissible on the indictment for the common assault. Had the jury here believed the woman, they must have convicted the prisoner of the indecent assault, and it was therefore only because they believed the prisoner that they did not do so, and found him guilty of a common assault. It was never intended by the Legislature that a prisoner should go into the witness-box and be subjected to cross-examination, not with a view to prove an indecent assault, but to convict him of a totally different offence, upon which his evidence would be inadmissible. In *Reg.* v. *Payne* (L. Rep. 1 C. C. R. 352), where two prisoners were indicted and tried together, and it was held that one was not a competent witness for the other, Blackburn, J. said: "If a prisoner on his trial is examined, he must be cross-examined; and that can hardly be without giving evidence against himself." So here nothing that the prisoner said in giving evidence upon the charge of indecent assault was admissible to support the conviction for the common assault.

Appleton, for the prosecution, was not called upon.

Lord COLERIDGE, C.J.—I am of opinion that this conviction must be affirmed. The facts are simple. The prisoner was indicted for an unlawful and indecent assault, and in the indictment is a count for a common assault. The prosecutrix and her husband were examined, and thereupon the prisoner tendered himself as a witness, as he had a right to do, and admitted that he had put his arm round the prosecutrix, but denied that he had indecently or otherwise assaulted her, his evidence amounting to this, that she had in fact consented to his putting his arms around her. The case was left to the jury, with this direction: "That in any case there was clear evidence of a common assault, that the question of an indecent assault depended on whether the jury believed the prosecutrix or the defendant; if they believed the prosecutrix there was ample evidence in law to convict the defendant of an indecent assault, but it was for them to say if they thought an indecent assault or only a common assault had been committed." Now, it would perhaps have been a more complete direction—I am not saying that there was any misdirection—had the chairman told them that the prisoner's evidence was only admissible on the question as to the indecent assault, and that so far as the second count was concerned, which charged the prisoner with a common assault, they must determine the question without reference to his evidence. I am by no means certain, however, that such a direction was necessary, for the law is changed now to what it was. It is true you have no right to examine a prisoner on oath, except on certain specified indictments. But it is also true that admissions made by a prisoner were always receivable as evidence against him; and now that a prisoner is allowed to go into the witness-box upon a particular charge and make a statement on oath, if in the course of so doing he makes a statement in the nature of an admission on another charge, as he chooses to take advantage of the privilege of giving evidence on oath, any admission he makes on oath must stand in the same position as any other admission stood before the Act was passed. The only difference in the prisoner's position is, that the law now gives the sanction of an oath to what he says, and he must be taken as in the same position when he is on oath as he was in before when not on oath. There is another answer to the point which has been raised, namely, that the chairman did in effect direct the jury rightly. There were two cases, and it was for the jury to say whether there was evidence to support each of them or not, and they took the more lenient view, and found a verdict of guilty upon the count for the common assault, upon the proper evidence upon which I think they were substantially directed by the chairman. There is a fatal objection, however, to the point taken as to misdirection, which is, that no such point is reserved by the case. It is clear to me there was evidence apart from the evidence of the prisoner to support the verdict, and there was also evidence voluntarily supplied by the prisoner himself, who went into the box and made his statement, and cannot turn round now and say that although he had given his evidence on oath such evidence was not admissible.

MANISTY, HAWKINS, MATHEW, and SMITH, JJ. concurred.

Conviction affirmed.

Solicitor for the prosecution, *F. Brooke*, for *G. W. T. Coventry*, Upton-upon-Severn.
Solicitor for the prisoner, *Dreaper*.

Thursday, April 26, 1888.

(Before Lord COLERIDGE, C.J., MANISTY, HAWKINS, MATHEW, and SMITH, JJ.)

REG. *v.* WEALAND. (*a*)

Criminal law—Practice—Indictment for defiling girl under thirteen — Conviction for indecent assault—Admissibility of evidence not given on oath to support conviction — Criminal Law Amendment Act 1885 (48 *&* 49 *Vict. c.* 69, *ss.* 4, 9.)

In support of an indictment under sect. 4 *of the Criminal Law Amendment Act* 1885, *which charged a prisoner with unlawfully and carnally knowing a girl of the age of five years and nine months, the evidence of such girl was received, though it was not given upon oath, under the provisions contained in that section. The jury acquitted the prisoner of the offence charged under sect.* 4 *of the Act, but convicted him under sect.* 9 *of an indecent assault. In order to support such conviction the evidence was insufficient unless the evidence which had been given by the girl under sect.* 4 *was admissible.*

Held, that such evidence was admissible, although, had the prisoner been charged with an indecent assault upon the girl only it would not have been admissible.

CASE stated by Hawkins, J. as follows:—

The prisoner was tried before me at the Central Criminal Court, on the 28th Feb. 1888, upon an indictment under sect. 4 of the Criminal Law Amendment Act 1885 (48 & 49 Vict. c. 69), (*b*) charging him with unlawfully and carnally knowing Eliza Wheal, a girl under the age of thirteen years, to wit, of the age of five years and nine months.

The evidence of Eliza Wheal was received by me, though not given upon oath, under the provision contained in the same section of the Act, and she was corroborated as required.

The jury acquitted the accused of the charge under the 4th section, but found him guilty of an indecent assault under sect. 9. (*a*)

Without the girl's evidence the evidence would have been insufficient to justify a conviction.

In the statute there is nothing to make the evidence of the girl admissible without oath upon a simple indictment for indecent assault.

The only question is, whether the conviction can, under the circumstances, be supported.

No counsel appeared in support of or against the conviction.

Lord COLERIDGE, C.J.—This is a case which my learned brother has reserved in order to settle an important point on the Criminal Law Amendment Act 1885, on which there have been conflicting opinions, though perhaps not decisions. We are all of opinion that the conviction was perfectly correct. The case is one in which a man was indicted under sect. 4 of the Criminal Law Amendment Act 1885, for unlawfully and carnally knowing a girl under the age of thirteen. In the course of the trial the child was called, she was between five and six years old, and being in the opinion of my learned brother not capable of understanding the nature of an oath, her evidence was allowed to be given without her being sworn. Now, the same section of the Act which enabled her evidence to be so given provides, that no person shall be liable to be convicted of the offence, unless the testimony admitted by virtue of the section and given on behalf of the prosecution shall be corroborated by some other material evidence in support thereof implicating the accused. The prisoner was indicted under the 4th section, and there was evidence of corroboration, but, on the whole, under the direction of my learned brother, the jury acquitted the prisoner of the graver offence. Under sect. 9 of the Act, however, it is provided that anyone who has been acquitted of the more serious offence, may nevertheless be convicted of an indecent assault. Under sect. 9 of the Act, however, there is no provision enabling the evidence of a child who is too young to give evidence upon oath to be given, even with the qualifications under which such evidence can be given under sect. 4. It follows from this legislation, if we uphold this conviction, that if a person is indicted for the graver offence and unsworn evidence is given, he may be acquitted and yet may be convicted of the lesser offence, but that, if he had been indicted for the lesser offence, the evidence, upon which had he been indicted for the greater offence he could have been convicted of the lesser offence, could not have been given; which would plainly be an anomalous state of the law, for it might lead to persons being indicted in respect of one offence when it was intended to prove another. That is not a satisfactory state of affairs, and is one which was probably not contemplated by the Legislature; but though we are not here to make the law, we may point out any

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

(*b*) Sect. 4 enacts (*inter alia*) that: "Any person who unlawfully and carnally knows any girl under the age of thirteen years shall be guilty of felony. . . . . Where upon the hearing of a charge under this section, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received, though not given upon oath, if, in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth: Provided that no person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section, and given on behalf of the prosecution, shall be corroborated by some other material evidence in support thereof implicating the accused."

(*a*) Sect. 9 enacts that: "If upon the trial of any indictment for rape, or any offence made felony by sect. 4 of this Act, the jury shall be satisfied that the defendant is guilty of an offence under sect. 3, 4, or 5 of this Act, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same, then, and in every such case, the jury may acquit the defendant of such felony, and find him guilty of such offence as aforesaid, or of an indecent assault."

anomaly that exists in it. That, however, does not affect the question whether this conviction is right, and we are all of opinion that it is. The evidence given under the 4th section was clearly admissible, even though the conviction was not of the offence charged in the indictment, but was of an offence under another section; and therefore the evidence being admissible under the one section, it was admissible to support the conviction of an indecent assault under the 9th section.

MANISTY, J.—I am of the same opinion, the statute having so provided. It is, however, certainly a strange anomaly that a man should be convicted upon evidence which had he been indicted for the offence of which he was convicted would not have been admissible.

HAWKINS, J.—I am of the same opinion. I only reserved the point because there were conflicting opinions entertained upon the subject, and I thought that it was better that the question should be settled once for all.

MATHEW and SMITH, JJ. concurred.

Conviction affirmed.

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 22, 1887; *Jan.* 21, 23, *and Feb.* 23, 1888.

(Before Lord ESHER, M.R., FRY and LOPES, L.JJ.)

THE GUARDIANS OF THE POOR OF THE HIGHWORTH AND SWINDON UNION (apps.) *v.* THE GUARDIANS OF THE POOR OF THE WESTBURY-ON-SEVERN UNION (resps.)

Poor law — Settlement by residence — Derivative settlement—Child under sixteen—Persons physically incapable — Doctrine of emancipation — Divided Parishes and Poor Law Amendment Act 1876 (39 *& 40 Vict. c.* 61), *ss.* 34, 35.

By the Divided Parishes and Poor Law Amendment Act 1876, *it is enacted that* (*sect.* 34) "*Where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise.*" (*Sect.* 35) "*No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.*"

Held, by the Court of Appeal, that, since the passing of the above Act every child on attaining the age of sixteen is for the purposes of settlement emancipated, and is rendered capable of acquiring a settlement for itself under sect. 34, *whether such child continues a member of its father's family or not, and whether mentally or physically incapable or not.*

But held also (*reversing the decision of the Queen's Bench Division*), *that the whole of the three years' residence under sect.* 34, *must be after the child has attained the age of sixteen, in order to give it a settlement of its own under that section.*

SPECIAL CASE stated pursuant to 12 & 13 Vict. c. 45, s. 11.

The case stated the following order and facts:—

By an order of justices bearing date the 18th March 1887, it was adjudged that the last legal settlement of Eliza Wait, a pauper chargeable to the Westbury-on-Severn Union, was in the parish of Wanborough, in the Highworth and Swindon (appellant) Union. The appellants have appealed against the said order on the ground that the said Eliza Wait is legally settled in the parish of Rhydgwern, in the Newport Union, in the counties of Monmouth and Glamorgan, by reason of a three years' residence there.

The following is a statement of facts agreed upon between the appellants and respondents:

1. The pauper, Eliza Wait, is the lawful daughter of Charles and Matilda Wait, and was born in the parish of Wanborough, in the said Highworth and Swindon Union, on the 27th Oct. 1861.

2. The said Charles Wait was also born in the said parish of Wanborough.

3. The said Charles Wait, his wife, and the said Eliza Wait, left the said parish of Wanborough about the year 1862, and went to reside at the said parish of Rhydgwern, in the county of Glamorgan, in the Newport Union, in the counties of Monmouth and Glamorgan.

4. The said Charles Wait died at the said parish of Rhydgwern on or about the 2nd Aug. 1868.

5. The said Matilda Wait, with her daughter Eliza Wait, continued to reside at the said parish of Rhydgwern, and in the year 1871 the widow married one George Gibbs, or Gibson, and resided with him in the said parish of Rhydgwern, and he died there in the year 1884.

6. The mother, Matilda Gibbs, or Gibson, again married her present husband, James Woodhouse, in Nov. 1885, and on the 9th Nov. 1885 went with her husband and her daughter, the said Eliza Wait, to reside at Adsett, in the parish of Westbury-on-Severn, in the Westbury-on-Severn Union, in the county of Gloucester.

7. The said Eliza Wait became chargeable to the Westbury-on-Severn Union on the 21st Sept. 1886.

8. The guardians of the Westbury-on-Severn Union, on the 18th March 1887, obtained an order for the removal of the said Eliza Wait to the Highworth and Swindon Union, on the ground that the said parish of Wanborough was the birthplace and last legal settlement of Charles Wait, the father, and Eliza Wait, the pauper in question.

9. The said Eliza Wait attained the age of sixteen years, on the 27th Oct. 1877, and resided continuously with her mother at the said parish of Rhydgwern from the year 1862 up to the 5th June 1880, without ever having received relief.

10. The said Eliza Wait was in receipt of relief from the Newport Union from the 5th June

(*a*) Reported by ADAM H. BITTLESTON, and R. A. BENNETT, Esqrs., Barristers-at-Law.

1880 up to the time of her going to Adsett, 9th Nov. 1885.

11. The said Eliza Wait resided for more than three whole years after the passing of the Act 39 & 40 Vict. c. 61, in the said parish of Rhydgwern, viz., three years and ten months from the 15th Aug. 1876, when the above Act came into operation, until she became chargeable on the 5th June 1880, being one year and two months whilst under sixteen years of age, and two years and eight months after she attained that age.

12. The said Eliza Wait is now residing and always has resided with her mother, and is now and always has been physically incapable of work.

R. Cunningham Glen for the appellants.—The pauper here has acquired a settlemant by residence in Rhydgwern, under sect. 34 of the Divided Parishes Act 1876. Residence under the circumstances of the present case would have rendered her irremovable before the Act:

Reg. v. *Inhabitants of Elvet*, 2 E. & E. 266.

The object of the statute was to put an end as far as possble to all questions of emancipation. Accordingly, it has been held under it that children even of tender years, and whether legitimate or illegitimate, may acquire a settlement of their own by residence:

Wolstanton Union v. *Northwich Union*, 46 L. T. Rep. N. S. 528;
Holborn Union v. *Chertsey Union*, 52 L. T. Rep. N. S. 102; 14 Q. B. Div. 289;
St. Pancras Parish v. *Norwich Incorporation*, 56 L. T. Rep. N. S. 111; 18 Q. B. Div. 521;
Reg. v. *Leeds Union*, 4 Q. B. Div. 323.

The two periods, before and after attaining the age of sixteen, must be taken to coalesce so as to form one period of residence, in the same way as residence partly as wife and partly as widow:

Reg. v. *The Inhabitants of Glossop*, 17 L. J. 171, M. C.

Fraser Macleod (with him *H. D. Greene*, Q. C.) for the respondents.—There is no such residence here as would before the Divided Parishes Act have conferred status of irremovability. An unemancipated child never could acquire irremovability:

Reg. v. *St. Olave's Union*, 29 L. T. Rep. N. S. 426; L. Rep. 9 Q. B. 38;
Salford Union v. *Manchester*, 48 L. T. Rep. N. S. 119; 10 Q. B. Div. 172.

The pauper is unemancipated. She has always resided with her mother, and she is incapable of getting her living. This finding, it is submitted, places her for the present purpose in the position of an idiot, which never can become emancipated:

Rex v. *The Inhabitants of Much Cowarne*, 2 B. & Ad. 861.

In *Salford Union* v. *Manchester* (*ubi sup.*) it is expressly laid down that a legitimate child unable to maintain itself, whether from imbecility of mind or infirmity of body, gains no independent status by residence merely as a member of its father's family. The mother having married again, there is here no question of widowed mother, and sect. 35 expressly forbids the mother's derivative settlement to be gone into. It is therefore necessary to go back to the birth settlement.

Glen in reply.—*Salford Union* v. *Manchester* was used to support the same argument as the above in *Holborn Union* v. *Chertsey Union*, though the report does not show it. The expressions referred to in the former case are inconsistent with the judgment in the *Chertsey* case. [He was stopped by the Court.]

STEPHEN, J.—What we have to look to in this case is the position of the pauper in Sept. 1886, the time when she became chargeable to the respondent union. Had she then acquired any settlement of her own? We consider that she had. She had resided at Rhydgwern for many years after her father's death and her mother's second marriage, and for more than three years subsequently to the passing of the Divided Parishes Act 1876. We consider that the effect of the statute under those circumstances is that she acquires a settlement by residence in Rhydgwern. It is said that the statute does not apply to unemancipated children. It is not stated in the case that she was unemancipated, but it says, "the said Eliza Wait is now residing and always has resided with her mother, and is now and always has been physically incapable of work." There is no statement there that she will always remain in that condition; but, however that may be, I do not think at all that mere physical incapacity for work is a proof that she was unemancipated, or that it prevents her acquiring a settlement under the statute. It appears to me that the pauper has acquired status of irremovability although she resided with her mother, and that she is therefore settled in Rhydgwern.

CHARLES, J.—I am of the same opinion. Under the circumstances of this case the pauper Eliza Wait certainly in point of time acquired status of irremovability. The question has been raised whether she is a person who could do so. It seems to me that, even if she were unemancipated, *Reg.* v. *Elvet* is decisive of the point that she is a person capable of acquiring status of irremovability. That being so, and she having resided for the period of three years in the parish, sect. 34 of the Divided Parishes Act fixes a settlement for her in Rhydgwern.

The Guardians of the Westbury Union appealed.

H. D. Greene, Q.C. and *Fraser Macleod*, for the Guardians of the Westbury Union, in support of the appeal.

Lumley Smith, Q.C. and *R. Cunningham Glen*, for the Guardians of the Highworth Union, *contrd.* The following cases were cited in addition to those cited in the court below:

Reg. v. *St. Anne, Blackfriars*, 22 L. J. 137, M. C.;
Reg. v. *Overseers of St. Giles-in-the-Fields*, 30 L. J. 12, M. C.;
Reg. v. *Inhabitants of St. Leonard, Shoreditch*, 6 B. & T. 784;
Overseers of Easton v. *Overseers of St. Mary, Marlborough*, 2 Q. B. Div. 128;
Reg. v. *Overseers of Manchester*, 45 L. T. Rep. 679; 8 Q. B. Div. 50;
Reg. v. *Ireland*, 17 L. T. Rep. N. S. 466; 3 Q. B. Div. 130;
Reg. v. *Inhabitants of East Stonehouse*, 24 L. J. 121, M. C.

Cur. adv. vult.

Feb. 23.—The judgment of the court was delivered by

LOPES, L.J. — This case raises important questions under the Divided Parishes Act 1876.

To make our judgment intelligible it is necessary to state some of the material facts and dates. The order of removal was made on the 18th March 1887. The pauper, Eliza Wait, is the lawful daughter of Charles and Matilda Wait, and was born on the 27th Oct. 1861, in the parish of Wanborough, in the appellant union. Charles Wait was born in the same parish. In 1862 the father and mother, with the pauper, left Wainborough, and went to reside in the parish of Rhydgwern, in the county of Glamorgan, in the Newport Union. The father died at Rhydgwern about the 2nd Aug. 1868. The mother and the pauper continued to reside at Rhydgwern, and in 1871 the widow married George Gibbs, and they continued to reside with him until he died in 1884. The mother married her present husband, James Woodman, in Nov. 1885, and they, with the pauper, resided in Rhydgwern until the 9th Nov. 1885, when they went to reside at Adsett, in the parish of Westbury-on-Severn, in the Westbury-on-Severn Union, in the county of Gloucester, the respondent union. On the 21st Sept. 1886 the pauper became chargeable to the respondent union, whereupon the order of removal was made, whereby it was adjudged that the last legal settlement of Eliza Wait was in the parish of Wanborough, in the appellant union. On the 27th Oct. 1877, the pauper attained the age of sixteen. She was in receipt of relief from the Newport Union from the 5th June 1880, up to the time of her going to Adsett on the 9th Nov. 1885. She is now residing with, and always has resided with, her mother, and now is, and always has been, physically incapable of work. It is to be assumed that the pauper, being physically incapacitated, would have been regarded as unemancipated before the Divided Parishes Act 1876. It is also a fact that she resided with her mother in Rhydgwern from 1862 to the 5th June 1880, without having received relief. The Divisional Court decided in favour of the appellants, holding that the pauper had acquired a settlement in Rhydgwern. Against this decision the respondents appeal. In our opinion the case is governed by the Divided Parishes Act 1876, ss. 34, 35. It will be necessary, therefore, carefully to consider these two sections. Sect. 35 abolishes all derivative settlement except the derivative settlement that a wife may take from her husband, and a child under sixteen may take from its father, if alive, or from his widow after his death, if she has acquired a settlement in her own right between the time of the death of the father and the child's attaining sixteen. Previously to the passing of this statute great expenses were often incurred by parishes in tracing remote derivative settlements and difficult steps in family pedigrees; and it was with a view to obviate this mischief that the 35th section was introduced into the Act, which, at a stroke, prohibits any question of a derivative settlement being entered upon beyond the two derivative settlements expressly mentioned: See *Reg.* v. *Guardians of Bridgnorth* (48 L. T. Rep. 600; 11 Q. B. Div. 314). But the provision with regard to the child is most important. It is only while the child is under sixteen that it is to be capable of taking the derivative settlement of the father or widowed mother; any settlement acquired by the parents after the child attains sixteen is not to be communicated to the child, but the child is to retain the derivative settlement it had when it attained sixteen until it acquires another. The language in the latter part of sect. 35 is clear and distinct. It declares that every child under the age of sixteen, "shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another." The Legislature hereby positively enacts what settlement a child shall take and hold up to sixteen, and until it acquires another. The settlement of every child before sixteen and until it acquires another is definitely fixed and determined by the latter part of sect. 35. There is no qualification or limitation to the word "child," and we think that the doctrine of emancipation, as it existed before 1876, can no longer prevail, and that every child on attaining the age of sixteen, whether such child continues a member of its father's family or not, and whether mentally or physically incapable or not, is for the purposes of settlement emancipated, and is rendered capable of acquiring a settlement for itself. Adopting this view of sect. 35, we have now to consider what the position of the pauper was on the 27th Oct. 1877, when she attained sixteen. The father died in 1868. Up to that time she took his settlement, which was in Wanborough, in the appellant union, which settlement she would retain up to sixteen, unless her mother in the interval, whilst a widow, acquired a settlement in her own right, when she would take that settlement up to sixteen and retain it until she acquired another. The mother never acquired a settlement in her own right. She was twice married, and would on each occasion take her husband's settlement. Under the law before the Divided Parishes Act the mother's settlement so acquired would not have been communicated to the pauper, and under the 35th section of the statute the same result, in our opinion, follows, because on the second marriage of the pauper's mother she ceased to be a widowed mother, and consequently her settlement, by such second marriage would not be communicated to her child. Therefore, under the provisions contained in sect. 35 the pauper would retain her father's settlement in Wanborough until she acquired another. Has she acquired another? It is said that she has acquired a settlement in Rhydgwern by three years' residence under sect. 34 of the Divided Parishes Act. To have acquired this settlement she must have resided in Rhydgwern for the term of three years, in such a manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render her irremovable. But this must mean a residence after she attained sixteen, because up to that time she took her father's settlement and retained it until she acquired another. The pauper, in fact, has not resided in Rhydgwern so as to gain a settlement there since she attained sixteen, because attaining sixteen on the 27th Oct. 1877, she was in receipt of relief on the 5th June 1880, and continued in receipt of relief up to the 9th Nov. 1885, when she went to Adsett, where, on the 21st Sept. 1886, she became chargeable. We are of opinion, therefore, that the pauper has not acquired a settlement in Rhydgwern, but is settled in Wanborough, in the

appellant union, the place of her father's last legal settlement. The decision of the court below must be reversed, and this appeal must be allowed.

Appeal allowed.

Solicitors for the Guardians of the Westbury Union, *Wilkins, Blyth,* and *Dutton.*

Solicitors for the Guardians of the Highworth Union, *Few* and *Co.,* for *J. E. G. Bradford,* Swindon.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

April 25, *May* 5 *and* 9, 1888.

(Before STIRLING, J.)

Re THE BRITON MEDICAL AND GENERAL LIFE ASSOCIATION LIMITED. (*a*)

Jurisdiction — Company — Summary and list of members—Statement as to liabilities and assets —Annual return to Registrar of Joint Stock Companies—Police magistrate—Power to inquire into accuracy — Prohibition — Companies Act 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 25, 26, 27, 35, 44, 65.

A company does not comply with sect. 26 *of the Companies Act* 1862, *unless the summary of the capital of the company and the list of members returned by the company annually to the Registrar of Joint Stock Companies, as required by that section, are substantially in accordance with fact; and a magistrate, on a summons under sect.* 27 *of the Act to recover a penalty against the company for not having forwarded a summary and list of members as required by sect.* 26, *has jurisdiction to inquire into the truth or falsehood of the statements contained in a summary and list which had been forwarded to the registrar, although such documents corresponded with the company's register, and on the face of them purported to be the summary and list of members required by the Act, and on the face of them satisfied the requirements of the Act.*

ON the 17th April 1888 two summonses were issued from the Bow-street Police-court requiring the Briton Medical and General Life Association to appear and answer two separate informations laid by Mr. Bernard Boaler; one of the informations alleging that the company had made default, under sects. 26 and 27 of the Companies Act 1862, in forwarding to the Registrar of Joint Stock Companies a copy of the summary of the capital of the company, the number of the shares into which it was divided and certain other particulars, and the list of all persons who were members of the company as required by sect. 26 of the Act. The other information alleged that the company had made default in making and publishing the statement as to the capital, liabilities, and assets of the company required by sect. 44 of the Act. The summonses came on to be heard on the 24th April, and it was alleged in the police-court that, though the returns forwarded to the registrar corresponded with the company's register, the register was itself incorrect. The counsel who appeared for the company took the preliminary objection that, as a list of members and summary had been duly made and forwarded under sect. 26, and a statement had been made and published as required by sect. 44, which list, summary, and statement were in accordance with the existing register, and such register was conclusive until rectification, the magistrate had no jurisdiction to enter into the question whether the summary, list, and statement were correct or not.

The magistrate was of opinion that he had jurisdiction to hear the summonses, and proposed to do so, but on the application of the counsel for the company he adjourned the further hearing, so as to enable the company to apply to the High Court for a writ of prohibition.

April 25.—*Graham Hastings,* Q.C. and *Courthope Munroe* moved *ex parte* for a writ of prohibition to restrain the magistrate from proceeding further with the hearing of the summonses. They contended that the court had jurisdiction to grant the writ, and cited

Jones v. *Slee,* 55 L. T. Rep. N. S. 129; 32 Ch. Div. 585; and
Hedley v. *Bates,* 42 L. T. Rep. N. S. 41; 13 Ch. Div. 498.

STIRLING, J. held that he had jurisdiction, and that as the question involved was one as to the capital of the company, and the court had already dealt with questions concerning that on previous occasions in chambers, it was a proper case for exercising the jurisdiction. He granted a rule *nisi* for a writ of prohibition, following the form adopted by Bacon, V.C. in *Jones* v. *Slee.*

May 5.—*Alexander Young,* for Mr. Boaler, showed cause against the rule.—There is no proceeding before the court in which it has power to make any order. Under R. S. C. 1883, Order V., r. 9, and the Central Office Practice Rules, r. 18 (Annual Practice 1887-8, pp. 134, 1096) with certain exceptions, every cause or matter which shall be commenced in the Chancery Division must be assigned to and marked with the name of one of the judges of that division in the manner provided by that rule. This matter is not assigned under a writ of summons, notice of motion, originating summons, or petition. A court of equity has no jurisdiction to restrain criminal proceedings for the recovery of a penalty imposed by an Act of Parliament for the breach of regulations to be observed under the Act:

Saull v. *Browne,* 31 L. T. Rep. N. S. 493; L. Rep. 10 Ch. App. 64;
Glen v. *Corporation of Preston,* 6 Ch. Div. 463.

Under the Crown Office Rules of 1886, r. 81, an application for a writ of prohibition on the Crown side should be made by motion to a divisional court. A judge of the Chancery Division is not a divisional court (Appellate Jurisdiction Act 1876, sect. 17).

Graham Hastings, Q.C.—In anticipation of this objection we have obtained from the Lord Chancellor, under R. S. C. 1883, Order XLIX., r. 4, a direction that this matter should be heard and disposed of by your Lordship, and I understand that your Lordship has consented to do so.

Alexander Young.—That was on an *ex parte* application, and not made in any cause or matter.

STIRLING, J.—If the objection is pressed, I shall send the case to a divisional court.

(*a*) Reported by A. J. HALL, Esq., Barrister-at-Law.

Alexander Young.—I waive the objection. As to the merits, the case of *Hedley* v. *Bates*, relied on on the *ex parte* application, was an action for an injunction in a civil matter, and not a prohibition against a magistrate. *Jones* v. *Slee*, too, was an action, and the proceedings prohibited were civil. Here there is no action. Those cases show that there is no case for prohibition unless the inferior court is exceeding its jurisdiction. That is not the case here, and I submit that the magistrate has not exceeded his jurisdiction. The object of these summonses in the police-court was to recover penalties under sects. 27 and 44 of the Companies Act 1862. Under sect. 65 of that Act all offences made punishable by the Act by any penalty may be prosecuted summarily before two or more justices, as to England in manner directed by the Act 11 & 12 Vict. c. 43. Under sect. 33 of that Act any one of the metropolitan police magistrates can exercise any jurisdiction given by the Act to one or more justices of the peace. A magistrate has power to examine into the correctness of a list and summary, although they may be in accordance with the register of the company:

The Grosvenor Bank and Discount Company v. *Boaler*, 49 J. P. 774.

Graham Hastings, Q.C. and *Courthope Munroe* for the company.—The magistrate has no jurisdiction to decide whether the return made is true or not, but only whether it complies with the Act. The documents forwarded to the registrar purported to be the documents required by the Act, and on the face of them they satisfied the requirements of the Act. The summary and list of members are correct according to the company's register, and the magistrate cannot go behind that. The company's register has been kept as required by sect. 25 of the Companies Act 1862, and the matters by that section required to be entered in it have been duly entered, and under sect. 37 of the Act the register of members is *primâ facie* evidence of any matters by the Act directed or authorised to be inserted therein. The magistrate, if he were to go behind this, would practically be rectifying the register, and usurping functions by sect. 35 of the Act reserved to the judges of the Superior Courts. It is not proper for a magistrate, on such an application as these summonses, to decide whether the shares were properly issued, or questions of that kind A prohibition is the proper remedy where a court of inferior jurisdiction is exceeding its jurisdiction. A prohibition, in former days, lay to the Consistory Court if it proceeded to hear exceptions to an inventory exhibited by an executor under 21 Hen. 8, c. 5:

Henderson v. *French*, 5 M. & S. 406;
Griffiths v. *Anthony*, Ad. & E. 623.

Similarly, a prohibition was granted against a spiritual court which inquired into the propriety of churchwardens' accounts, it having only power to compel them to deliver their accounts:

Leman v. *Goulty*, 3 Durn. & E. T. R. 3.

When there is in an Act a special provision for the settlement of a dispute, a magistrate cannot decide the dispute upon a summons for penalties for breach of the provisions of the Act:

Dixon v. *Cockett*, 25 L. T. Rep. N. S. 826.

Where there is an omission or an improper entry in a register, a remedy is provided by sect. 35 of the Act, and a magistrate cannot question the accuracy of the register upon an application for penalties under sects. 27 and 44:

Reg. v. *Lindsay*, 4 Times L. Rep. 464.

Under sect. 25 of the Act, a company acting in contravention of its provisions as to the keeping of its register incurs penalties for so doing, whereas the penalties under sect. 27 are only for default in forwarding the list and summary, and impliedly for that only, as that is all that is mentioned. The proper mode of proceeding to obtain the revission of the decision of a court of inferior jurisdiction; when it has no jurisdiction to deal with the matter before it, is by way of prohibition, and not by way of appeal:

Full v. *Hutchins*, 2 Cowp. 422;
Brymer v. *Atkins*, 1 H. Bl. 164;
Gould v. *Gapper*, 5 East, 345;
Burder v. *Veley*, 12 Ad. & E. 233;
Veley v. *Burder*, Ibid. 265;
The Denaby Main Colliery Company v. *M. S. and L. Railway Company*, 3 Nev. & Mac. Ry. and Can. Traffic Cas. 426;
French v. *Trask*, 10 East, 348;
Byerley v. *Windus*, 5 B. & Cr. 1;
Thompson v. *Ingham*, 14 Q. B. 710;
Skaitt on Informations, Mandamus, and Prohibition, pp. 436, 456.

In the cases reported, no list of members or summary had been forwarded to the registrar:

Gibson v. *Barton*, 32 L. T. Rep. N. S. 396; L. Rep. 10 Q. B. 329;
Edmonds v. *Foster*, 33 L. T. Rep. N. S. 690.

An act done in supposed exercise of a *bonâ fide* right is not criminal:

Reg. v. *Young and White*, 52 L. J. N. S. 55, M. C.

STIRLING, J.—I will not trouble you, Mr. Young, to reply. I will put my judgment in writing.

May 9.—STIRLING, J.—In this case I have to decide whether an order *nisi* for prohibition ought to be made absolute. The facts are as follows: [His Lordship stated the facts, and continued:] It was contended before me that the magistrate was wrong in overruling the objection upon the following grounds: First, it was said that, inasmuch as the company had forwarded to the Registrar of Joint Stock Companies documents which upon the face of them purported to be the summary and list of members required by the Act, and which on the face of them satisfied the requirements of the Act, the magistrate had no jurisdiction to inquire further, and in particular was not entitled to investigate whether the alleged summary was true or false. If that objection be well founded, it follows that any company must be held to have complied with the provisions of the 26th section if it has forwarded to the registrar a few sheets of paper filled up in accordance with, and so as on the face of them to satisfy, the requirements of the Act, even although every statement should be an absolute fiction, and could be proved to be so simply by comparison with the books of the company. I am of opinion that this is not the true construction of the Act, and that a company does not comply with the provisions of the 26th section unless the list of members and summary are substantially in accordance with fact, and consequently that the magistrate had jurisdiction to inquire into the truth or falsehood of the state-

ments contained in the summary. In fact, this point appears to have been already decided in a case in the Queen's Bench Division, of the *Grosvenor Bank and Discount Company* v. *Boaler*, with the papers in which I have been furnished, and of which I have found a report at p. 774 of vol. 49 of the Justice of the Peace. It may be desirable to refer to the case which was stated by the police magistrate on that occasion for the opinion of the Court of Queen's Bench. It is there stated that the appellant company were summoned before Sir James Ingham at Bow-street on eight summonses, which charged them in these terms: Then it sets out the summonses, and they are precisely in fact almost identical in words, with the first of the summonses in this case, namely, that founded on the 26th section of the Act of Parliament. The case was heard and decided on the first summons, and then, after dealing with the fact that several years had expired, and the objection that was taken, the magistrate goes on to say: "It was proved before me that the Grosvenor Bank and Discount Company was duly registered at the Registry of Joint Stock Companies on the 1st Nov. 1878," and then there is a certain resolution for winding-up, and then he sets out in full, or almost in full, an agreement between a former company and the company in question under which certain shares were to be allotted with 1*l.* paid up. Then he states: "The Grosvenor Bank and Discount Company on the 19th Oct. 1881 filed at the Registry of Joint Stock Companies a return in the following form," and there the form complies on the face of it with the terms of sect. 26. Among other statements it contains this: "There has been paid up on each share, 10*s.*; total amount of calls paid, 4481*l.* 5*s.*" Now, upon investigation it appeared that included in that 4481*l.* was the 1*l.* which by the agreement which the magistrate sets out had been agreed to be paid up in full, and the magistrate held that there was a representation to the public that 4481*l.* in cash had come into the coffers of the company from calls, whereas in truth a call of 10*s.* on 635 shares only had been made, and all the company had received was 317*l.* 10*s.* Then he says: "I was of opinion that the summary was misleading, inasmuch as it must be understood to represent that the Grosvenor Bank and Discount Company had made a call of 10*s.* on each of the shares, and had received 4481*l.* 5*s.*; whereas in fact it had made a call of 10*s.* per share on 635 shares only, and received on such call not more than 317*l.* 10*s.*" He then points out another default in the summary which I need not deal with, and he goes on: "I am of opinion the misrepresentation was not fraudulent. The question for the consideration of the court is whether the filing of the summary was a sufficient compliance with the Act." He inflicted a penalty, being of opinion that it was not; and the court by the order I have before me affirmed that decision, and therefore held that the summary being false and misleading, though on the face of it complying with the requirements of the section, was not a compliance with the Act. Secondly, it was urged that in this case the summary is in accordance with the register kept by the company under sect. 25 of the Act; that this register on the face of it satisfies the requirements of this section, and is under sect. 37 *primâ facie* evidence of any matters directed or authorised to be inserted therein, and that the magistrate could not for the purposes of the application before him inquire into the accuracy of the register without usurping functions which by sect. 35 of the Act are reserved for Her Majesty's Superior Courts, or without adjudicating upon questions which ought not to be determined or even raised in the absence of parties materially interested—viz., the shareholders on the register. With much of the argument which was addressed to me in support of this contention I entirely agree. Undoubtedly questions of the greatest difficulty and nicety have arisen as to the title to shares and the right to be on the register, and have sometimes formed the subject of conflicting decisions, and have only been settled by the decision of the ultimate Court of Appeal. The Legislature has, by sect. 35 of the Act, conferred on the Superior Courts a summary jurisdiction with reference to these questions, or some of them, but there have been cases in which the courts have thought the questions were of such a nature that they could not be properly determined in a proceeding under that section, but must form the subject of an action in which all parties interested might be properly represented. I cannot think that it was ever intended that such questions should be summarily disposed of by two justices of the peace or a police magistrate in the absence of the parties interested; and if, in a proceeding for penalties under sect. 27, any such inquiry were attempted to be entered upon, it would, in my judgment, be the duty of the magistrate to say that, as he could not properly determine it, he must accept the register as practically conclusive upon it. Whether, if the magistrate took a different view, the remedy of the parties aggrieved would be in prohibition or by way of appeal, I think it unnecessary to consider; for I cannot find in this case that the magistrate has decided to enter upon the consideration of any such question. All that he has done is to overrule a preliminary objection, and for aught that I can see, he may well be of opinion that, among the matters of complaint brought before him, there are some with which he can deal without touching on any question which he cannot finally determine. All that I consider him to have decided is, that he is not precluded from hearing evidence on the complaint brought before him merely by the circumstance that the summary is in accordance with the register; and in my opinion he is right in so holding. In the first place, although, as I have already said, there may be questions as to which the magistrate cannot do otherwise than accept the register as practically conclusive, I am far from thinking that it would be correct to lay down that in no case can the magistrate inquire into the accuracy of the entries contained in it. The register is by the Act merely made *primâ facie* evidence of certain matters, and if it were shown, for example, that the entries or some of them were absolutely fictitious, that persons registered as shareholders were non-existent, and that the sums entered as paid up on the shares had never been paid up or agreed to be paid, I conceive that the magistrate would be justified in disregarding such fictitious entries, and holding that a summary based on them was false and misleading. I put this merely by way of example, and am not to be

understood as in any way suggesting that the books of this company contain any fictitious entries whatever. But, besides this, evidence, either documentary or oral, may be forthcoming, which may throw light on the meaning both of the summary and the entries in the register. Thus (to illustrate my meaning by what took place in the case of the Grosvenor Bank), if entries had been made on the register in exact accordance with the statement in the summary, I cannot see that the evidence on which the magistrate relied would not have been admissible, or the conclusion at which he arrived in the slightest degree affected. For these reasons, I am of opinion that the magistrate has not exceeded his jurisdiction. The order *nisi* must therefore be discharged, and I think the costs must be paid by the company.

Solicitor for Mr. Boaler, *Alfred Howard.*

Solicitors for the company, *Rowcliffes, Rawle, and Co.*

QUEEN'S BENCH DIVISION.

Monday, April 23, 1888.

(Before FIELD and WILLS, JJ.)

REG. *v.* INGHAM. (*a*)

Inland Revenue—Metropolitan police magistrate—Summary jurisdiction of—Excise penalty—"Recovery of any penalty imposed by any act or acts relating to the revenue of excise"—Construction of—Customs and Inland Revenue Act 1877—*Mandamus*—7 *&* 8 *Geo.* 4, *c.* 53, *ss.* 1, 3, 57, 65—15 *&* 16 *Vict. c.* 61, *s.* 1—50 *&* 51 *Vict. c.* 15, *s.* 4.

The proper construction of the words "for the recovery of any penalty imposed by any Act or Acts relating to the revenue of excise . . . an information thereupon may be exhibited, heard, adjudged, and determined . . . before any metropolitan police magistrate," in sect. 1 *of* 15 *&* 16 *Vict. c.* 61 (*which conferred upon metropolitan police magistrates concurrent summary jurisdiction with the Commissioners of Inland Revenue in excise offences arising within the limits of the chief office in London*), *does not limit the jurisdiction of a metropolitan police magistrate to the recovery of penalties imposed by previous Acts of Parliament but extends to the recovery of penalties to be imposed by revenue Acts to be passed in the future; therefore a metropolitan police magistrate is bound to hear and determine the matter of an information for the recovery of an excise penalty imposed by an Act passed subsequently to the Act of* 15 *&* 16 *Vict. c.* 61, *though it does not in specific words confer upon him summary jurisdiction in respect of the recovery of such excise penalty.*

THIS was an application for a rule *nisi* for a *mandamus* calling on Sir James Ingham, one of the metropolitan police magistrates, at Bow-street, to show cause why he should not hear and determine an information for the recovery of an excise penalty under 50 & 51 Vict. c. 15, s. 4.

The Commissioners of Inland Revenue laid an information against a tobacco dealer named Adams for an excise penalty for an alleged infraction of the above section.

When the matter came on for hearing the objection was taken that the police magistrate had no jurisdiction to entertain the application, as the penalty sought to be imposed was not one which had been imposed at the time of the passing of the Act conferring summary jurisdiction on the metropolitan police magistrates in revenue cases, and the Customs and Inland Revenue Act 1887 did not specifically provide for the recovery of the penalty sought to be imposed.

The police magistrate upheld the objection, and refused to hear the application.

The Commissioners of Inland Revenue obtained a rule *nisi* for a *mandamus* to the police magistrate to hear and determine the application.

By 7 & 8 Geo. 4, c. 53, s. 2:

Any four or more of the Commissioners of Excise shall constitute a Board of Commissioners of Excise for the United Kingdom for the collection and management of the whole of the revenue of excise arising in and throughout the whole of the United Kingdom of Great Britain and Ireland, and the islands and territories thereunto respectively belonging, and of all the duties imposed or to be imposed by any Act or Acts of Parliament.

By sect. 3:

This Act, and the several provisions thereof respectively, shall be deemed and taken to apply to all Acts of Parliament relating to the revenue of excise which shall hereafter be made, except in any of the above cases where the same shall be otherwise specially directed or provided.

By sect. 57:

All penalties imposed by this Act or any other Act or Acts of Parliament relating to the revenue of excise and incurred for or by reason of any offence or offences against this Act, or the said other Acts or any of them, may be sued for and recovered, and all goods, commodities, and chattels seized as forfeited under or by virtue of this Act, or any other Act or Acts of Parliament relating to the revenue of excise, may be returned for condemnation and condemned in Her Majesty's Courts of Exchequer at Westminster, Edinburgh, or Dublin respectively, as the cause of such prosecution may have arisen in England, Scotland, or Ireland; Provided always that the proceedings for the recovery of any such penalty or penalties, or for the condemnation of any such goods, commodities, or chattels, shall be commenced respectively within three years next after the commission of the offence or of offences by which such penalty or penalties shall have been incurred, or after the seizure of such goods, commodities, or chattels shall have been made.

By sect. 65:

For the recovery of any penalty imposed by this Act or any other Act or Acts of Parliament relating to the revenue of excise, and incurred for or by reason of any offence committed against this Act or the said other Acts or any of them or for the condemnation of any goods, commodities, or chattels seized as forfeited under or by virtue of this Act, or the said other Acts or any of them where the offence shall have been committed, or the person or persons committing the same shall be found, or where the goods, commodities, or chattels shall have been seized as aforesaid within the limits of the chief office of Excise in London, an information thereupon may be exhibited before, and be heard, adjudged, and determined by any three or more of the Commissioners of Excise, and where the offence shall have been committed, or the person or persons committing the same shall be found, or where the goods, commodities, or chattels shall have been seized as aforesaid, in any part of the United Kingdom out of the limits of the said chief office, the information thereupon may be exhibited before any one or more of Her Majesty's justices of the peace for the county, shire, division, city, town, or place wherein the offence shall have been committed, or the person or persons committing the same shall be found, or where the goods, commodities, or chattels shall have been seized as aforesaid; and such informa-

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

tion shall and may be heard, adjudged, and determined by any two or more of Her Majesty's justices of the peace for the said county, shire, division, city, town, or place; and such Commissioner of Excise, and any two or more of such justices of the peace respectively shall, and they are hereby respectively authorised and required, upon any such information having been so exhibited as aforesaid, and upon the appearance and pleading of the person or persons against whom such information shall have been exhibited, or who shall claim any goods, commodities, or chattels in such information alleged to have been forfeited, or in default of such appearance and pleading upon proof of the service of such summons of such person or persons as hereinafter mentioned, to proceed to the examination of the fact or facts in such information alleged, and to give judgment, as well for any such penalty or penalties which upon the due examination of one or more credible witness or witnesses upon oath or upon the voluntary confession of the party accused, shall be found to have been incurred, as for the condemnation of any goods, commodities, or chattels seized as aforesaid, which upon such examination or confession shall be found to be forfeited, or respectively as the case may require: Provided always that where any such information as aforesaid shall be exhibited before any justice or justices of any county or shire in England, Scotland, or Ireland, respectively, in which there are several and distinct commissioners of the peace, no information thereupon exhibited before any such justice or justices, nor any judgment thereupon given by such justices, nor any warrant or warrants thereupon granted for the due execution thereof, shall be subject or liable to any objection whatsoever by reason of any offence alleged in such information having been committed, or the person or persons committing the same having been found, or the goods, commodities, or chattels having been seized as aforesaid in any division, city, town, or place of such county or shire, having local jurisdiction, whether such city, town, or place be or not be a county in or of itself; anything in this Act or any other Act or Acts of Parliament to the contrary thereof in anywise notwithstanding.

By 15 & 16 Vict. c. 61, s. 1:

For the recovery of any penalty imposed by any Act or Acts relating to the revenue of excise, and incurred for or by reason of any offence committed against any such Act or Acts, or for the condemnation of any goods, commodities, or chattels seized as forfeited under or by virtue of any such Act or Acts, where the offence shall have been committed, or the person or persons committing the same shall be found, or where the goods, commodities, or chattels shall have been seized as aforesaid within the limits of the chief office of Inland Revenue in London, an information may thereupon be exhibited, heard, adjudged, and determined, either before any three or more of the said Commissioners of Inland Revenue, or before any metropolitan police magistrate sitting at any metropolitan police court; and such commissioners and magistrate, respectively, shall, and they are hereby required, upon any such information having been so exhibited as aforesaid, to proceed to hear and determine the same and give judgment thereon.

By 50 & 51 Vict. c. 15, s. 4:

If any manufacturer of tobacco shall have in his custody or possession any tobacco (except tobacco which must undergo some process of treatment or manufacture before it is fit for sale), or if any dealer in or retailer of tobacco shall have in his custody or possession any tobacco, and such tobacco shall in either case, on being dried at a temperature of 212 degrees as denoted by Fahrenheit's thermometer, be decreased in weight by more than 35 per centum, he shall incur an excise penalty of 50*l*., and the tobacco shall be forfeited.

Mead in support of the rule.—The rule ought to be made absolute, as the learned police magistrate had no jurisdiction to entertain the information in respect of the alleged revenue offence. The subject-matter of the information was not an excise penalty that had been imposed at the time of the passing of the Act, which conferred on the metropolitan police magistrates summary jurisdiction in revenue offences; nor does the Customs and Inland Revenue Act of 1887, s. 4, under which the information is laid, confer in express words such jurisdiction. Summary jurisdiction is a creature of statute, and before justices can act summarily, the jurisdiction to do so must be conferred upon them by some Act of Parliament. The Act of 7 & 8 Geo. 4, c. 53, which constituted the Board of Commissioners of Excise, gave them power over duties to be imposed by future Acts, and its provisions were to extend to future Acts relating to the revenue of excise. Sect. 65 of that Act confers jurisdiction in revenue offences arising out of the limits of the chief office in London to justices of the peace, and it is admitted that such would have jurisdiction in revenue offences created by subsequent statutes. But the present matter arises within the limits of the chief office. Then came the Act of 15 & 16 Vict. c. 61, which conferred summary jurisdiction on the metropolitan police magistrates; that statute in sect. 1 gave them jurisdiction to entertain an information "for the recovery of any penalty imposed by any Act of Parliament relating to the revenue of excise." Those words limit their jurisdiction to penalties imposed by Acts anterior to 1862, and so exclude it from applying to subsequent penalties. The question here really turns on the meaning of the words "imposed by any Act or Acts;" if they are to be construed as equivalent to "to be imposed by any Act or Acts" the present contention of course fails; but there is a significant absence in this later Act of such words as are to be found in the earlier statute. It is admitted that this particular penalty can be sued for, either in the Queen's Bench Division, as representing the former Court of Exchequer under sect. 57 of 7 & 8 Geo. 4, c. 53, or before the Commissioners of Inland Revenue, who have absorbed the duties of the Commissioners of Excise. This court cannot, however, read in the words "to be imposed." This omission to give metropolitan magistrates jurisdiction over penalties to be created in the future may have been the result of deliberation, so as to prevent fresh work being put at frequent intervals upon those magistrates whose time was fully occupied in their ordinary magisterial duties, because there was another tribunal within the metropolitan area which could entertain the application. He cited Maxwell on the Interpretation of Statutes, p. 5.

Sir *E. Clarke*, Q.C. (S.-G.), showing cause against the rule, was not called upon to argue.

FIELD, J.—This is an order for a rule to show cause why the magistrate should not proceed to hear and determine the matter of an information exhibited by order of the Commissioners of Inland Revenue against one Butler Adams, for the recovery of an excise penalty under the statute 50 & 51 Vict. c. 15. The statute of 50 & 51 Vict. c. 15 creates a new offence and a new penalty, and that being so, the objection taken before the learned magistrate, and upheld by him, is that he has no jurisdiction to hear and determine the matter. Now, it is said on the other hand that he has jurisdiction, and that that jurisdiction is given him in the Act 15 & 16 Vict. c. 61, which is an Act amending previous Acts, which Acts related to summary proceedings for penalties and forfeitures under the Acts relating to the excise. Now, the creation of the offence also provides for a consequence of

the offence, and that is, that he shall incur an excise penalty of 50*l*. It is clear, therefore, that the Legislature thoroughly understood in using that language that there was a known thing existing as an excise penalty, and to my mind there is no doubt about that. Inasmuch as in this Act no remedy is provided, there must be in some Act of Parliament some remedy of that sort, and that remedy is given under 15 & 16 Vict. That Act first of all recites the Act 7 & 8 Geo. 4, by which certain excise penalties may be recovered, or offences punished or determined by any of the three or more Commissioners of Inland Revenue, when the offence was committed within the limits of the chief office, but when the offence was committed beyond the limits of the chief office, then two justices of the peace were to adjudge and determine whether the penalties were incurred. Then this Act says that it is desirable and expedient that the justices of the peace should have and exercise concurrent jurisdiction with the Commissioners of Inland Revenue in relation to any such offence, person, matter, or thing as aforesaid respectively committed, found, or seized within the limits of the chief office of Inland Revenue. It being the intention of the Legislature to give the magistrates concurrent jurisdiction with the three commissioners, this is an enactment for the recovery of any penalty imposed by any Act or Acts relating to the revenue of excise. Then, if within the limits of the chief office, which is analogous to within the limits of any of Her Majesty's justices of the peace, a justice of the peace being a metropolitan magistrate, within the limits, and two justices or otherwise in quarter sessions without the limits, the Crown says that gives the learned magistrate jurisdiction to hear and determine this matter. Now, first of all, what is the enactment for? It is for the recovery of any penalty imposed by any Act of Parliament, and the penalty itself must be incurred for an offence committed against someone. Mr. Mead admitted that, with regard to future offences in respect of a past Act, the magistrate had jurisdiction. But he further contended that the only jurisdiction given is that in respect of penalties imposed by any previous Act before this particular Act. Well, of course, if those words had been clear, if it had been for "the recovery of any penalty imposed by any Act heretofore passed relating to revenue of excise," we must have given effect to that argument. But the word "imposed" is to my mind ambiguous. It may mean "has been," or "is now," or "will be hereafter imposed;" there is nothing to limit in point of time any penalty imposed, and when you find that the very same language is used with regard to the offence, namely, "incurred"—that is, in the past tense—it is to my mind holding that this Act of Parliament has not said what to my mind it clearly has said. Mr. Mead used an argument drawn from the second section of the 7 & 8 Geo. 4, c. 53. There is no doubt that, in that section, language is used which is clear, because it very clearly provides for penalties "imposed or to be imposed," "which are or shall be," so and so, using therefore very careful language, to show that this was an Act intended for all time so long as Parliament could make laws connected with the excise. No doubt that is an argument that is entitled to consideration. But, after all, it comes to what I find so often happens, that the Legislature sometimes uses large and broad words, clear and conclusive words, and sometimes uses language which is not quite so clear, but which is large enough to include certain things. Of course, I cannot myself infer that, because the Legislature do not in these sections use the words "shall be," or "shall arise," or the like words of futurity, they do not intend that this Act should apply to offences hereafter created by Acts hereafter to be passed. I am of opinion that the learned magistrate has jurisdiction to entertain this application, and that he may safely exercise it.

WILLS, J.—I am of the same opinion. The argument against the Crown consists, in this case, of the narrowest possible grammatical construction of the word "imposed," and it rests upon the argument that that is not an appropriate expression to include "to be imposed" as well as "actually imposed" or imposed by past legislation. But I think that the moment that you see in the next line, and the line following, there are two past participles used, which it is impossible not to construe as in the future, that argument falls to the ground as applied to the present context—"incurred" and "committed" must each of them respectively be read as "incurred or to be incurred" and as "committed or to be committed." Otherwise the Act of Parliament would have a ridiculous application, restricted merely to such offences as had been committed within the space of four months before it was passed. To my mind no one could ask the court to take such a view as that. You have the draftsman using in close contiguity to the other this expression "imposed," and that must be subject to the same observation, and it seems to me no violence to any principle of construction, to say "imposed" must be read as including "to be imposed," and in fact reason and convenience point in that direction. This is not a case at all analogous to the class of cases to which Mr. Mead referred. The passage from Mr. Benson-Maxwell on Statutes, which he called our attention to, was really not relevant to this case. It referred to the class of cases in which new rights are created or old rights are taken away. But this is a mere modification of procedure, and a modification that was clearly intended to be in the interests of the subject and largely benefiting the subject, and in relaxation of the rigorous and expensive proceeding which was in existence before. I think, therefore, it is clear that the Crown are right upon this question.

Order absolute for mandamus.

Solicitors for the applicant, *Rivington* and *Sons*.

Solicitor for the Crown, *Solicitor for the Inland Revenue.*

Monday, April 23, 1888.

(Before CAVE and SMITH, JJ.)

THE ASSESSMENT COMMITTEE OF THE FULHAM UNION *v.* WELLS AND CO. (*a*)

Valuation (Metropolis)—Provisional list—Appeal—Appeal against provisional list from assessment committee to special sessions—Whether there is such appeal—The Valuation (Metropolis) Act 1869 (32 *&* 33 *Vict. c.* 67), *ss.* 18, 19, 46, 47.

When a provisional list has been made under the provisions of sect. 47 *of the Valuation (Metropolis) Act* 1869, *and when any objection to such list has been heard and determined by the assessment committee, no appeal lies against such provisional list from the assessment committee to the special sessions, under sects.* 18 *and* 19 *of the Act.*

SPECIAL CASE stated by the justices of the Kensington Division of the county of Middlesex, in special sessions assembled, on an appeal against a decision of the Assessment Committee of the Fulham Union, with respect to a provisional list for the parish of Fulham. The question now argued was, whether or not, as to the "provisional list," there is an appeal from the assessment committee to the special sessions.

The respondents were a firm of builders, who had contracted to erect certain buildings and complete the same on the 31st Dec. 1887. Owing to the position of the site on which the buildings were to be erected, it was necessary for the respondents, in order to comply with the Metropolis Local Management Act 1855, to erect a certain hoarding, not for the purposes of scaffolding but, as an independent structure which should shut off the building works from the public road. In July 1887 a licence was obtained for the erection of the hoarding, and was renewed from time to time until the date of the hearing of the appeal. The respondents let out the hoarding for advertisements, but otherwise made no use of it.

On the 21st Sept. a provisional valuation list was made by the overseers, in which the land and hoarding were described as of a certain rateable value. The respondents being dissatisfied with this assessment, on the 25th Oct. objected thereto before the assessment committee (the appellants), who thereupon made a small reduction in the assessment, and on the 29th Oct. a poor rate was made by the overseers of the parish in respect of the hoarding. The respondents gave notice of their intention to appeal to the next special sessions from the above decision of the assessment committee. This appeal came on for hearing in Dec. 1887, when an objection was taken that the special sessions had no jurisdiction to hear the appeal, as the Valuation (Metropolis) Act 1867 did not give an appeal to special sessions, so far as regards the provisional list. The special sessions overruled the objection, and heard and dismissed the appeal. It was stated by the respondents, and in fact admitted, that the hoarding was a temporary structure, and that it would be removed within a few days from the hearing of the appeal, and they contended that, if there were no appeal in this case, they would be without any remedy, as the hoarding would be removed before the making up of the supplemental list, and would not appear therein.

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

The question for the opinion of the court is, whether the special sessions had jurisdiction to hear the appeal from the assessment committee.

The following are the material sections of the Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67) upon the construction of which the question depended:

Sect. 18. In every petty sessional division in the metropolis the justices of the peace acting in and for such division shall, in every year at the time mentioned in this Act, hold a special sessions for hearing appeals under this Act against the valuation lists of the several parishes within such division.

Sect. 19. Any ratepayer and any overseers of a parish, so far as respects the valuation list of such parish, and any surveyor of taxes, so far as respects the valuation list of any parish in the petty sessional division, may, if he or they feel aggrieved by any decision of the assessment committee on an objection made with respect to the unfairness or incorrectness of the valuation of any hereditament included in such list, but not otherwise, appeal against such decision to the special sessions. The right to appeal to special sessions shall not deprive a person of any other right of appeal conferred on him by this Act.

Sect 20 defines the extent of jurisdiction of special sessions.

Sect. 46 provides for the revision of the valuation list, such revision in every period of five years to be conducted in each of the first four years by means of a supplemental list to be made out in the same form as the valuation list showing all the alterations which have taken place during the preceding twelve months, and in the fifth year by means of a new valuation list to be made by the overseers.

(3.) The same regulations shall be observed and the same proceedings shall be had in the case of a supplemental list and a new valuation list as are directed by this Act and the Acts incorporated herewith in the case of the valuation list made in the first year after the passing of this Act.

Sect. 47. If in the course of any year the value of any hereditament is increased by the addition thereto or the erection thereon of any building or is from any cause increased or reduced in value, the following provisions shall have effect:

(1.) The overseers of the parish in which such hereditament is situate may . . . . send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditament.

(4.) An objection may be made to any such provisional list by the said occupier, and by the surveyor of taxes, or by either of them, by a notice thereof in writing being served on the clerk of the assessment committee, on the overseers, on the surveyor of taxes, and on the occupier, or on such of them as the case may require.

(6.) The committee shall hear and determine on the objection in the same manner as if it were an objection to a valuation list, and may make such order as they think just.

(10.) A provisional list during the time that it is in force shall be deemed to form part of the valuation list for the time being in force, and shall (so far as is necessary) be substituted for so much of that valuation list as relates to the same hereditament, and every rate and tax in respect of which the valuation list is conclusive, which are respectively made or charged after the provisional list comes into force, and the proportion of the current rate charged as before provided in this section, shall be levied accordingly; but if when the next revision of the valuation list takes place the list as approved and altered on appeal contains a smaller value for the hereditament comprised in a valuation list than the value stated in such provisional list, the amount of rate or tax which has been overpaid in consequence of the larger value having been stated shall be repaid or allowed.

Poland (*A. Glen* with him) for the appellant assessment committee.—The question here is, whether there is an appeal under the Valuation (Metropolis) Act 1869 to the special sessions

against a provisional list; in other words, whether a provisional list is a valuation list within the meaning of sect. 19 of the Act, so as to give a right of appeal from the assessment committee to the special sessions. The Act provides for three kinds of lists, namely, the valuation or quinquennial list, which continues in force for five years (sect. 43); the supplemental list, which is made up at the end of each year, showing all the alterations which have taken place during the year, in the matters stated in the valuation list, and which is incorporated with the valuation list for the succeeding year (sect. 46); and the provisional list, which is made up during the year, showing alterations or buildings made in the course of the year, and comes into operation during the year (sect. 47). This provisional list is intended to be temporary only. By sect. 32, any person aggrieved by any decision of the assessment committee may appeal to the assessment sessions; and by sect. 19, so far as respects the valuation list, any person who may be aggrieved by any decision of the assessment committee may appeal to the special sessions. This section gives the right of appeal to the special sessions only as regards the valuation list, but does not give any right of appeal as regards the provisional list. Sect. 20 shows the extent of the jurisdiction of the special sessions; sect. 42 provides the machinery to enable an appeal to be made to the special sessions, and also an appeal to the assessment sessions; and and by sect. 43, the list, when finally settled, shall remain in force for five years, subject to any alterations that may be made in it by any supplemental or provisional list. Sect. 46 provides for the revision of the valuation list in every period of five years, by requiring that, in each of the first four years of such period, a supplemental list shall, if necessary, be made out, in the same form as the valuation list, showing the alterations made during the preceding twelve months in the matters stated in the valuation list; and by sub-sect. (2), in the fifth year of every such period the overseers shall make a new valuation list, and sub-sect. (3) lays down the regulations to be observed in the case of a supplemental list and a new valuation list. Then sect. 47 deals with the provisional list, and provides the mode in which any objection may be taken to the provisional list, and the committee are to hear and determine on the objection in the same manner as if it were a valuation list; and by sub-sect. (10) a provisional list during the time it is in force shall be deemed to form part of the valuation list for the time being in force. [Smith, J.—You have got the provisional list, the supplemental list, and the valuation list; what you appeal against is the valuation list as altered by the supplemental or provisional list. Where is the section enabling you to appeal against a supplemental list?] Sub-sect. (3) of sect. 46. By sect. 45 the list is made binding and absolutely conclusive as to the value of the property. There has never been an appeal against a provisional list until this present case. The clauses giving an appeal to the special sessions have reference only to the quinquennial and supplemental lists and have no reference to the provisional list.

Winch, Q.C. (*Hammond Chambers* with him) for the respondents.—By sub-sect. (6) of sect. 47 the committee are to hear and determine on the objection to the provisional list, in the same manner as if it were an objection to a valuation list; and by sub-sect. (10) the provisional list shall be deemed to form part of the valuation list for the time being in force. Sect. 20, defining the jurisdiction of the special sessions provides that the special sessions shall not hear any appeal touching any part of the valuation list, except the part relating to the value of an hereditament. This present appeal clearly relates to value, and the Act thus gives in the plainest terms the right of appeal from the provisional list. Sect. 18 provides that any person who feels aggrieved by any decision of the assessment committee, on an objection made with respect to the value of any hereditament included in the list, may appeal to the special sessions. This section is in the most general terms, and gives a person aggrieved by any decision of the committee a right of appeal, and I submit that a person aggrieved by a decision of the assessment committee, with regard to the provisional list, comes within this section, and has therefore a right of appeal from the assessment committee to the special sessions under sect. 19 of the Act as regards the provisional list.

Cave, J.—I am of opinion that in this case the appellants are entitled to succeed and that no appeal lies. It is undoubted law that an appeal is a creature of the statute, and that you must have an appeal expressly given. Now this Act of 1869 was passed for the purpose of providing for uniformity in the assessment of rateable property in the metropolis, and the first thing that was done was to provide for the making of a valuation list. When we look at the form of the statute, it appears to be a provision for the making of the first valuation list first of all, and the sections are all devoted in the first instance to the question of the first valuation list. Sects. 18, 19, and 20, with reference to appeals, appear to me, in the first instance, to be passed with relation to the list that is first to be made. Then having disposed of all that matter and got their list, the statute then proceeds to provide for the revision of the valuation list, and it is to be revised yearly and quinquennially: yearly it is done by virtue of a supplemental list which merely records the necessary alteration; and quinquennially it is done by a thoroughly new valuation list which contains a fresh statement of the whole of the hereditaments which are liable to to the poor rate. Then having provided in that way for the yearly and quinquennial revision of the valuation list, sub-sect. 3 of sect. 46 proceeds to apply to these yearly revisions the same regulations and proceedings as were directed by this Act in the case of a valuation list made in the first year after the passing of the Act. That again is strong, in my opinion, as showing that sect. 19 and sect. 20 in their first issue applied only to the valuation list made in the first year, and sect. 46, sub-sect. 3, takes those sections applied to the first list and makes them also applicable to the supplemental list and the new valuation list. I think it is quite clear that that clause does, amongst other things, give an appeal against the supplemental list and also against the new valuation list by a direct reference to sect. 19, amongst others of the sections that have gone before. Then we come to sect. 47, and what it says is this—that whereas up to the present time we have been providing for a revision of the list which, by

means of the supplemental list, was to take place every year, now provision is made and a rather closer net is introduced, by which every new subject-matter of the poor rate is to be drawn within the area of taxation, not merely year by year but at a shorter interval than a year, because a provisional list is to be made as soon as any new subject-matter of rating appears, and, by means of that provisional list so made, the new subject-matter of rating may be made to pay a proportionate part of any rate which may be in force at the time when the provisional list comes into force. Then what is to be done? There are provisions contained, not, as in sect. 46, sub-sect. 3, by reference to and re-enacting all the provisions that have gone before, but there are certain express provisions contained for allowing a person who is rated to go before the assessment committee. But it stops there, and there is no provision at all, to my mind, which enables the occupier to go beyond the assessment committee. The only section or sub-section which is relied upon by the respondents is sub-sect. 10 of sect. 47, which says, "The provisional list during the time that it is in force shall be deemed to form part of the valuation list for the time being in force." Now it is said that must be read as meaning that it shall be deemed to form part of the valuation list for all purposes, and inasmuch as an appeal is given against the valuation list at a particular time of the year therefore an appeal must be given against the provisional list at a different time of the year and under quite different circumstances. I think that such a wide interpretation as that cannot be put upon such words as "shall be deemed to form part of the valuation list." Just compare, for a moment, the language of sub-sect. 5 of sect. 46 with the language of the first part of sub-sect. 10, sect. 47. In sub-sect. 5 of sect. 46 it says, "In each of the last four years of such period the valuation list which was in force on the day before the commencement of each such year, together with and as altered by the supplemental list, if any, which comes into force at the commencement of such year, shall be the valuation list which is in force during that year." When we come to sub-sect. 10 of sect. 47 the language is changed: "A provisional list during the time that it is in force shall be deemed to form part," not "shall form part" but "shall be deemed to form part." Whenever the Legislature uses the words "shall be deemed to form part," it is an indication that the thing is not to be the same for all purposes but only for the purposes which the Legislature has in view at the time. The provisional list, therefore, is to be deemed to form part of the valuation list for the time being in force, and to be substituted for so much of the valuation list, with reference to what follows, namely, with reference to a poor rate which is in force, and which so far as the proportion of it is concerned is to be levied on the hereditaments comprised in the provisional list as if they had been comprised in the valuation list and as if the provisional list had formed part of the valuation list. But, to my mind, it is only for that purpose, and not further or otherwise, that the provisional list is to be deemed to form part of the valuation list. Now, if there could be any doubt upon that point, and I do not think there could be, it seems to me it is clearly removed by the concluding part of that sub-section. A man might say, "What is to happen to me if the assessment committee go wrong in valuing my property for the purposes of the provisional list? What am I to do? Am I to sit down under it and to have no appeal?" I think the answer is, "Yes, you must sit down under it, and you can have no appeal unless the statute has given you an appeal." This latter part of the clause to my mind is clear as showing that the statute did not intend there should be any appeal, because it says: "If when the next revision of the valuation list takes place," that is to say, when the next yearly or quinquennial valuation is made, either by a supplemental list or by a new valuation altogether, if when that takes place "the list as approved and altered on appeal," after you have had an appeal and it is finally settled, "contains a smaller value for the hereditaments comprised in a provisional list than the value stated in such provisional list, the amount of rate or tax which has been overpaid in consequence of the larger value having been stated shall be repaid or allowed." That, to my mind, was quite unnecessary if an appeal had been given against a provisional list. There is no similar provision with reference to a supplemental list, because there is an appeal given in the case of a supplemental list, and consequently that provision is not wanted. Here, on the other hand, the fact that such a provision is made for enabling the occupier to recover what he had overpaid combined with the fact that there is no provision directly made for any appeal, is conclusive to my mind as showing that the Legislature intended that with regard to the provisional list there should not be any appeal, but that the valuation stated in that list should depend on the supplemental list or a new valuation list, as the case may be, and that the right to recover any excess should depend on the final valuation in the supplemental or new valuation list, whichever it might be. On these grounds it seems to me that no appeal lies, and consequently this appeal must be allowed.

SMITH, J.—I have really nothing to add. I agree entirely with what has fallen from my brother Cave.

Judgment for the appellants with costs. Leave to appeal refused.

Solicitors for the appellants, *Nye, Greenwood,* and *Moreton.*

Solicitors for the respondents, *Bolton* and *Mote.*

Thursday, April 26, 1888.

(Before FIELD and WILLS, JJ.)

THE GUARDIANS OF THE POOR OF THE TYNEMOUTH UNION *v.* THE OVERSEERS OF THE TOWNSHIP OF BACKWORTH. (*a*)

Rating—Precept of guardians to overseers—Payment by overseers upon valuation subsequently reduced—Right of overseers to be credited on subsequent precept with amounts so overpaid—Discretion of justices to refuse distress-warrant.

The overseers of the town of B. paid the guardians of T. Union contributions to rates on the basis of a valuation list afterwards found by arbitration to have been excessive. On the overseers

(*a*) Reported by R. A. BENNETT, Esq., Barrister-at-Law.

refusing to pay the amount of two subsequent precepts issued by the guardians on the ground that they had already paid too much on the excessive valuation list and were entitled to be credited with the surplus, the guardians applied to justices for a distraint-warrant to enforce their precepts. The justices refused to grant the warrant.

Held, upon a case stated, that the justices had a discretion as to granting the warrant, and had exercised it properly.

Held, also, that the overseers were entitled to be credited on the precepts now in question with the amounts previously overpaid under the incorrect valuation list.

SPECIAL case stated by justices of the peace for Northumberland under 20 & 21 Vict. c. 43.

The case stated the following facts:—

The township of Backworth, of which the respondents are overseers, is one of the contributory places within the meaning of the Public Health Act 1875 (38 & 39 Vict. c. 55), included in the rural sanitary district of the appellants' union.

In March 1884 the rateable value of the township of Backworth, according to the valuation list, was 14,163*l.*, and between March 1884 and Sept. 1886 the appellants made half-yearly calls upon the respondents upon the basis of that valuation, and the respondents duly paid such calls.

In May 1884 the owners of Backworth Colliery (who were liable to pay nearly two-thirds of the entire rates for the township of Backworth) appealed against the valuation at the general quarter sessions, and the assessment committee of the Tynemouth Union, with the consent and on behalf of the appellants, appeared as respondents in such appeal.

In April 1885, by consent of all parties to the appeal, the appeal was referred to arbitration, "that the valuation lists and rate-books should, if necessary, be amended in accordance with the award to be made in such arbitration," and "that pending the decision and until the final award, order, and judgment, the owners of Backworth Colliery should pay on all rates on a reduction at the rate of 25 per cent. on the then rateable assessment."

In Oct. 1885 the award was entered up as the order of the Court of Quarter Sessions, its effect being to reduce the annual rateable value of the township of Backworth to 10,885*l.*, the rateable value of the Backworth Colliery being reduced about 43 per cent.

On the award being made known the respondents refunded to the owners of the Backworth Colliery the difference between 25 per cent., which they had been allowed, and 43 per cent., the amount of the deduction ordered by the award from the time when the rate was appealed against.

The respondents consequently found themselves unable to pay the contributions required by the precepts of the appellant union in Sept. 1886 and March 1887 without making a special rate for the purpose. Accordingly they levied a special rate upon the occupiers of rateable hereditaments in the township of Backworth, including the owners of Backworth Colliery, but the said owners refused to pay on the ground that by doing so they would in effect repay the amounts which had been refunded to them by the respondents in consequence of the result of the appeals, and would thereby lose the benefit to which they were entitled by reason of the rateable value of the colliery having been reduced. The respondents therefore did not enforce the payment of the special rate.

The appellants, their precepts for Sept. 1886 and March 1887 remaining undischarged, then applied to the justices for a distress-warrant to enforce payment.

The accounts of the appellant's union are made out at the end of each half-year, on March 25 and Sept. 29.

Upon the foregoing facts it was contended on behalf of the appellants: (*a*) That they were bound to make calls for contributions from the township of Backworth pending the appeal to quarter sessions under 25 & 26 Vict. c. 103, s. 30, namely, upon the existing valuation list. (*b*) That the accounts having been made up each half-year and closed, they could not be re-opened. (*c*) That the precepts for the contributions in question (namely the sum of 48*l.*) were conclusive evidence of the amount mentioned therein.

It was contended on behalf of the defendants: (*a*) That their payments to the appellants in March 1884 and Sept. 1885 were made subject to the appeals which were then pending, and did not preclude them from now calling upon the appellants to give them the credit which they claim by reason of the calls having been based upon a rateable value in excess of the true rateable value. (*b*) That the duty of the justices was not purely ministerial, but that they might in their discretion refuse to grant a distress-warrant.

The justices were of opinion that it would be illegal, unfair, and unjust to the respondents under the circumstances above stated to grant the application for a distress-warrant and dismissed the summons, and declined to issue a distress-warrant.

The questions of law submitted to the court were: First, whether or not the duty of the magistrate was ministerial; secondly, whether they were justified, on the merits of the case, in dismissing the application.

J. Lawson Walton for the appellants.—The magistrate ought to have issued the distraint-warrant applied for, on the grounds (1) that they had no discretion to refuse it, *i.e.*, their duty was purely ministerial; (2) if they had a discretion, they exercised it wrongly:

Ex parte The Guardians of Bridgend and Cowbridge Union, 9 L. T. Rep. N. S. 720;
R. v. *Boteler*, 33 L. J. 101, M. C.;
Newbould v. *Coltman*, 6 Exch. 189; 20 L. J. 149, M. C.

The valuation list was duly made as between the guardians and overseers, and never appealed against; the precepts therefore had to be issued. Some payments were made in accordance with that list as between the parish and the overseers; the contribution orders have been properly made, and the money paid and applied properly, and the account audited. There is no provision in any Act of Parliament that that expenditure and audit can be re-opened. [FIELD, J.—The parish say: "We have paid too much. There was nothing wrong in making the payment at the time, but since the payments were made, it has been the

subject of an award of an arbitrator, that sums which have been paid have been so paid upon a wrong footing."] Our only remedy is by distress. [FIELD, J.—A new credit will remedy the matter. If your contention is right, the Backworth Colliery will have to pay more now than if they had lost their appeal. Is there no provision by which an excessive assessment having been made, a sum of money in reduction can be returned if necessary?] I do not know of any. [*R. C. Glen* for the respondent.—Audits take place twice a year, but the auditor only settles whether the payments are proper (7 & 8 Vict. c. 101, s. 32). The guardians are bound to take into consideration the balance due to the parish:

Hale v. *The Guardians of the Poor of the City of London*, 6 C. B. N. S. 863; 29 L. J. 5, M. C.]

That case differs from this. The court will not direct the auditor to re-open closed accounts. [FIELD, J.—There is no necessity to re-open the accounts.]

R. C. Glen for the respondents was not called upon.

FIELD, J.—I think this is a plain case. It might have involved the consideration of a great many provisions in various Acts of Parliament, and I thought at first there might be a legal disability which compelled the auditor to adopt the course he did. But the short facts are simple. In 1884 the valuation list showed that the rateable value of the township of Backworth was 14,163*l.*, and among the rateable occupiers in the list were the owners of the Backworth Colliery, and they were very large occupiers. The valuation list was made at a sum which everybody agreed was, at that time, thought to be the right sum. It was agreed then that the question should be referred to an arbitrator whether the Backworth Colliery was properly rated, and during the time that the arbitrator was making the award the colliery was to pay to the respondents 25 per cent. less than the rateable assessment. After a year and a half the arbitrator found that 43 per cent. was to be deducted in the rateable value of the colliery. There was also an agreement in 1884 between the colliery and the assessment committee that the valuation lists were to be settled in accordance with the finding of the arbitrator; the result of which was that the Backworth township was assessable for 10,885*l.* instead of 14,163*l.* Two orders were served by the appellants upon the respondents for contributions to the general expenses, requiring them to pay to the treasurer of the union four sums amounting to 48*l.* The respondents then levied a special rate upon the rateable occupiers, including the owners of the Backworth Colliery. The colliery refused to pay such rate unless the respondents contested their liability to pay the amounts required by the orders, and thereupon the respondents did contest their liability, but the union assessment committee said, "We insist on your paying," and applied to the magistrates for a distress. The magistrates refused to make a distraint order. The only question now is, whether they exercised their discretion properly in refusing to make such order. It is quite clear they have a discretion. Mr. Glen cited *Hale* v. *City of London Union*, which I think is a stronger case than this. The effect of the distress-warrant issuing would be to throw the whole of this mistake on Backworth, whereas it ought to be spread over the whole district.

WILLS, J.—I am of the same opinion. I am not surprised that the guardians wish to take the opinion of this court and raise it in this way. The matter apparently is complicated enough, but when one looks at the enactments, complicated as they are and difficult to disentangle, the question is really a simple one. It is this: whether, supposing that the parish had, under sect. 32 of the 25 & 26 Vict. c. 103, appealed against the valuation list of their parish, and made the guardians of the union respondents in that appeal, and the old valuation list had to be acted on in the meantime by the then appellant parish, the guardians could under the circumstances, when it turned out that the valuation had been wrong from the time the appeal was entered, correct the payments that had been erroneously made under the old valuation list. There is no specific machinery provided by Parliament, but I cannot help thinking that that was present to the minds of those who drafted the Act; and certainly the Acts of 1862 (25 & 26 Vict. c. 103) and 1864 (27 & 28 Vict. c. 101) indicate no lack of knowledge of the subject on the part of the framers of those Acts. It is a question they must have known must arise. The guardians ought in the ordinary honest course of business to return the money, or correct it in some other way. I cannot see what legal objection there is to their doing so. When the thing as to which discussion arises with respect to powers stands on such a footing, I think it rather requires an enactment to prevent it being done, if such were the object of the Legislature. It is true the parish did not bring the appeal of the 27th May 1884 under sect. 32; that is a pure matter of form. The colliery owner, who paid so large a share in the rates of this township, brought the appeal. Then the assessment committee of the union, availing themselves of the power under sect. 32 of the Act 1864 (25 & 26 Vict. c. 103), became, with the consent and on behalf of the overseers, respondents and they fought the matter out, and litigated the question on the same point as if there had been a formal appeal between the parish and the assessment committee. It turns out there is no practical difficulty in correcting the matter so far as the payments are concerned. The precepts were most properly made. No exception can be taken to them. But the answer which the colliery makes is that, "We have already paid the money, and we ought not to pay twice over." The question substantially raised here is, as to whether this court would have made the same order under the circumstances. I think the magistrates had discretion to make the order they did, and used their discretion quite properly.

Appeal dismissed.

Solicitors for the appellants, *Williamson, Hill, and Co.*, for *Whitehorn*, North Shields.

Solicitors for the respondents, *J. E.* and *H. Scott*, for *Daglish* and *Muncaster*, Newcastle-on-Tyne.

Monday, May 14, 1888.

(Before FIELD and WILLS, JJ.)

REG. *v.* LONG AND ANOTHER (Justices of the Peace). (*a*)

Causing obstruction in street—Persons walking abreast on footpath of street—Annoying passengers thereby, and causing them to leave footpath — Conviction for obstruction — Towns Police Clauses Act 1847 (10 *&* 11 *Vict. c.* 89), *s.* 28.

Three defendants were convicted by the defendant justices, under sect. 28 *of the Towns Police Clauses Act* 1847, *for obstructing passengers in the public street, and unlawfully preventing persons passing there.*

It appeared by the evidence of a police-constable that the three defendants were standing, with three or four other persons, on the pavement, blocking up the same. Several persons had to leave the footpath and go into the road in order to pass. The constable spoke to the defendants, and asked them to move off. They then walked up the street, all three abreast, causing passengers who met them to leave the footpath and go into the road. Again, later in the evening, the constable saw the three defendants walk up and down the street several times. Two ladies were turned off the footpath, and one lady said, "I wonder the police do not put a stop to this," but otherwise no complaints were made, and no persons were called to prove that they had been impeded by the defendants, nor could the names of any persons so obstructed be given by the witnesses for the prosecution.

Sect. 28 *of the Act provides that "Every person who by means of any cart, carriage, sledge, truck, or barrow, or any animal, or other means, wilfully interrupts any public crossing, or wilfully causes any obstruction in any public footpath, or other public thoroughfare," shall be guilty of an offence under the Act, and liable to a penalty.*

Held (making absolute a rule for a certiorari), that the conviction was wrong, and could not be sustained.

RULE to show cause why a writ of *certiorari* should not issue to remove into the High Court a certain record of convictions by justices of the peace for the county of Sussex at a general petty sessions held at Arundel on the 20th Feb. 1888, whereby the three defendants, Henry Denyer, Albert Hale, and Albert Northeast, were respectively convicted for that they on the 5th Feb. 1888, at Littlehampton, in the aforesaid county, in a street called the High-street, in which parish the provisions of the Towns Police Clauses Act 1847, with respect to obstructions and nuisances in streets were then in force, to the obstruction of passengers in the said street unlawfully did prevent passengers passing there. On the hearing of the above charge, an order was made by the justices by which all the defendants were convicted and fined 11*s.* and 19*s.* costs. It appeared by the evidence of a police constable that the three defendants were standing with three or four other persons on the pavement, blocking up the same. Several persons had to leave the footpath and go out into the road in order to pass. The constable spoke to the defendants, and asked them to move off. They then walked up High-street, all the three abreast, causing passengers who met them to leave the pavement and go into the road. Again, later in the evening, between eight and nine o'clock, the constable saw the three defendants walk up and down the street several times. Two ladies were turned off the footpath, and one lady said, "I wonder the police do not put a stop to this;" but otherwise no complaints were made. The constable afterwards took the defendants' names, and summoned them for causing an obstruction in the street, under sect. 28 of the Town Police Clauses Act 1847, which provides:

> Every person who in any street, to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall be liable to a penalty not exceeding 40*s.* for each offence, or may be committed to prison for a term not exceeding fourteen days;

and among the offences is the following:

> Every person who by means of any cart, carriage, sledge, truck, or barrow, or any animal, or other means, wilfully interrupts any public crossing, or wilfully causes any obstruction in any public footpath or other public thoroughfare.

No person was called to prove that he was impeded or wilfully prevented from passing by the defendants, nor could any person be named by the witnesses who had been so obstructed.

Gill showed cause against the rule.—The provisions of the Towns Police Clauses Act 1847, with respect to obstructions and nuisances in the streets, are incorporated with the Public Health Act 1875, by sect. 171 of that Act, and by sect. 262 of that Act no conviction made under the Act shall be vacated, quashed, or set aside for want of form, or (unless otherwise expressly provided by that Act) be removed or removable by *certiorari*, or any other writ or process whatsoever, into any of the Superior Courts. The remedy by *certiorari* is thus taken away, and the remedy suggested for any ruling of the magistrates is rather by special case than by *certiorari*. The conviction was under the latter part of one of the provisions of sect. 28 of the Act, which makes it an offence under the Act for a person by means of any cart, &c., or "other means" to wilfully interrupt any public crossing, or wilfully cause any obstruction in any public footpath, or other public thoroughfare. The question now is, whether the defendants were guilty of any offence under the section, or whether there was any evidence to support the conviction. I submit that the conduct of the defendants brought them within the words persons who by "other means" wilfully interrupt a public crossing and obstruct a public thoroughfare. [FIELD, J.—If a man is large enough himself to occupy the whole side path, and in consequence a lady has to leave the path, is that an offence?] That would not be an offence, as the mere passing along the street does not constitute an offence, but if the person came backwards and forwards, causing an obstruction, that would be an offence. [FIELD, J. — Has any such construction been placed upon the clause?] There is no English case on the point, but there is a Scotch case, in which persons were convicted under similar words.

Raven, in support of the rule, was not called upon.

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

FIELD, J.—I am sorry we must grant a *certiorari* in this case. We shall give no costs.

WILLS, J. concurred.

Rule absolute for a certiorari.

Solicitors for the justices, *Wood, Bigg,* and *Nash,* for *Holmes* and *Co.,* Arundel.

Solicitor for the defendants, *R. Blagden,* Littlehampton.

Wednesday, June 20, 1888.

(Before MANISTY and STEPHEN, JJ.)

GUARDIANS OF THE POOR OF SOUTHAMPTON *v.* BELL AND TAYLER. (*a*)

Practice—Poor law—Employment of solicitor by guardians—Taxation of costs by clerk of the peace—Poor Law Amendment Act 1844 (7 *&* 8 *Vict. c.* 101), *ss.* 32, 35, 39—*Solicitors Act* 1843 (6 *&* 7 *Vict. c.* 73), *s.* 37.

When a solicitor is employed by the guardians of the poor, the taxation of his bill of costs by the clerk of the peace under the Poor Law Amendment Act 1844 (7 *&* 8 *Vict. c.* 101), *s.* 39, *is not final and conclusive against him, and he is entitled to an order for taxation as between solicitor and client, under the Solicitors Act* 1843 (6 *&* 7 *Vict. c.* 73), *s.* 37.

ARGUMENT of a point of a law raised by the pleadings under R. S. C. 1883, Order XXV., r. 2.

The action was brought by the plaintiffs, the guardians of the poor of Southampton, against the defendants, a firm of solicitors employed by them, to recover a sum of 64*l.* 16*s.* 6*d.*, a balance claimed by them out of a sum of 600*l.* which they had advanced to the defendants for the purpose of carrying on an action. This sum was arrived at by deducting from the 600*l.* so advanced a sum of 535*l.* 3*s.* 6*d.*, the costs allowed to the defendants by the allocatur of the clerk of the peace of Hampshire, under sect. 39 of the Poor Law Amendment Act 1844 (7 & 8 Vict. c. 101) less his taxing fee. The defendants admitted their liability as to a sum of 13*l.* 13*s.* 3*d.*, but claimed to retain the residue of the 600*l.* in respect of costs due to them for work and labour done and money expended by them as solicitors for the plaintiffs, and denied that they were liable to pay the fee on the taxation by the clerk of the peace under the Poor Law Amendment Act 1844, or were bound by such taxation, and claimed a right to have their bill of costs taxed as between solicitor and client by a taxing master of the High Court under sect. 37 of the Solicitors Act 1843 (6 & 7 Vict. c. 73). A summons for taxation by the defendants was also before the court.

The Poor Law Amendment Act 1844 (7 & 8 Vict. c. 101) provides as follows:

Sect. 32. Every auditor appointed for such a district shall have full powers to examine, audit, allow, or disallow of accounts and of items therein, relating to money assessed for and applicable to the relief of the poor of all parishes and unions within his district, and to all other money applicable to such relief.

Sect. 35. If any person aggrieved by any allowance, disallowance, or surcharge by any such auditor require such auditor to state the reasons for the said allowance, disallowance, or surcharge, the auditor shall state such reasons in writing in the book of account in which the allowance, disallowance, or surcharge may be made; and it shall be lawful for every person aggrieved by such allowance, and for every person aggrieved by such disallowance or surcharge, if such last-mentioned person have first paid or delivered over to any person authorised to receive the same, all such money, goods, and chattels as are admitted by his account to be due from him or remaining in his hands, to apply to the Court of Queen's Bench for a writ of *certiorari* to remove into the said court the said allowance, disallowance, or surcharge.

Sect. 39: On applicatcn of any overseer, or of any board of guardians, or of any attorney-at-law, it shall be the duty of the clerk of the peace of the county or place, or his deputy, if thereunto required, to tax any bill due to any solicitor or attorney in respect of business performed on behalf of any parish or union situate wholly or in part within such county or place; and the allowance of any sum on such taxation shall be *primâ facie* evidence of the reasonableness of the amount, but not of the legality of the charge; and the clerk of the peace shall be allowed for such taxation after the rate to be fixed from time to time by the Master of the Crown Office, and declared by an order of the said commissioners; and if any such bill be not taxed before it is presented to the auditor, the auditor's decision on the reasonableness as well as the legality of the charges shall be final.

By the Solicitors Act 1843 (6 & 7 Vict. c. 73), s. 37, it is provided that, if no application has been made for the taxation of a solicitor's bill of costs within a month after it has been delivered,

It shall be lawful for such reference to be made either upon the application of the attorney or solicitor, or the executor, administrator, or assignee of the attorney or solicitor . . . or upon the application of the party chargeable by such bill . . . and the costs of such reference shall, except as hereinafter provided for, be paid according to the event of such taxation; that is to say, if such bill when taxed be less by a sixth part than the bill delivered, then such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall pay such costs; and if such bill when taxed shall not be less by a sixth part than the bill delivered, then the party chargeable with such bill, making such application, or so attending, shall pay such costs.

P. Gye for the plaintiffs.—The plaintiffs are entitled to judgment on the point of law. The taxation of a bill of costs by the clerk of the peace under sect. 39 of the Poor Law Amendment Act 1844 is final and conclusive as between the guardians and a solicitor employed by them. The difficulty of construing sects. 32, 35, and 39 of the Poor Law Amendment Act 1844, which taken together regulate the poor law audit was pointed out by the court in *Reg.* v. *Hunt* (6 E. & B. 408). But it would appear to supersede sect. 37 of the Solicitors Act 1843.

J. Alderson Foote for the defendants.—The taxation by the clerk of the peace was only an *ex parte* taxation, and is not final. The Legislature, by sect. 39 of the Poor Law Amendment Act 1844, gives a solicitor the assistance of the clerk of the peace, but says that his allowance on taxation shall be only "*primâ facie* evidence of the reasonableness of the amount," but shall not be evidence of the "legality" of the charge. This must mean that it is evidence which can be reviewed on appeal. The taxation is itself not a necessary part of the audit. The pleadings do not show that an audit was held, but if one were proved to have taken place, the Act does not make any provision for the solicitor being represented. Every solicitor has, under the Solicitors Act 1843, a right to have his costs taxed by a master of the High Court unless deprived expressly of such right by some Act. It has been suggested by the plaintiffs that the Poor Law Amendment Act 1844 repealed this as regards work done for poor

(*a*) Reported by ALFRED H. LEFROY, Esq., Barrister-at-Law.

law guardians. If so, this would also deprive guardians of the power to have a bill of costs taxed, as well as the solicitor employed by them. The defendants are not liable for the costs of this taxation by the clerk of the peace. Under sect. 37 of the Solicitors Act 1843 the plaintiffs would not be entitled to costs unless they succeeded in reducing the defendants' bill of costs by a sixth. The defendants are entitled to an order for taxation under sect. 37 of the Solicitors Act 1843. He cited

Reg. v. *Napton*, 25 L. J. 296, Q. B.; and
Re Worth, 44 L. T. Rep. N. S. 462; 18 Ch. Div. 521.

P. Gye in reply.—Under sects. 32 and 39 of the Poor Law Amendment Act 1844 solicitors are obliged to wait for payment till the auditor has passed the accounts. If a solicitor's bill is first taxed by the clerk of the peace, and then presented to the auditor under sect. 32, his allowance is final as to the reasonableness of the amount. If it is not first taxed the auditor's decision on the reasonableness as well as the legality of the charges is final. If any person is not satisfied with the taxation he must apply for a *certiorari* to have his bill taxed by a master under sect. 35. As the defendants have not done this they are bound by the allocatur.

MANISTY, J.—The question raised by the defence and reply in this case, is, whether the taxation of the clerk of the peace, under sect. 39 of the Poor Law Amendment Act 1844, which provides for a taxation in certain cases by the clerk of the peace of the costs of the solicitor employed by a board of guardians, as a matter connected with the auditing of accounts under the poor law, is final and conclusive against the solicitor, and has the effect of disentitling him to taxation as between solicitor and client, under sect. 37 of the Solicitors Act 1843. I am of opinion that the provisions of the section have not this effect. It seems to me that this section does not preclude a solicitor from bringing an action for his bill of costs, or for a balance due. I cannot accede to the proposition advanced by Mr. Gye that if guardians employ a solicitor he is bound to wait till the auditor has passed the accounts. If this were so, tradesmen also, from whom the guardians may have purchased goods, would have to wait. Conclusive authority would have to be adduced before I could accede to such a proposition. If the auditor adopted the allocatur and disallowed the sum claimed, the result would be, in my opinion, notwithstanding some expressions in *Reg.* v. *Hunt* (6 E. & B. 408), that the propriety of the disallowance could not be disputed as between the guardians and the ratepayers, but that as between the guardians and the solicitor to the board the question would remain open, and the action could be maintained. It is to be remembered that the auditor cannot be supposed to have any knowledge of the principles on which a solicitor's bill is taxed. Solicitors have a right to have their bills of costs taxed, and there must be a clear legislative enactment to take away the privilege which a solicitor, tradesman, or anyone else, at present enjoys, of having any question affecting his rights tried in the ordinary way. The defendants are entitled to judgment and an order for taxation of their costs by a master, under sect. 37 of the Solicitors Act 1843.

STEPHEN, J.—I am of the same opinion. It seems to me to be clear that, although there are some enactments which apply to solicitors and their charges, sect. 39 of the Poor Law Amendment Act 1844 was never intended to deprive them of their right to have their bills of costs taxed under sect. 37 of the Solicitors Act 1843. We should be doing an injustice if we allowed the taxation of the clerk of the peace to be final. The object of sect. 39 is to prevent the rates being wasted in useless expenditure. The defendants are entitled to have their costs taxed by a taxing master, notwithstanding the taxation by the clerk of the peace.

Order for taxation under the Solicitors Act 1843, the costs of the application to be the defendants' in any event, and the costs of the summons to tax to be costs in the taxation.

Solicitors for the plaintiffs, *F. J.* and *G. J. Braikenridge*, for *Bernard Harfield*, Southampton.
Solicitors for the defendants, *Emanuel, Round*, and *Nathan*.

Thursday, June 7, 1888.

(Before MANISTY and STEPHEN, JJ.)

BOWDEN AND OTHERS (pets.) v. BESLEY AND ANOTHER (resps.). (a)

Municipal Corporations Act 1882 — *Election of councillors—Nomination paper—Subscription of assenting burgesses—Signature—45 & 46 Vict. c. 50, ss. 9, 51, 241, sched. 3, part 2, rr. 1, 2, 5; sched. 8, part 2, Forms C., H., and I.*

The Municipal Corporations Act 1882 *requires the eight assentors to the nomination of a candidate for election to the office of councillor to be burgesses enrolled on the burgess or ward-roll, and that they subscribe the nomination papers. In the statutory form (I.) the column in which they are to subscribe their names is headed by the word "signature."*

At an election to fill vacancies in the office of town councillor, one Tuckwell and the two respondents were nominated as candidates. Three of the eight assentors to Tuckwell's nomination signed as follows: "Edwin J. Hooper," "W. E. Waller," and "R. Turner." In the ward-roll which was then in force the following names appeared as entered against the ward roll members (which were correctly set out in the nomination paper): "Edwin John Hooper," "William E. Waller," and "Robert Turner." Objection was taken before the mayor to Tuckwell's nomination paper on the ground that it was not duly subscribed, as the names and initials of the said three assenting burgesses were not names that were enrolled on the ward-roll. The objection was allowed, and the respondents were declared duly elected. The petitioners appealed by way of special case.

Held, that the nomination paper was valid, as the Act permitted the nomination paper to be subscribed by assentors by signature only, and by the signatures in question the identity of the names of the assenting burgesses with those on the ward-roll was secured, and that consequently the respondents had not been duly elected.

THIS was a petition praying that the respondents were not duly elected, in the form of a special case

(a) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

stated for the opinion of the court, pursuant to the order of Field, J.

The material parts of the case were as follows:

1. The city of Exeter was a city to which the Municipal Corporations Act 1882 applied, and was divided into wards.

2. On the 1st Nov. 1887 an election was held to fill two vacancies in the office of councillor for St. David's Ward, in the said city. The petitioners were each of them persons who had a right to vote at the said election.

3. The respondents were duly nominated as candidates for the said office.

4. On or before the last day for the delivery of nomination papers for the said election two nomination papers were duly delivered by each, of which one Henry Tuckwell of Netheravon, 47, Prospect-park, Exeter, gentleman, being a person duly qualified for election, was nominated as a candidate for the said office. One of the said nomination papers was in the words and figures following:

NOMINATION PAPER.

City and County of the City of Exeter.

Election of councillors for St. David's Ward in the said city and county to be held on the 1st day of November 1887.

We, the undersigned, being respectively enrolled citizens, hereby nominate the following person as a candidate at the said election:

Surname.	Other Names.	Abode.	Description.	Signature.	Number on Roll of Citizens, with the Ward or Polling District, if any, having a distinct numbering.
Tuckwell	Henry	Netheravon, 47, Prospect-park, Exeter	Gentleman	Charles Westron Henry Ellis	No. 367, St. David's Ward. No. 693, St. David's Ward.

We, the undersigned, being respectively enrolled citizens, hereby assent to the nomination of the above-named person as a candidate at the said election.

Dated this 24th day of October 1887.

Signature.	Number on Roll of Citizens, with the Ward or Polling District, if any, having a distinct numbering.
Edwin J. Hooper ...	No. 867, St. David's Ward
W. E. Waller	No. 908, St. David's Ward
John L. Manley	No. 910, St. David's Ward
George Roberts	No. 875, St. David's Ward
R. Turner	No. 1045, St. David's Ward
Isaac Provins	No. 1089, St. David's Ward
William Barter	No. 766. St. David's Ward
James Jerman	No. 617, St. David's Ward

5. In the ward-roll which was in force in the said ward at the time of the said election the following names appear as entered against the following numbers:

No.	Name.
867	Edwin John Hooper.
908	William E. Waller.
1045	Robert Turner.

6. The other nomination paper, and the matters relating thereto, are not set out, on the ground that like objections and defects (if any) existed with reference to it as to the nomination papers set out above, and that if the latter was invalid the nomination paper not set out was invalid also.

7. On the day next after the last day for delivery of the nomination papers the mayor attended at the Guildhall, in pursuance of the provisions of the Municipal Corporations Act 1882, for the purpose of deciding on the validity of objections to the nomination papers of candidates for the said office.

8. The representative of the respondent Lawrence proceeded to object to the said nomination paper of the said Henry Tuckwell.

9. The objections so stated were as follows: The representative of the said respondent objected to the said nomination paper on the ground that it was not duly subscribed by duly enrolled burgesses by reason of the following alleged defects in the same, viz., that the names and initials of three of the assenting burgesses appeared as Edwin J. Hooper, W. E. Waller, and R. Turner, but no such names were so enrolled in the said ward-roll.

10. It was contended on behalf of the said respondents, in support of the said objections, that the said nomination paper was not duly subscribed, inasmuch as a comparison of the names as subscribed in the said nomination paper of the said three assenting burgesses with the said ward-roll would not disclose the identity of the said persons respectively with the persons whose names were entered against the corresponding numbers in the said ward roll.

11. It was contended on behalf of the said Henry Tuckwell that the Municipal Corporations Act 1882 requires only that the signature and not that the full names of the assenting burgesses shall be subscribed in the nomination paper of a candidate for the office of councillor; that the three assenting burgesses had respectively subscribed the name with their signatures within the meaning of the said Act, and that the identity of the said persons respectively with the persons whose names were entered against the corresponding numbers in the said ward-roll sufficiently appeared from a comparison of the names as subscribed to the said nomination paper with the names as entered in the said ward-roll.

12. The mayor, after hearing the arguments of the representatives of the said respondent and the said Henry Tuckwell, intimated that he had come to the conclusion that the objections must prevail, and that therefore the nomination paper was invalid. The mayor then proceeded to deal with other cases of a similar nature.

14. There being no candidate for the said office other than the respondents and the said Henry Tuckwell, the only candidates duly nominated were the respondents, and upon the day of election the respondents were accordingly declared duly elected.

The question for the opinion of the court was: Whether the mayor was right in holding that the said nomination paper was invalid? If the question was answered in the negative, the petition was to be allowed and its prayer granted.

By 45 & 46 Vict. c. 50, s. 9:

(1.) A person shall not be deemed a burgess for any purpose of this Act unless he is enrolled as a burgess.

By sect. 51:

(1.) At an election of councillors a person shall be entitled to subscribe a nomination paper, and to demand

and receive a voting paper, and to vote, if he is enrolled in the burgess roll.

By sect. 241:

No misnomer or inaccurate description of any person, body corporate, or place named in any schedule to the Municipal Corporation Act 1835, or in any roll, list, notice, or voting paper required by this Act, shall hinder the full operation of this Act with respect to that person, body corporate, or place, provided the description of that person, body corporate, or place, be such as to be commonly understood.

By sched. 3, part 2, r. 1:

Every candidate for the office of councillor must be nominated in writiug.

By rule 2:

The writing must be subscribed by two burgesses of the borough, or, in the case of a ward election, of the ward, as proposer and seconder, and by eight other burgesses of the borough or ward, as assenting to the nomination.

By rule 5:

The nomination paper must state the surname and other names of the candidate, with his abode and description.

By sched. 8, part 2, Form C.:

The List of Burgesses of the Borough of in the Parish [*or* Township] of .

Surname and other Names of each Person in full.	Nature of the Property for which he is now rated.	Name and Situation of Property for which he is now rated.
Ashton, John ...	Shop	No. 23, Church-st.
Bates, Thomas ...	House	Brook's Farm.

By Form H.:

Take notice.

(2.) Candidates must be nominated by writing, subscribed by two burgesses as proposer or seconder, and eight other burgesses as assenting to the nomination.

By Form I.:

NOMINATION PAPER.

Borough of election of councillors [elective auditors or revising assessors], for ward in the said borough [*or* the said borough], to be held on the day of

We, the undersigned, being respectively burgesses, hereby nominate the following person as a candidate at the said election:

Surname.	Other Names.	Abode.	Description.	Signature.	Number on Burgess Roll, with the Ward or Polling District, if any, having a distinct numbering.
				A. B. C. D.	

We, the undersigned, being respectively burgesses, hereby assent to the nomination of the above-named person as a candidate at the said election.

Dated this day of 18 .

Signature.	Number on Burgess Roll, with the Ward or Polling District, if any, having a distinct numbering.
E. F. G. H. I. J. K. L. M. N. O. P. Q. R. S. T.	

Asquith for the petitioners.—The question here is, whether the ordinary signatures of three assentors to the nomination of a candidate for election as a councillor for St. David's Ward, in the City of Exeter, is sufficient, such signatures not agreeing in full with the names given in the ward-roll for the particular ward. The mayor of Exeter allowed an objection against one candidate on the ground of the insufficiency of such signatures; and the other candidates were declared elected. The special case finds that three assentors signed their ordinary signatures on the nomination paper, thus, Edwin J. Hooper, W. E. Waller, and R. Turner, but that on the St. David's ward-roll their names appeared as Edwin John Hooper, William E. Waller, and Robert Turner. Their ward numbers on the nomination paper were accurately set out. Sched. 3, part 2, of the Municipal Corporations Act 1882 contains rules for the nomination of councillors, &c., and it is clear from those rules and from the forms based on them, that a distinction is drawn between the names of the candidates and those of their proposers and assentors; there is no doubt that the names in full of the candidates are to be given, but that the signatures of the proposers, seconders, and assentors are enough. Here the three assentors in question have signed all that is required of them, that is their signature; the Act does not tell them to give their surname and other names in full. If a person named Edwin John Hooper, with his full name on the burgess-roll, appends his name Edwin J. Hooper to the nomination paper, it is contended that he is sufficiently described by his signature, if his ward number is accurately set forth. There was ample evidence of his identification. The mayor, however, thought otherwise, but his decision was wrong. [He was here stopped.]

Foote, for the respondents.—It is not sufficient to show that the nomination paper bore a signature; any signature in a colloquial form is not enough. The Act of 45 & 46 Vict. c. 50 requires that the nomination paper of a candidate shall be subscribed by his proposer, seconder, and assentors; that is, such persons are to subscribe their names in full for the purpose of thorough identification. This case is very nearly altogether covered by that of

Moorhouse v. *Linney*, 53 L. T. Rep. N. S. 353; 15 Q. B. Div. 273.

There a variance between the names in the burgess-roll and on the nomination paper was held fatal, though the case found that there was no doubt of the identity of the two persons. All the names in the burgess-roll should appear in the nomination paper to avoid any chance of identity being concealed. By sect. 9 of the Act, if a person professes to act as burgess he must act under his burgess-roll name; and by sect. 51 he is only entitled to subscribe a nomination paper if he is on the burgess or ward-roll, and "not otherwise." There is a good reason for the full names appearing, as at nominations only candidates and their agents are present. [MANISTY, J.—Is not this objection cured by sect. 241?] No, for that section does not refer to errors in nomination papers; and the defect cannot be

cured, as it was fatal *ab initio*. The proposition put forward by the petitioners is, that a man's ordinary signature on a nomination paper is enough, provided it is consistent with his true name; but that is against the effect of *Moorhouse* v. *Linney* (*ubi sup.*). [*Asquith.*—In that case there was an actual discrepancy between the names in the burgess-roll and the nomination paper; in the present there is no such variance, but the signature and the burgess-roll name actually tally.] Suppose in the burgess-roll there were John Smith and Jacob Smith, and one of them signed as assentor in a nomination paper his ordinary signature "J. Smith," it could not be maintained that that would be sufficient. In a case where a person nominating a candidate at a municipal election put on the nomination paper a wrong number opposite his name for his burgess-roll number, it was held that the error could not be cured, although it was not suggested that anybody was or could be deceived thereby:

Gothard and others v. *Clarke and others*, 42 L. T. Rep. N. S. 776; 5 C. P. Div. 253.

In the case of *Mather* v. *Brown* (34 L. T. Rep. N. S. 869; 1 C. P. Div. 596) a like discrepancy to the present one was held fatal, though I admit that was in the case of a candidate. But the last case of *Moorhouse* v. *Linney* (*ubi sup.*) assumes that the variance between the name in the burgess-roll and the signature of the assentor is fatal, and cannot be cured by sect. 241. Burgesses must be enrolled by their names, and without being enrolled they cannot subscribe their names to nomination papers.

Asquith was not called on to reply.

MANISTY, J.—This case raises the question whether the Mayor of Exeter was right in holding the nomination paper of Mr. Tuckwell invalid. If the decision of the court is in the negative, the prayer of the petition is to be allowed. I have come to the conclusion that he was wrong. I am of opinion that the provisions of sect. 241 of 45 & 46 Vict. c. 50 are applicable to this case. By sched. 3, part 2, r. 1, a candidate for the office of councillor must be nominated in writing; nothing is there said about signatures or names; by rule 2 the writing is to be subscribed by "eight other burgesses of the borough or ward as assenting to the nomination;" by rule 5 it is expressly enacted that the nomination paper must state the surname and other names of the candidate. But there is no mention made of the names or signatures of any other person but the candidate nominated. We next come to sched. 8, part 2, which contains forms relating to elections. Form C. is for the list of burgesses, and in that list the surname and other names of each qualified person must no doubt be given in full, but that requirement does not touch this question. Form I. is the nomination paper. That form complies with the enactment requiring the surname and other names of the candidate to be set out in full. When we come to the signatures of the nominators and assentors to the nomination, as distinguished from the candidate, the column for the names is only headed "signature," and letters of the alphabet are employed to illustrate such signatures. A distinction was intended to be drawn by the Legislature between candidates and their nominators and assentors. Paragraph 4 of the special case shows that the nomination paper complied with the statutory requisites in setting out the surname and other names of the candidate in full; then follow the two names of his nominators, also in full; and lastly, the names of the assentors, among whom was Edwin J. Hooper. His signature in the signature column is not exactly the same as appears in the burgess-roll, which is Edwin John Hooper. That raises the whole question; how are assentors to sign or subscribe the nomination paper, by their names in full, or simply by their ordinary signatures. Can anyone reasonably doubt that the description of that person is not such as is commonly understood? In addition it must be remembered that the number of the assentor on the burgess-roll is to be added to the signature, and in Hooper's case it is found by the case to be correct. The same remarks apply to the signatures of W. E. Waller and R. Turner, whose names appear on the burgess-roll as William E. Waller and Robert Turner. There cannot be any reasonable doubt that all these three persons are the same, and that their identity has been established. For these reasons my judgment must be for the petitioners.

STEPHEN, J.—I am of the same opinion. I have looked through all the forms, and think it important to observe that the various statutory provisions in them differ. Rule 2 of sched. 3, part 2, requires the nomination paper of a candidate for councillor to be subscribed by burgesses of the borough; and Form C. of sched. 8 gives an illustration of what ought to be filled up in the burgess-roll; there the full names of persons qualified to be burgesses must be given, it is clear. So, too, Form H. (3) shows that the nomination paper must state the name and other names of the person nominated. But in Form I., which is the form of a nomination paper, the column in which the nominators and assentors are to subscribe their names is headed "Signature," and we find as examples only alphabetical names, such as A B., C D., and so on. From this fact we may gather that it was the intention of the Legislature that the latter classes of persons should sign their names in the ordinary way. That is the general reason for my judgment and I do not think the aid of sect. 241 is necessary to cure any defect or irregularity. I must say that Mr. Foote's ingenious argument, based on *Moorhouse* v. *Linney* (*ubi sup.*) had for a time great weight with me; however, on reading that case, I find that the decision turned on an original error in the burgess-roll. In the burgess-roll of the borough the man's name was entered as Charles Burman, while he filled in the nomination paper as assentor with his true signature, Charles Arthur Burman; and by reason of that error his identity could not be secured, and so the error was incurable. *Moorhouse* v. *Linney* (*ubi sup.*) is much the same case as that of a man who has a cheque payable to his order, which he does not indorse according to the name on its face. There the man signed his name in a way to suggest that he was not the same man as on the burgess-roll. There must be, I admit, a degree of conformity between the signature and the full name, and enough to enable a person looking at the two documents to see that the two names belong to one and the same person. I answer the

question in the negative, and give judgment for the petitioners.

Judgment for petitioners.

Solicitors for the petitioners, *H. A. Farman*, for *A. E. Dunn*, Exeter.

Solicitors for the respondents, *S. D. Hamilton*, for *Friend* and *Beal*, Exeter.

Supreme Court of Judicature.

COURT OF APPEAL.

Saturday, Feb. 11, 1888.

(Before Lord Esher, M.R., Fry and Lopes, L.JJ.)

Tunnicliffe and others (apps.) *v.* Overseers of Birkdale (resps.). (*a*)

Poor rate — Rateability — Certified reformatory school—Reformatory School Act 1866 (29 *&* 30 *Vict. c.* 117), *s.* 4.

A reformatory school, certified under the Reformatory Schools Act 1866, *is rateable to the poor rate.*

Sheppard *v.* Bradford (10 *L. T. Rep. N. S.* 421; 16 *C. B. N. S.* 369) *overruled.*

This was an appeal from a judgment of the Queen's Bench Division, upon a case stated by the Lancashire Quarter Sessions upon an appeal against a poor rate.

The appellants were the managers of a reformatory school for youthful offenders of the Roman Catholic religion, certified under the Reformatory Schools Act 1866 (29 & 30 Vict. c. 117), s. 4. The premises, which were held by the appellants partly under leases and partly as yearly tenants, consisted of school buildings, in which handicrafts were taught, and a farm used for instruction in agriculture. The inmates were boys professing the Roman Catholic religion, sent on conviction to the reformatory school as part of their sentence by justices' orders under sect. 14 of the Act; but by sect. 8 the managers "may decline to receive any youthful offenders proposed to be sent to them." The expenses were partly defrayed out of contributions made by the counties in which the convictions took place, under private agreements. The managers derived some profit from the sale of farm produce, and of articles made by the inmates.

The appellants contended that the houses and lands were not rateable, as they were "property in the nature of a gaol, and occupied by and for the purposes of the Crown only." The respondents denied that the property or the occupation was properly thus described, and contended that the premises were for rating purposes on the same footing as an industrial school certified under the Industrial Schools Act 1866 (29 & 30 Vict. c. 118), sect. 7.

The Queen's Bench Division upheld the order of quarter sessions, and confirmed the rate (19 Q. B. Div. 280).

The appellants appealed to the Court of Appeal.

Sir *C. Russell*, Q.C. and *Segar* for the appellants.—The point was decided in favour of the appellants in the case of *Sheppard* v. *Bradford* (10 L. T. Rep. N. S. 421; 16 C. B. N. S. 369). That case was, however, decided before the *Mersey Docks case* (12 L. T. Rep. N. S. 643; 11 H. of L. Cas. 443). Assuming that, according to the latter case, the appellants have to show that the occupation of the school in question is the occupation of the Crown for the purposes of Government, then it is submitted that that is in this case shown. A certified reformatory school is practically a gaol, and it is subject to various rules and regulations under 29 & 30 Vict. c. 117. Its inmates are youthful persons convicted of crimes, and there is, therefore, a great distinction between the case of a reformatory school and the case of an industrial school where the inmates are homeless and destitute children:

Reg. v. *West Derby*, 32 L. T. Rep. N. S. 400; L. Rep. 10 Q. B. 283.

Aspland, Q.C. and *Melsheimer* for the respondents.—The case of *Sheppard* v. *Bradford* (*ubi sup.*) was overruled by the *Mersey Docks case* (*ubi sup.*), and was so treated by Lord Blackburn in the case of *Reg.* v. *West Derby* (*ubi sup.*). This case is not within the only exemption allowed by the *Mersey Docks case*, namely, an exemption of property occupied by the Crown, or by servants of the Crown, for the purposes of the Crown. The reformatory school is in its foundation a private charity, and only comes under the Reformatory Schools Act 1866 when the managers elect to take out a certificate under that statute. When they do so they become subject to the statutory enactments, and may by arrangement with the Government take charge of young persons who have been convicted of crime, but that does not make them servants of the Crown occupying for the purposes of the Crown. They may by sect. 8 refuse to receive any youthful offender proposed to be sent to them.

Segar, in reply, referred to

Coomber v. *Justices of Berkshire*, 50 L. T. Rep. N. S. 405; 9 App. Cas. 61.

Lord Esher, M.R.—In this case the question is, whether such a reformatory school as this, regulated in certain respects by statute, is rateable to the poor rate. It is urged that it is not so rateable because it is in effect a prison, and therefore part of the machinery for the public administration of law and order. Now it does not seem to me that the question is simply whether this is a prison or not, because no exception is given to prisons because they are prisons, but only because they are prisons belonging to the Crown, and are occupied only by the servants of the Crown. The question, therefore, is not whether this is a prison, but whether, if it be a prison, it can be said to be exempt on the ground that it is occupied by servants of the Crown. For the purpose of deciding such a question as this, the first case we must consider is the *Mersey Docks case* (12 L. T. Rep. N. S. 643; 11 H. of L. Cas. 443.) In that case the House of Lords held that the courts had in previous cases partially misconstrued or misapplied the statute of Elizabeth, and they brought back the courts to the true construction of that Act. The House of Lords laid down the true construction and application, and pointed out that the statute imposed a liability to be rated upon every person occupying land, houses, &c., in such a way that the occupation could be made beneficial in the hands of any

(*a*) Reported by A. A. Hopkins, Esq., Barrister-at-Law.

ordinary occupier, and that the only exception to that general rule was the Crown, and that the exemption of the Crown arises only from the fact that the Crown is not named in the statute, and therefore is not affected by it. That exemption was stated in terms as the only exemption by Lord Westbury, but the language of Lord Cranworth is usually accepted as being the clearest exposition of the grounds of the decision. He says: "To avoid all misconception I wish to add that there are certain cases to which the observations I have made do not apply. The Crown, not being named, is not bound by the Act. It follows, therefore, that lands or houses occupied by the Crown, or by servants of the Crown for the purposes of the Crown, are not liable to be rated, and I conceive that it is from a confusion between property occupied for public purposes and property occupied by servants of the Crown that this mistake has arisen." I think the words "by servants of the Crown" were used by Lord Cranworth as an expansion of the term "occupied by the Crown," and to prevent its being supposed that the exemption was confined to the personal occupation of the Sovereign. It seems to me to come to this, that the exemption extends to lands and houses which are occupied by the servants of the Sovereign in his sovereign capacity, so that the occupation by them is, as in the case of the occupation of houses by the servants of a private individual, the occupation not of the servants but of the master. The logical result of all the learned Lords said seems to be that, the Crown not being bound because not named in the statute, lands and houses occupied by the Crown, or by the servants of the Crown in its Sovereign capacity, are not rateable. Lord Blackburn, in delivering the opinion of the majority of the judges, really says the same thing. He says: "The Crown not being named in the statute of Elizabeth is not bound by it." So far he makes the exemption depend upon the same principle as that stated by Lord Cranworth; but then he goes on to enumerate cases in which there had been decided to be an exemption, in order to examine how they could be brought within the principle. He says: "So far the ground of exemption is perfectly intelligible, but it has been carried a good deal further, and applied to many cases in which it can scarcely be said that the Sovereign or the servants of the Sovereign are in occupation. Long series of cases have established that, where property is occupied for the purposes of the Government of the country, including under that head the police and the administration of justice, no one is rateable in respect of such occupation." He then refers to police and county buildings, judges' lodgings, &c., and then continues: "In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign so as to make the occupation that of Her Majesty; but the purposes are all public purposes of that kind which by the constitution of this country fall within the province of Government, and are committed to the Sovereign, so that the occupiers, though not strictly servants of the Sovereign, might be considered *in consimilii casu*." That is an attempt by the learned judge to bring those cases within the principle, which is stated in exactly in the same terms by the learned law Lords. If therefore at any time since the decision in the *Mersey Docks case* it has been held that there is in the case of any particular class of buildings an exemption, and if there is upon the point a long series of decisions declaring them exempt, so that no court, not even the House of Lords, would now overrule the cases, then such cases must be taken not as establishing any new principle, but as being in some way brought within the principle laid down in the *Mersey Docks case*. Except where the court is concluded by a long series of decisions from holding that a certain class of buildings is within the strict rule, then I think the strict rule laid down in the *Mersey Docks case* must be applied, namely, that the only exemption is where the occupation is either the occupation of the Crown or the occupation of persons in the position of servants of the Crown, so that they do not occupy for themselves. It was argued that later cases had enlarged the rule, and various authorities were cited on the subject. *Reg.* v. *West Derby* (*ubi sup.*) was the case of an industrial school. In that case Blackburn, J. himself refers to the judgment of Lord Cranworth as laying down the principle of exemption to be that the only exemption was the Crown, as not being named in the statute of Elizabeth. *Coomber* v. *Justices of Berks* (*ubi sup.*) was the case of assize courts, and the question there, which was a question as to whether they were liable to pay income tax, was stated to turn upon similar considerations to those affecting the question of rateability. The buildings were held not liable, but the case does not seem to me to lay down any new principle, or to enlarge the principle already laid down. Lord Blackburn, in giving judgment, quoted the language of Lord Westbury in the *Mersey Docks case*, and treated the question as being whether the occupation could properly be said to be the occupation of the servants of the Crown. Lord Watson, speaking also of the language of Lord Westbury, said: "The precise language of that definition satisfies me that the noble and learned Lord meant to affirm and did affirm that the exemption extended not only to the immediate and actual servants of the Crown, but to all other persons not being servants of the Crown whose occupation was ascribable to a bare trust for purposes required and created by the Government of the country." That seems to me to mean that the exemption extends not only to cases of occupation by the Crown, through its immediate and actual servants, but also to cases where the building is a public building occupied and used for the purposes of Government by persons who must be considered as servants of the Crown, because intrusted with the performance of duties forming part of the functions of the Sovereign. Then the case of *Sheppard* v. *Bradford* was cited, which was a case of a reformatory school substantially similar to the one now in question; the school was there held not rateable. But that case was decided before the *Mersey Docks case*, and there does not seem to have been any long series of decisions on the matter, or any continued practice founded on the decision. I think we must therefore consider the case of *Sheppard* v. *Bradford* as overruled by the *Mersey Docks case*, unless the buildings there in question can be brought within the strict rule. Indeed, Lord Blackburn in *Reg.* v. *West. Derby* (*ubi sup.*) seems to have treated the case as overruled. The result therefore is, that we have to

determine whether this school can be said to be exempt as being in the occupation of the Crown. For myself, I think it might be said to be a prison, inasmuch as it is used for the purpose of dealing with young persons convicted of crime and ordered to be kept there as part of their sentence on conviction. I think it is a prison in such a sense that it would have been sufficiently shown to be a building used for public purposes, and for the general administration of the county, to come within the old rule acted on before the *Mersey Docks case*. But now it is not enough to show that a building is used for public purposes. The question is, whether the occupation is that of the Crown, or its servants; in other words, whether, if the premises were subject to a rate, the Crown would be the person to be rated. I need not now state the circumstances of this school, they have been fully discussed; in my opinion they show conclusively that the buildings cannot be said to be occupied by the Crown or by the servants of the Crown. Such schools as this are subject to certain regulations enacted by 29 & 30 Vict. c. 117, but I see nothing to make those in the possession and management of the school servants of the Crown. The school was instituted by benevolent persons, and is managed by a committee; those in charge of the school are appointed and can be dismissed by the committee. The Crown has certain statutory powers over the convict children, but none over the building; the Crown is not in any way in possession or occupation of the building, and all it can do is to withdraw the certificate if anything is done with the building without the sanction of the Crown. For these reasons I think that the case does not come within the only exemption which, having regard to the rule laid down in the *Mersey Docks case*, can now be admitted to the general liability imposed by the statute of Elizabeth. I think the judgment of the court below must be affirmed.

Fry, L.J.—I am of the same opinion. The effect of the *Mersey Docks case* (*ubi sup.*) was to recall the courts after a long interval to the very words of the statute of Elizabeth. The only exception to the liability upon every occupier imposed by that statute was held to be the Crown, which is excepted, because not named in the statute. The occupation may be, of course, the personal occupation of the Sovereign, with that we have nothing to do here; or it may be the occupation by servants of the Crown exclusively for the purposes of the Crown. But the rule is that, in order to maintain exemption, the occupation must be shown to be that of the Crown. Now, who are the persons charged here as occupiers of the building now in question? They are the committee of management of a reformatory school, being persons intrusted with the carrying out of an enterprise begun by private benevolence, an enterprise which had for its object the benefit and reform of convicted children. By statute such reformatory schools are enabled to receive contributions both from the county and from the Consolidated Fund, and they are given powers which otherwise they would not have possessed, among them a right to detain the children under their charge. I should be sorry to call a reformatory school a prison; I speak only for myself, but it seems to me that the Legislature has dealt with them as used not so much for the purposes of punishment as of reformation. However, this point is really immaterial. The managers are the servants of the committee of management, and that committee consists of the nominees of the subscribers. They are not appointed or dismissible by the Crown, and they are not bound to take any child whom the Crown may tender for reception. I think it is impossible to say, under these circumstances, that they are the servants of the Crown. It is argued, however, that they are carrying out a public purpose in giving effect to sentences passed by the constituted authorities of the country, and that they cannot be regarded as mere volunteers. It must not, however, be forgotten that a sentence of detention in a reformatory school only became a sentence known to the law when the Legislature became minded to avail themselves of the efforts in this direction of private individuals. I do not think that the managers of this institution can in any sense be properly called the servants of the Crown. Then, is there any other principle according to which it can be said that these premises are in the occupation of the Crown? I think not; I can find none. I only wish to make one more observation. The case of *Sheppard* v. *Bradford* (*ubi sup.*) has been cited to us as an authority; but when that case is examined it will be seen that the decision mainly turned on the view that the school was either a charitable institution or an institution for public purposes, which at that time was supposed to be sufficient ground for exemption. I do not think that case can be considered as authority, since the decision in the *Mersey Docks case*. I think that we are now bound to inquire whether the premises are occupied by the Crown, and in this case I think our answer must be in the negative.

Lopes, L.J.—I am of the same opinion. The *Mersey Docks case* (*ubi sup.*) must now be taken to be the governing case on the subject. The only principle of exemption laid down in that case was that the Crown, not being named in the statute of Elizabeth, is not bound by it. Lord Cairns put the ground very clearly and concisely in the case of *Greig* v. *University of Edinburgh* (L. Rep. 1 Sc. App. 348), where at p. 350 he says: "The general principle, as I understand it, approved by your Lordships in this case is this, that the Crown, not being named in the English or Scotch statutes on the subject of assessment, and not being bound by statute when not expressly named, any property which is in the occupation of the Crown, or of persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the poor." The question therefore comes to this: Can this reformatory be said to be in the occupation of the Crown? As a fact it is not in the occupation either of the Crown or its servants; the Crown has no such control over the occupants as places them in the position of servants of the Crown. The site and building belong to private persons, and private persons founded the institution and contribute largely to its support. The managers appoint and dismiss the officers of the school: they may decline any child sent to them, and they may shut up the establishment upon notice without any consent of the Crown. I do not think it necessary to express any opinion as to whether this building is a prison or not; I incline to the opinion that it is in its nature a private institution, but in any case I think it cannot be said to

be in the occupation of the Crown. As to the case of *Sheppard* v. *Bradford* (*ubi sup.*), I need only say that I think it cannot now be considered as an authority.

Appeal dismissed.

Solicitors for the appellants, *Gregory, Rowcliffes,* and *Co.*, for *Threlfall,* Preston.

Solicitors for the respondents, *Bower, Cotton,* and *Bower,* for *Parr, Sadler,* and *Dickinson,* Lancaster.

Tuesday, Feb. 21, 1888.

(Before Lord Esher, M.R., Fry and Lopes, L.JJ.)

The Mayor, Aldermen, and Burgesses of Bury *v.* Lancashire and Yorkshire Railway Company. (*a*)

Railways—Bridges—Roadway over bridge—Liability of railway company to repair roadway over bridge—Railways Clauses Consolidation Act 1845 (8 *Vict. c.* 20), *s.* 46.

By two Acts of Parliament which incorporated the Railways Clauses Consolidation Act 1845, *a railway company was empowered to make certain extensions of their line. For the purpose of doing so it became necessary to carry the extensions under a certain turnpike road (since disturnpiked). The deposited plans described the road as "turnpike road, level unaltered." The extension lines, as they approach the road, are in a deep cutting, and pass under the road at a considerable depth. The road and soil thereunder are supported by two arches of a bridge, under which the lines of railway pass. No alteration was made in the level of the road, and no additional expense had been caused in respect of the maintenance and repair of any additional length or width of roadway, owing to the construction of the lines.*

Held (affirming the judgment of the Queen's Bench Division), that sect. 46 *of the Railways Clauses Consolidation Act* 1845 *imposed on the railway company the liability of maintaining and keeping in perpetual repair the roadway over the bridge and the approaches thereto, although no alteration had been made in the level of the road, and no additional expense in the maintenance and repair of the roadway had been caused by the extension lines of the company.*

This was an appeal from a judgment of the Queen's Bench Division (Mathew and Cave, JJ.), reported at 57 L. T. Rep. N. S. 99, upon questions of law arising in the action and stated by the parties.

The plaintiffs, having expended certain sums in the repair of the roadway over a certain bridge, claimed to be repaid those sums by the defendants, and brought the action to recover the amount. The facts are fully stated in the report in the court below, and are sufficiently referred to in the above head note. The Queen's Bench Division gave judgment in favour of the plaintiffs.

The defendants appealed.

Sir *R. E. Webster* (A.-G.) and *Henn Collins,* Q.C. (*W. Graham* with them) for the defendants.

R. S. Wright, for the plaintiffs, was stopped.

The arguments sufficiently appear from the judgments. The following cases were referred to:

Leech v. *North Staffordshire Railway Company,* 5 H. & N. 160;
North Staffordshire Railway Company v. *Dale,* 8 E. & B. 836;
Waterford and Limerick Railway Company v. *Kearney,* 12 Ir. Com. Law, 224;
North of England Railway Company v. *Langbaugh,* 24 L. T. Rep. N. S. 544;
Fosbury v. *Waterford and Limerick Railway Company,* 13 Ir. Com. Law, 494;
London and North-Western Railway Company, v. *Skirton,* 10 L. T. Rep. N. S. 648; 5 B. & S. 559;
Great Eastern Railway Company v. *Hackney District Board.* 49 L. T. Rep. N. S. 509; 8 App. Cas. 687.

Lord Esher, M.R.—I think that, on different occasions, as many as sixteen different judges have expressed their opinions upon sect. 46 of the Railways Clauses Consolidation Act 1845. They were all of opinion that it was to be construed according to the plain meaning of the words used, and otherwise than as contended for by the defendants. We are now asked to overrule those judges; I am certainly not prepared to do so. I think the first decision on the point was that of Lord Campbell, C.J., and Wightman and Crompton, JJ., in the case of *North Staffordshire Railway Company* v. *Dale* (*ubi sup.*), and in that case the substance of the decision was this: Here is a section dealing with certain specified cases in plain language, and if the section alone is looked at there cannot be a doubt as to its meaning, but then counsel, by suggesting that it must be read with other sections, cloud its plain meaning; the court was of opinion that it must be taken by itself. Doing so, one thing is quite clear, that whatever works the railway company is to execute under the section, those it is to maintain for ever. The question therefore is what does the section compel them to execute? The section enacts that, "If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge of the height and width, and with the ascent or descent by this or the special Act in that behalf provided, and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed, and at all times thereafter maintained at the expense of the company." It was argued by Mr. Collins, on behalf of the defendants, that the section does not speak of a road, but of a bridge to carry it, and that therefore the road is not included in the term "bridge," but that seems to me to be contrary to plain English. Then it was argued that it applied only to cases where there was an ascent or descent; but that is not the true meaning, the section means only that the ascent or descent, if any, must be such as is specified. In ordinary English the word bridge includes the roadway over the bridge, and if the railway company are to make that, as I think they are, then they are also to maintain it. As to the other sections which have been referred to, I think they are wholly independent of sect. 46. If I had had any doubt on the matter I should not have been prepared to overrule the decisions of so many judges, but I have none, and I am entirely of their opinion. I think the decision of the court below was right and must be affirmed.

(*a*) Reported by A. A. Hopkins, Esq., Barrister-at-Law.

FRY, L.J.—I am entirely of the same opinion. It would be very difficult to overrule a long line of decisions unanimous and unbroken for thirty years, but if the matter had not been affected by authority, I should arrive at the same conclusion. Now the words are, "If the line of railway cross any turnpike road or public highway," then the section is to apply. Now it is argued for the defendants that those very general words apply only when the crossing is such as to make an ascent or descent necessary, and not to a case where the level remains unaltered. To hold so would be to introduce a new term into the definition of the application of the section. I think those words only mean that the ascent or descent, if any be necessary, shall be such as specified. Then it was argued that the word "bridge" does not include the roadway over the bridge, and that therefore the railway company is not bound to maintain the roadway. It is, however, plain that whatever they are bound to execute, they are also bound to maintain. I think that, in cases to which the section applies, the railway company is bound to make a bridge and a road over the bridge. It seems to me that by the law of England a bridge, where it formed part of a highway, included the roadway over its arches. The Statute of Bridges (22 Hen. 8, c. 5) is silent as to the roadway, but it is conceded that the liability under that statute extended to the road over the bridges, and it seems to me obvious, having regard to the terms of that statute, that the Legislature regarded a bridge as including the roadway upon it. Therefore when I find it provided in sect. 46 of this Act of Parliament that the road is to be carried over the railway by means of a bridge, I have no hesitation in coming to the conclusion that the words "such bridge" mean the bridge with the roadway upon it. But that is not all, the section says: "Such bridge with the immediate approaches, and all necessary works connected therewith." And yet it is gravely argued that these words do not include the metalling on the arches or embankments, or whatever may be the nature of the approaches. Surely the approaches to a bridge must be considered with reference to the kind of traffic which is likely to pass over the bridge, and the maintaining the approaches must include the metalling of the roadway. If the railway company is bound to maintain the roadway of the approaches, then it seems to me to be a monstrous conclusion to hold them not liable to repair the roadway of the bridge to which the approaches are made. I think the words "all necessary works connected therewith" mean all works necessary to make the bridge an effective and useful part of the highway. It was said that we must construe sect. 46 by the light of sects. 53 and 56 of the Act. I do not think those sections apply to cases covered by sect. 46, and I think sect. 46 in cases to which it applies must be construed by itself. I agree that the appeal must be dismissed.

LOPES, L.J.—In this case a road, which is a highway, is carried on arches over a railway. In such a case sect. 46 of the Railways Clauses Consolidation Act 1845 applies, and the language of that section imposes, as it seems to me, upon the railway company, the duty of maintaining the fabric of the bridge, the approaches thereto, and the roadway over. In construing that section, it seems to me that it would be idle to say that the word bridge does not include the roadway by which the traffic passes over it, and there is a long current of authority in favour of the construction which I put upon it. I think that sections 53 and 56 of the Act, to which we have been referred, have no application to the case before us. They are, in my opinion, wholly independent of sect. 46, and do not apply to a state of things contemplated by that section. It was argued that sect. 46 only applied where the bridge was approached by an ascent or descent, but that argument seems to me quite untenable. The road is just as much carried over the railway whether it is carried over on a level, or by a bridge with an ascent or descent.

Appeal dismissed.

Solicitor for plaintiff, *E. Andrew*, for the Town Clerk, Bury.

Solicitors for defendants, *Clarke, Woodcock*, and *Ryland*, for *Moorhouse*, Manchester.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Monday, June 18, 1888.

(Before DENMAN and HAWKINS, JJ.)

PIDLER (app.) *v.* BERRY AND OTHERS (resps.). (a)

Salmon fishery—Bye-law—Validity of—Ultra vires—Salmon Fishery Act 1873 (36 & 37 *Vict. c.* 71), *s.* 39, *sub-sect.* 11.

By sub-sect. 11 *of sect.* 39 *of the Salmon Fishery Act* 1873, *it was provided that a board of conservators might make bye-laws for the better protection, preservation, and improvement of the salmon fisheries within their district, to regulate during the annual and weekly close seasons the use within any river of nets for fish other than salmon, when such use at such times was prejudicial to the salmon fisheries.*

A board of conservators made a bye-law that it should not be lawful for any person to use any net whatever inside the bar in any public water of their fishery district, except a trawl net, between the 1*st Dec. and the* 30*th April, both inclusive.*

Upon an information under the above bye-law against fishermen for using a draft net inside the bar in a public water of the said fishery district, on the 13*th April, the magistrates found as a fact that trawl nets could not be advantageously used by fishermen in that part of the river, and that certain other kinds of nets could be used without prejudice to the salmon.*

Held, that the said bye-law was ultra vires and invalid, and that the conservators had no power under sub-sect. 11 *of sect.* 39 *of the Salmon Fishery Act* 1873 *to make a bye-law which was not a mere regulation, but an absolute prohibition, for a definite time, of the use of nets which were not prejudicial to the salmon fishery.*

THIS was a case stated by the justices of the peace in and for the county of Devon, under sect. 33 of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49), for the opinion of the Queen's Bench Division of the High Court of Justice.

1. At a petty sessions, holden at the Hall of

(a) Reported by F. A. CRAILSHEIM, Esq., Barrister-at-Law.

the Bridge Chambers in Barnstaple, in and for the division of Braunton, in the county of Devon, on the 2nd May 1888, an information was preferred by the appellant, a water bailiff in the employ of the conservators for the fishery district of the rivers Taw and Torridge, against the respondents, fishermen of Appledore, in the parish of Northam, in the said county, under bye-law No. 9 of the bye-laws made by the said conservators, for that they on the 13th April 1888, at the parish of Braunton, in the said county, did unlawfully use a draft net inside the bar, to wit, in the river Taw there, being a public water of the Taw and Torridge fishery district, such net not being a trawl net, contrary, &c., and upon such hearing the justices dismissed the said information.

2. And whereas the appellant being dissatisfied with the determination of the justices upon the hearing of such information, as being erroneous in point of law, has, pursuant to the said 33rd section of the Summary Jurisdiction Act 1879, duly applied to them in writing to state and sign a case setting forth the facts and the grounds of such their determination as aforesaid for the opinion of the court, and has duly entered into a recognisance as required by the said statute in that behalf:

3. The said justices, in compliance with the said application, and the provisions of the statute, did state and sign the following case.

4. Upon the hearing of the said information, the due making and publication of the bye-law having been admitted by the respondents, the following evidence was then given by and on behalf of the appellant.

Alexander Pidler, appellant, sworn, said:

I live at Instow, in the county of Devon, and am a duly appointed water bailiff, acting under the Taw and Torridge Fishery Conservators. I was on duty in the estuary, at a place called Sprat Ridge in the river Taw, which is inside the bar, and is public water of the river Taw, on Friday the 13th April last, at half-past two in the morning. I saw the defendants in a boat. They were using a net which was not a trawl net, but an ordinary salmon net—a draft net—and it was being used in an ordinary salmon draft; in fact, Sprat Ridge is one of the best salmon drafts in the river. I saw them shoot the net and draw it.

Cross-examined by the solicitor for the respondents, he said:

I think they caught one small fish, namely, a bass of about half a pound in weight. Trawl nets are not used inside the bar in winter.

Re-examined by the solicitor for the appellant, he said:

There is no reason why a trawl net should not be used inside the bar in the winter.

Re-examined by the justices, he said:

I do not think that any net other than a trawl net can be used in the river in the winter without danger of catching salmon, but of course it would be unreasonable to think that salmon could be caught in a shrimp net or landing net; and such nets, of course, might be used without prejudice to the salmon.

5. On the part of the respondents it was contended that the 9th bye-law was invalid, as it amounted to a prohibition of all fishing, and was therefore beyond the powers conferred on the conservators by sub-sect. 11 of sect. 39 of the Salmon Fishery Act 1873 (36 & 37 Vict. c. 71), to make bye-laws to regulate, during the annual and weekly close seasons, the use of nets for fish other than salmon, when such use at such times should be prejudicial to the salmon fisheries. Sect. 14 of 24 & 25 Vict. c. 109, and sect. 16 of 36 & 37 Vict. c. 71, were also referred to, as showing that the Salmon Fishery Acts did not take away the right of fishing for fish other than salmon during the close seasons, as the former section expressly provided that when salmon were accidentally taken they should be forthwith returned to the water with the least possible injury, and the latter section provided that nothing in that section should apply to any kind of fishing for fish other than salmon legally practised in any river. It was therefore contended that by these sections of the Salmon Fishery Acts a right to fish for fish other than salmon during the close seasons was recognised, and should be preserved.

The respondents then called witnesses to show that there were drafts in the river where salmon could not be caught, and that such witnesses had exercised a right of fishing in the river for coarse fish during the close season for several years. The evidence of such witnesses was as follows:

John Carter, sworn, said:

I am a fisherman and live at Appledore, and have been a fisherman for the last twenty years, and I get my living chiefly by fishing. I fish both in the open and close seasons, and in the latter season I catch the following small fish, namely, bass, mullet, soles (but soles are very scarce now), whiting, cod, and conger, but I do not know of trawls being used inside the bar in winter.

Re-examined by the justices, he said:

A trawl net, in my opinion, cannot be used above Fremington Pill. I have fished for a month together in the winter with an ordinary salmon net, and have never seen a salmon. There are places in the rivers Taw and Torridge where small fish are caught, and without danger of catching salmon.

Thomas Light, sworn, said:

I live at Barnstaple, and have been a fisherman for twenty-six years, and earn my livelihood by fishing and nothing else. During the close season for salmon I have been in the habit of catching 6 cwt. of common fish a week. There are many places in the river Taw where common fish are caught, and where salmon are never caught. On Monday, the 12th March last, I shot six drafts in the presence of the water bailiffs, Pidler and Lock, and caught on the average 15lbs. of bass each draft. This was at a place called "Pitt Limestones," which is just opposite the Sprat Ridge. The places in the river Taw where small fish are caught, but never salmon, are Penhill Point, Fremington Backs, Between two Rocks, the back of Allen's Rock, Inner Taw Pit, the back of Horsey Weir, Inner Pill Stone, Outer Pill Stone, and several other places. We catch small fish at these places in the winter time when there are no other fish to be had. A trawl net can be used as far as "Braunton Pill," but not further. A trawl net is not suitable for catching small fish in the winter.

6. On the part of the appellant it was contended that the bye-law was not in excess of the powers conferred on the conservators by the said sub-sect. 11 of sect. 39 of the Salmon Fishery Act 1873, as there could not be any regulation without a partial prohibition, and that the bye-law only partially and not totally prohibited the use of nets inside the bar, and was therefore a good and valid bye-law.

7. The justices found as a fact, from the evidence, that the respondents, on the said 13th April 1888, used a net other than a trawl net, to wit, a draft net, in the river Taw, a public water of the Taw and Torridge fishery district, and inside the bar; and they also found as a fact that a trawl

net was not and could not be advantageously used in that part of the river Taw which is above Fremington Pill in the parish of Fremington, and that therefore the bye-law practically prohibited the use of all nets in the said river for a distance of several miles of the public waters of the river Taw; and they also found as a fact that a trawl net was not used by fishermen inside the bar as a mode of catching small fish for a livelihood.

They, therefore, dismissed the said information, as they were of opinion that the bye-law was bad, being in excess of the powers given to the conservators by sub-sect. 11 of sect. 39 of the Salmon Fishery Act 1873 (36 & 37 Vict. c. 71), namely: "To regulate during the annual and weekly close seasons the use within any river of nets for fish other than salmon, when such use at such times is prejudicial to the salmon fisheries, &c.," as the bye-law not only prohibited the use of nets the use of which is prejudicial to the salmon fisheries, but also prohibited the use of nets the use of which is not prejudicial to such fisheries, and that therefore the bye-law was more than a mere regulation, and amounted to a prohibition of all nets (except a trawl net), as far as Fremington Pill, and virtually of all nets above that point, whether their use was prejudicial to the salmon fisheries or not.

They also found as a fact that shrimp nets and landing nets could be used without prejudice to the salmon fisheries, but yet their use was prohibited by the bye-law; and on referring to sub-sect. 12 of sect. 39 of 36 & 37 Vict. c. 71, they observed that, although power was thereby given to the conservators to prohibit during the night time, the use of any net, yet there was introduced into that sub-section an exception in favour of a landing net and a net for taking eels. But as bye-law 9 applied to both day and night, such exception in favour of landing nets and nets for taking eels was presumably taken away, or, if not taken away, the two bye-laws were inconsistent during the period mentioned in the 9th bye-law.

They referred to the case of *Everett* v. *Grapes* (36 L. T. Rep. N. S. 669), decided on a bye-law made by a town council of a borough, that no person should keep, or suffer to be kept, any swine within the borough, from the 1st May to the 31st Oct. inclusive, in any year. The court held that the bye-law was bad, as it was generally against the keeping of pigs, and that the bye-law should have had the qualification "so as to be a nuisance" to make it a valid bye-law.

The justices were of opinion that this case was in point, and that the 9th bye-law prohibited the use of nets generally, and did not distinguish between those the use of which was prejudicial to the salmon fisheries, and those the use of which was not prejudicial to such fisheries.

The question for the opinion of the court was whether, under the circumstances, the justices were right in dismissing the said information.

The Board of Conservators for the Taw and Torridge Fishery District, by virtue of the powers intrusted to them under the Salmon Fishery Act 1873 (36 & 37 Vict. c. 71), made certain bye-laws for the better protection, preservation, and improvement of the salmon fisheries within the said district, of which the following are material:

1. The annual close season for all modes of salmon fishing, except with rod and line, shall commence on the 21st Sept. and terminate on the 30th April, both inclusive.

9. It shall not be lawful for any person to use any net whatever inside the bar in any public water of the Taw and Torridge Fishery District, except a trawl net, between the 1st Dec. and 30th April, both inclusive.

By sect. 39 of the Salmon Fisheries Act 1873 (36 & 37 Vict. c. 71):

Subject to the provisions hereinafter contained for the confirmation and publication of bye-laws, a board of conservators may make bye-laws for the better execution of the Salmon Fishery Acts 1861 to 1873, and for the better protection, preservation, and improvement of the salmon fisheries within their district, and alter the same from time to time for all or any of the following purposes; that is to say,

11. To regulate during the annual and weekly close seasons the use within any river of nets for fish other than salmon, when such use at such times is prejudicial to the salmon fisheries.

12. To prohibit the use in any inland water of any net, except a landing net, or a net for taking eels, between the expiration of the first hour after sunset and the first hour before sunrise.

Willis-Bund for the appellant.—It is submitted that bye-law No. 9 is validly made by the conservators under the powers given to them by sub-sect. 11 of sect. 39 of the Salmon Fishery Act 1873. The bye-law is merely a regulation, and not a total prohibition as the magistrates held it to be. The word "regulation" includes a partial prohibition, and implies some restriction such as this bye-law contains. It is necessary that there should be some restriction to prevent the free use of nets in these rivers. This bye-law does not prohibit all netting; if it did, it is admitted that it would be bad. He cited

Dick v. *Badart*, 48 L. T. Rep. N. S. 391; 10 Q. B. Div. 387.

J. A. Thorne for the respondents.—The magistrates were right in holding that the bye-law was bad, as it is practically, upon the findings in the case, a prohibition of all fishing with nets during the close season, whether such fishing is prejudicial to salmon or not. Such a bye-law was not contemplated by the Act, and it is submitted that it is invalid and *ultra vires*.

Willis-Bund replied.

DENMAN, J.—I was very much impressed at first by Mr. Willis-Bund's argument, and it seemed to me then to be pretty clear that the magistrates were wrong in dismissing the information. However, there are certain nets—such as casting nets, for instance—which have no operation whatever with regard to the catching of salmon, and to prohibit the use of those nets would be an idle operation, so far as regards the Salmon Fishery Acts. But there are several different kinds of nets. For instance, one kind of net is, as we all know, a casting net. The magistrates have illustrated this by referring to landing nets. As far as landing nets are concerned, I think that example is a bad illustration, because a landing net is not one of the nets at all contemplated by the Act—it is a different thing from a net for catching fish; but a casting net is a net for catching fish, and would catch fish of many sorts. Now, the facts of the case seem to come to this, that the Taw and Torridge are rivers in which there are many places in which salmon cannot be caught at all. The Salmon Fishery Act 1873 is an Act for regulating the catching of salmon, and for preventing the catch-

ing of salmon during a certain close season—at least, that is the object of it. The board of conservators have, by its provisions, the right to regulate the use of nets, and they are to regulate the use of nets for certain purposes and within certain limits; that is to say, they are "to regulate, during the annual and weekly close seasons, the use within any river of nets for fish other than salmon, when such use at such times is prejudicial to the salmon fisheries." Now, the magistrates have found that, in this particular case, the bye-law in question covers cases in which the nets which would be used by fishermen generally in that river are nets which would not be at all prejudicial to the salmon fishery. It would cover cases, for instance, of casting nets, and cases of little nets to catch gudgeon in the shallow parts of the river in which there are no salmon; indeed, it covers every sort of net except one particular net—a trawl net. A trawl net is a net which is found in the case to be one very rarely used at all inside the bar of the river, and is only one of several different kinds of nets. Then the question is, whether the conservators had power to make a restrictive bye-law of this nature, under sub-sect. 11 of sect. 39 of the Salmon Fishery Act 1873. It was held by the magistrates that they had not, because the bye-law which they have made is not mere regulation, but it is absolute prohibition for a definite time of the use of a good many kinds of nets which are not prejudicial to the salmon fishery. I think that the bye-law is one which goes beyond the terms of the statute which gives power to regulate. It is asked by the appellant what else can be done under the name of regulation. It strikes me that, taking the facts of this case, a great many things might be very easily done. There are parts of the rivers in question in which it would be dangerous to the salmon to use any other nets than trawl nets. Those parts of the river might be defined, and it might be ordered that during the season intended to be close, trawl nets only should be used in those parts of the river. That would be a fair regulation; but to take the whole of the rivers, including the parts in which nets of different sorts could be used without the slightest prejudice to the salmon fisheries, and to prohibit the use of all nets but trawl nets, which are comparatively useless, does seem to me to be going beyond mere regulation, and to amount to a prohibition not intended by the Salmon Fishery Acts. The case of *Dick* v *Badart* (48 L. T. Rep. N. S. 391; 10 Q. B. Div. 387), cited by counsel on behalf of the appellant, is not exactly in point, but it is a case which goes to show that the court will be very strict in not allowing a bye-law to be carried which contains a prohibition of that which otherwise would be free and open to persons to do according to law, and will not allow, under a power to make bye-laws for regulation, the prohibition of the doing of a thing which is in itself *prima facie* a lawful thing. The principle of the case, I think, applies, though the actual decision is upon totally different facts, and under a somewhat different state of things. I think that in the present case the magistrates were right in holding that, under the circumstances of this case, and as applicable to fisheries in the rivers in question, the bye-law made by the conservators is beyond regulation, and amounts to prohibition, and is bad in consequence. The appeal must, therefore, be dismissed.

HAWKINS, J.—I am of the same opinion. Sub-sect. 11 of sect. 39 of the Salmon Fishery Act 1873 enables the conservators to make bye-laws to regulate during the annual and weekly close seasons the use within any river of nets for fish other than salmon when such use at such times is prejudicial to the salmon fisheries. The question is whether, under that provision, the conservators had power to make a regulation or bye-law prohibiting the use of any net in the way they have done under this bye-law No. 9. Bye-law No. 9 says: "It shall not be lawful for any person to use any net whatever inside the bar in any public water of the Taw or Torridge Fishery District, except a trawl net, between the 1st Dec. and the 30th April, both inclusive." That bye-law makes it absolutely illegal to use any net except a trawl net between those two particular days, whether the use of such net is prejudicial or not to the salmon fisheries. I think they had power only to make the bye-law regulating the use or prohibiting the use of nets, when the use of nets would be prejudicial to the salmon fisheries, and that they had no power to make a bye-law which absolutely prohibits the use of every net except a trawl net, without regard to the question of whether such net was prejudicial or not.

Appeal dismissed with costs.

Solicitors for the appellant, *Surr, Gribble, Bunton,* and *Gribble.*

Solicitors for the respondents, *Kennedy, Hughes,* and *Kennedy,* for *J. Bencraft* and *Son,* Barnstaple.

Monday, April 16, 1888.

(Before FIELD and WILLS, JJ.)

RICHARDS (app.) *v.* KESSICK (resp.).(a)

Local government—Public Health Act 1875 (38 & 39 *Vict. c.* 55), *ss.* 4 *and* 150—"*Street*"—*Strip of land by the side of highway repairable by the inhabitants at large—Power of authority to give notice to frontagers to pave, channel, and kerb.*

The owners of a field adjoining a highway repairable by the inhabitants at large used it for building land, and threw open to the highway a strip of land in front of the houses erected on it. Held, that the houses with the strip of land in front of them together formed a "street" within the meaning of sect. 150 *of the Public Health Act* 1875 (38 & 39 *Vict. c.* 55), *which the urban sanitary authority, within whose district it was situate, could compel the frontagers to pave, channel, and kerb to their satisfaction under the provisions of that section.*

THIS was a case stated by justices of the county of Monmouth under the statutes 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, on the application of the appellant, for the purpose of obtaining the opinion of the court on questions of law which arose before them. On the hearing of a complaint preferred by Thomas Kessick, the respondent, clerk to the urban sanitary authority of the district of Christchurch, on the 5th Nov. 1887, charging the appellant with having neglected and refused to pay to such urban sanitary authority

(a) Reported by ALFRED H. LEFROY, Esq., Barrister-at-Law.

the sum of 16*l.* 7*s.* 5*d.* due for expenses of pavement, kerbing, and channelling incurred by them in Church-road within their district, under sect. 150 of the Public Health Act 1875 (38 & 39 Vict. c. 55). The facts set out in the case were so far as material as follows:—

The Christchurch Local Board of Health was constituted in pursuance of the Public Health Act 1848, by a provisional order of the 31st July 1855, and the extent and boundaries of the district under its jurisdiction were set out in the schedule thereto. At the place where the Christchurch urban sanitary authority had incurred the expenses which they sought to recover, the boundary of the district, as set out in the schedule, runs easterly along the southern boundary of Church-road. Church-road was originally a turnpike road, but for fifty years and upwards has been a highway repairable by the inhabitants at large.

There was originally between the macadamised road and the fence a ditch of three feet in width, and the bank of the ditch towards the road was one of the boundary lines of the board's district. In 1876 the corporation of the adjoining borough of Newport, by its Improvement Act of that year, extended its municipal boundary so as to include this road up to the boundary line of the Christchurch Local Board of Health, and there after the boundary line of the Christchurch Local Board of Health along Church-road became coincident and continuous with the municipal boundary line of the borough of Newport, and Church-road was taken and included within the borough, and since that date the road has been widened, and continuous rows of houses and shops erected on each side. Under the requirements of its bye-laws the Christchurch Local Board of Health approved plans for the erection of a row of dwelling-houses within its district, fronting the southern boundary of Church-road. These houses were erected by the appellant William Richards and sixteen other persons, and they of their own accord flagged and channelled in front of their respective new houses; but the work not having been efficiently done, and being out of repair, the board, in exercise of its powers, called upon such frontagers to pave, channel, and kerb in front of their respective houses, and, on the frontagers refusing and neglecting to do the work required, the board executed it themselves, and their surveyor apportioned the cost thereof as a charge against the frontagers.

The work so executed was situate wholly to the south of the boundary line, and within the district of the Christchurch Local Board of Health. The frontagers having refused to pay, the above-mentioned complaint was preferred, and on the hearing thereof the justices found that the houses built by the appellant and others with the pavement in front of them together formed a street within the meaning of sect. 150 of the Public Health Act 1875, and of the word "street" in sect. 4 of the same Act, and that an order for payment should be made against William Richards, the appellant, and the other frontagers. The opinion of the court was requested as to whether the justices were correct in point of law in their determination.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides as follows:

Sect. 4. In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them; that is to say . . . "street" includes any highway (not being a turnpike road), and any public bridge (not being a county bridge), and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not.

Sect. 150. Where any street within any urban district (not being a highway repairable by the inhabitants at large), or the carriage-way, footway, or any other part of such street, is not sewered, levelled, paved, metalled, flagged, channelled, and made good, or is not lighted, to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, levelled, paved, metalled, flagged, or channelled, or to be lighted, require them to sewer, level, pave, metal, flag, channel, or make good, or to provide proper means for lighting the same, within a time to be specified in such notice. . . .

If such notice is not complied with the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, &c.

The same proceedings may be taken and the same powers may be exercised in respect of any street or road of which a part is, or may be, a public footpath, or repairable by the inhabitants at large, as fully as if the whole of such street or road was a highway not repairable by the inhabitants at large.

A. T. Lawrence for the appellant.—The decision of the justices was wrong. The pavement in front of these houses is not a "street" within the meaning of sect. 150 of the Public Health Act 1875. This strip of land is part of a highway repairable by the inhabitants at large, and sect. 150 of the Public Health Act 1875 only applies to streets which are not highways repairable by the inhabitants at large. A street cannot be cut into lateral sections, one section being repairable by the inhabitants at large and another not. [WILLS, J.—This piece of land was up to the time of building private property; the fact of the owner having thrown it into the public road does not make it repairable by the inhabitants at large, but makes it a road not repairable by the inhabitants at large.] The word "street" in sect. 150 of the Public Health Act 1875 is used in the ordinary and popular sense of the term, and means a highway with houses on both sides. In *Pound* v. *The Plumstead Board of Works* (25 L. T. Rep. N. S. 461; L. Rep. 7 Q. B. 183) Blackburn, J. defined a "street" as "a place with continuous houses on each side." The piece added to the highway in this case has not houses on both sides, and therefore does not come within this definition. [FIELD, J.—No square in London is within the definition, because there are houses on one side only, and a railing and garden on the other.] Where there is a street, a portion only of the street cannot be called a street. [FIELD, J.—By sect. 23 of the Highway Act 1835 (5 & 6 Will. 4, c. 50) a road does not become repairable by the inhabitants at large unless the person dedicating it has complied with the provisions of that section, which the appellant has not done, and therefore an indictment would not lie against the inhabitants at large, and if there is no remedy against the public by indictment for non-repair of a highway, it shows that it must be repairable by the adjoining owners.] It is not necessary to show that an indictment would lie, the respondent

must show that this strip of land comes within sect. 150. [FIELD, J.—The justices have found that this is a street, and you must show us that it is not a street within the meaning of sect. 150 of the Public Health Act 1875.] The justices have not found that this was a street as a fact, but as a matter of construction of the Act, which it was held in *Maude* v. *The Baildon Local Board* (48 L. T. Rep. N. S. 874; 10 Q. B. Div. 394) they ought not to do.

Jelf, Q.C. (*R. Heber Jones* with him) for the respondent.—The case of *Maude* v. *The Baildon Local Board* was overruled in *The Corporation of Portsmouth* v. *Smith* (50 L. T. Rep. N. S. 308; 13 Q. B. Div. 184). It has been held recently, in the case of *Jowett* v. *Idle Local Board* (57 L. T. Rep. N. S. 928), that the definition of the word "street" given by the interpretation section of the Act must be read into sect. 150, and this decision was affirmed on appeal (W. N. 1888, p. 87). Reading in that definition the justices were right in holding that these houses with the pavement in front of them together formed a street within the meaning of the section. [He was stopped by the Court.]

FIELD, J.—I am of opinion that the decision of the justices in this case was right and should be affirmed. The facts, as I understand them, are these: There was an old road called Church-road, which has had for some time houses on the northern or Newport side, and until recently was bounded on the southern or Christchurch side by a field, from which it was separated by a hedge and a ditch three feet wide. The present appellant, who is the owner of this field, wishing to convert it into building land, pulled down the hedge, filled up the ditch, and built houses on the Christchurch side of the road, turning the strip of land formed by filling in the ditch into a paved footpath in front of the newly built houses, and the public have since then used this as a highway. The northern side of the strip of land in question forms the southern boundary of the district over which the Newport sanitary authority exercises jurisdiction, and the northern boundary of that over which the Christchurch sanitary authority has jurisdiction. The Christchurch urban sanitary authority has nothing to do with that part of the road which lies to the north of the boundary. That part there is no doubt is repairable by the inhabitants at large. The owners of this strip dealt with it as a highway, and paved it and intended making it a footway for traffic or a street. The Christchurch urban sanitary authority thought that the work had been badly done, and considered that they were not justified in undertaking the future repairs in the condition in which it was; accordingly they served a notice on the adjoining owners to pave, channel, and kerb in front of their respective houses, and, on their refusing to do the work required, the local authority carried out the work themselves. It was objected on behalf of the appellant and the other adjoining owners that this strip of land was part of a highway repairable by the inhabitants at large, and that the houses built by them with the pavement in front did not form a new street within the meaning of sect. 150 of the Public Health Act 1875 (38 & 39 Vict. c. 55) and of the word "street" in sect. 4 of the same Act. No doubt by pulling down the hedge the strip of land became a part of the highway, and so the local authority had the right to enforce their order. This portion of Church-road was not repairable by the inhabitants at large. I consider that there was reasonable evidence before the justices that this street came within sect. 150 of the Public Health Act 1875, and if there was we cannot interfere. I think it may reasonably come within that section. What is a street? The interpretation clause (sect. 4) of the Public Health Act 1875 says: "The word 'street,' if not inconsistent with the context, includes any highway (not being a turnpike road) and any public bridge (not being a county bridge), and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not." Now, on looking at the 150th section, I cannot understand how any doubt can have arisen as to reading this definition into it; but we have not to decide that point now, because, in *Jowett* v. *The Idle Local Board* (57 L. T. Rep. N. S. 928), which is the last case on the point, it was decided that it was to be read in. Taking then the two sections together, is there any reason for setting aside the decision of the justices on the ground that this is not "a street within an urban district, not being a highway repairable by the inhabitants at large" within the meaning of the 150th section? This strip of land, some three feet wide, is within the district of the Christchurch urban sanitary authority. If the whole of Church-road were the street in question there could be no argument. This strip of land is not separated from Church-road by any boundary; there is a continuous row of houses on the south side of it, and there is also a continuous row of houses along the north side of the road at large, and the public have access all over it; therefore it is a street within the meaning of the section. I think the construction of the justices a reasonable one.

WILLS, J.—I am of the same opinion. We find that there was a strip of land belonging to contiguous landowners who decided to alter its nature and turn it into a thoroughfare. This strip was separated from the high road by a bank with a fence; the owners removed these and joined it to the highway. We have only to deal with the strip of land which was dedicated to the public as a footpath, and the houses built behind it. I think that these together form a street. It has been argued that there must be houses on both sides to form a street. I think not. In the case of *Taylor* v. *The Corporation of Oldham* (35 L. T. Rep. N. S. 696; 4 Ch. Div. 395) Sir George Jessel M.R. says: "The question I have to consider is this, Is the place in question a street, or a place laid out as or intended for a street?" In considering that I must also take into account the interpretation clause of the Public Health Act 1875, which says that a "'street' includes any road, lane, footway, square, court, ally, or passage, whether a thoroughfare or not." In the case of *Reg.* v. *Fullford* (10 L. T. Rep. N. S. 346; 1 Leigh & Cave's C. C. R. 403) Blackburn, J. says: "It seems to me that a street exists within the meaning of this Act (24 & 25 Vict. c. 61, s. 28) when the houses on one side are so contiguous as to be substantially one continuous row; and whether they are or are not so continuous is a question of fact." If there happens to be a river on one side of a thoroughfare and houses on the other, can it

be said that this thoroughfare is not a street? So far as I can see there is no authority for the proposition that there must be houses on both sides of a thoroughfare to make it a street. Why should not this be a street? It is true it is a narrow one, but no less a street. If the landowners, instead of joining the Church-road, had kept up a light fence between this strip of land and it, why should it not, under those circumstances, have been both a highway and a street? It is unnecessary to consider the point any further, as I think the interpretation clause of the Public Health Act 1875 clearly includes such a case as this. It was argued that this section should not be read with sect. 150 of the same Act, and the case of *Maude* v. *The Baildon Local Board* (48 L. T. Rep. N. S. 874; 10 Q. B. Div. 395) was cited in support of that contention. I always thought that decision was wrong, and in the case of *The Corporation of Portsmouth* v. *Smith* (50 L. T. Rep. N. S. 308; 13 Q. B. Div 196) the Master of the Rolls says: "I respectfully differ from the judgment in *Maude* v. *Baildon Local Board*. I think that the learned judges in that case mistook the point actually decided in *Reg.* v. *Dayman* (26 L. J. 128, M. C.)" And it now appears that it has lately been decided in the Court of Appeal, in the case of *Jowett* v. *Idle Local Board*, that the definition of the word "street" given in the 4th section is to be read into the 150th section; therefore I consider that this strip of land was a street. The next question is, was it repairable by the inhabitants at large? This is not arguable. The public could not be called upon to repair it because it has become in a popular and inaccurate sense a part of the highway called Church-road. It seems clear, therefore, that this strip of land is a street, and is not repairable by the inhabitants at large; and for these reasons I think that the justices were not only justified in arriving at the conclusion they came to, but that any other conclusion would have been wrong.

Appeal dismissed.

Solicitor for the appellant, *G. S. Warmington*, for *C. M. Baillache*, Newport.

Solicitors for the respondent, *Yewdall* and *Son*, for *F. S. Dauncey*, Newport.

Thursday, April 19, 1888.

(Before Cave and Smith, JJ.)

The British Empire Mutual Life Assurance Company (apps.) *v.* The Southwark and Vauxhall Water Company (resps.).(*a*)

Water rate—Unoccupied houses not exceeding the value of twenty pounds — Owner's liability—Waterworks Clauses Act 1847 (10 *Vict. c.* 17), *s.* 71—*The Southwark and Vauxhall Water Act* 1852 (15 *&* 16 *Vict. c. clviii.*), *s.* 58.

The respondents, relying on sect. 58 *of their private Act* (15 *&* 16 *Vict. c. clviii.*), *which extended the provisions of sect.* 72 *of the Waterworks Clauses Act* 1847 *to houses not exceeding the annual value of* 20*l.*, *claimed water rates from the appellants as owners of certain houses under the annual value of* 20*l. each, for two quarters, during the whole of which time such houses were unoccupied.*

Held, that an owner's liability for rates under sect. 72 *of the Waterworks Clauses Act* 1847 *ceases on the quarterly day of payment next after the house has become unoccupied, and that as sect.* 58 *of the respondents' private Act merely extended the provisions of that section to houses not exceeding the annual value of* 20*l.*, *the respondents were not entitled to recover.*

This was a case stated by one of the magistrates of the police-courts of the metropolis under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on a question of law which arose before him on the hearing of a complaint preferred by the respondents against the appellants, on the ground that they had been supplied with water by the respondent company at Nos. 221, 231, 226, and 222, Crystal Palace-road, Nos. 30 and 32, Heber-road, Nos. 3, 5, 7, 9, 4, and 14, Silvester-road, and Nos. 23, 25, and 27, Landcroft-road, for which they had not paid, and were then liable to pay the respondents' charges, amounting to 7*l.* 1*s.* for two quarters' water supply up to Midsummer 1887.

The material facts were as follows:—

The houses Nos. 221, 231, and 226, Crystal Palace-road, were occupied during both quarters to Midsummer 1887. The house No. 4, Silvester-road, was occupied during the quarter from Christmas 1866 to Lady-day 1887 only. The remaining houses were unoccupied during the two quarters in respect of which the rates were claimed, and had previously been unoccupied for and during various periods, as the respondents were aware, but no claim for payment of rates in respect thereof had been made upon the owner until the present time.

During the said two quarters each of the said houses was under the annual value of 20*l.*, and the appellants were the owners thereof.

Communication pipes connecting the said houses respectively with the pipes of the respondents were laid before the commencement of the said two quarters, and the same had not been cut off by the respondents, nor had the water been stopped from coming into the said houses, nor had any notice to discontinue the supply to any of the said houses been given to the respondents by the appellants, or by anyone else.

None of the water so supplied had been used by the appellants, nor, so far as their knowledge extended, by any other person.

The appellants did not dispute their liability to pay the respondents' charges in respect of the houses occupied during the aforesaid periods, and the magistrate decided that they were also liable in respect of the houses unoccupied during those periods.

The question for the opinion of the court was, whether the magistrate was right in deciding that the appellants were liable to pay the respondents' rates in respect of those houses which had been unoccupied during the whole period for which the claim was made.

Sect. 10 of the Waterworks Clauses Act 1847 (10 Vict. c. 17) provides as follows:

The occupier of any dwelling-house, or part of a dwelling-house, liable to the payment of any water rate, who shall give notice of his intention to discontinue the use of the water supplied by the undertakers, or who shall remove from his dwelling between any two quarterly days of payment, shall pay the water rate in respect of such dwelling-house, or part of a dwelling-

(*a*) Reported by Alfred H. Lefroy, Esq., Barrister-at-Law.

house, for the quarter ending on the quarterly day of payment next after his quitting the same or giving such notice.

Sect. 58 of the Southwark and Vauxhall Water Act 1852 (15 & 16 Vict. c. clviii.) provides that,

The owners of all houses, or parts of houses occupied as separate tenements, not respectively exceeding the annual value of twenty pounds, shall, during such time as the same shall be supplied with water by the company, be liable to the payment of the rates chargeable in respect thereof under the authority of this Act instead of the occupier thereof; and the person receiving the rents of any such house or tenement from the occupier thereof on his own account, or as agent or receiver for any person interested therein, shall be deemed the owner of such house or tenement.

Bompas, Q.C. (*R. Burnet Morris* with him) for the appellants.—The decision of the magistrate was wrong. No water was supplied during the time for which the rates are claimed. By sect. 68 of the Waterworks Clauses Act 1847 the rates are made payable by the person using the water. By sect. 70 the rates are made payable in advance, so that the water company can always know when the house becomes unoccupied, and can cut off the supply. By sect. 71 the occupier of any dwelling-house who shall give notice of his intention to discontinue the use of the water supplied, or who shall remove from his dwelling between any two quarterly days of payment, shall pay the water rate for the quarter ending on the quarterly day of payment next after his quitting or giving such notice. Then sect. 72 enacts that the owners of all dwelling-houses, or parts of dwelling-houses, occupied as separate tenements, the annual value of which houses or tenements shall not exceed the sum of 10*l.*, shall be liable to the payment of the rates instead of the occupiers thereof; and the powers and provisions herein, or in the special Act, contained for the recovery of rates from occupiers, shall be construed to apply to the owners of such houses and tenements; and the person receiving the rents of any such house or tenement as aforesaid from the occupier thereof, on his own account, or as agent or receiver for any person interested therein, shall be deemed the owner of such house. This is merely a provision that, in the case of small houses, the landlord shall collect the rates, and pay them over to the company. Sect. 74 gives the company power to cut off the supply of water if the rate is not paid. By sect. 58 of the Southwark and Vauxhall Water Act 1852 the limit of 10*l.* laid down in sect. 72 of the Waterworks Clauses Act 1847 is changed to 20*l.*, and the owners of houses not exceeding the annual value of 20*l.* during such time as the same shall be supplied with water, are made liable for the water rate instead of the occupiers thereof. In the case of unoccupied houses exceeding the value of 10*l.* neither the owner nor last occupier is liable for the water rate beyond the quarterly day next after the houses have ceased to be occupied. Sect. 72 of the Waterworks Clauses Act 1847 and sect. 58 of the respondents' private Act merely change the liability for the water rate from the occupier to the owner, and do not make the owner's liability any greater than the occupier's was formerly. [He was stopped by the Court.]

R. A. McCall (*Poland* with him) for the respondents.—The water company might have demanded payment of the rates in advance, and if they had been paid, the mere fact that the houses became unoccupied afterwards would have been no ground for claiming a return of them. An occupier can put an end to his liability in two ways: he may give notice to discontinue the use of the water; or he may cease to be occupier. The owner of these premises is placed in the same position as the occupier, and therefore he must either give notice to discontinue, or cease to be owner, before he rids himself of his liability. The owner or occupier, by giving notice to the company and asking for a supply, thereupon becomes liable for the rate; and as long as the supply is in the communication-pipes, the liability under sect. 58 of the company's Act remains, until either notice to discontinue is given, or the person liable has ceased to be owner or occupier. The owner knows when his house becomes unoccupied, and ought to give notice. If it is the company's business in such cases to cut off the supply, they will be at the expense and inconvenience of finding out which houses are occupied and which not.

Cave, J.—It is clear that in this case the learned magistrate came to a wrong conclusion, and that the appellants are not liable for water rates beyond the quarterly day next after the time when their houses became unoccupied. Sect. 58 of the respondents' private Act, which is the same as sect. 72 of the Waterworks Clauses Act 1847, with the exception that it raises the annual value from 10*l.* to 20*l.*, provides that the owners of houses under the annual value of 20*l.* shall be liable to pay the water rates "instead of the occupiers thereof." It has been contended that the words in sect. 58, "during such time as the same shall be supplied with water by the company," render the owner liable so long as water is in the pipes. I am of opinion that no such meaning was intended to be put upon those words, and that they were merely inserted *ex majore cautelâ*. Those words cannot control the language of the Act. If it was intended to make the owner pay when the occupier was not liable, or when there was no occupier to be liable, the Legislature have not expressed that intention plainly. I think that, in all cases since this Act, the owners of houses not exceeding the annual value of 20*l.* have been liable to the payment of the rates instead of the occupiers, and they have the same liability as occupiers had before the Act. I do not think that the owner has to pay for the time his house has been unoccupied, as well as when it was occupied, any more than occupiers were liable before the Act to pay on the houses they had ceased to occupy after the quarter ending on the quarterly day next after their quitting such houses. The Act only gives the Southwark and Vauxhall Water Company the right to recover their rates from the owners of houses instead of the occupiers in cases where the annual value of the houses does not exceed 20*l.*, but does not confer on them any greater rights against the owners than they had formerly against the occupiers.

Smith, J.—I am of the same opinion. The meaning of sect. 72 of the Waterworks Clauses Act 1847 is, that the Legislature by this section makes an exception to the general rule that the occupier of a house is liable to the payment of the water rate, and says that in cases where the annual value of the house shall not exceed the

sum of 10*l.* the owner shall be liable instead of the occupier, so that in all cases in which the occupier of such a house was liable before the Act the owner is now liable; where the occupier was not liable neither is the owner. Sect. 58 of the Southwark and Vauxhall Water Act 1852 (15 & 16 Vict. c. clviii.) extends the provisions of the 72nd section of the Waterworks Clauses Act 1847 to houses or parts of houses occupied as separate tenements of which the annual value shall not exceed the sum of 20*l.*, and so enables the Southwark and Vauxhall Water Company in such cases to recover from the owners instead of the occupiers, but does not give them any greater rights against the owner than they had before against the occupier, and as the occupier's liability, who removes from his house between two quarterly days, ceases on the quarterly day of payment next after quitting his house, the owner's liability ceases at the same time. The magistrate has decided that the owner is to remain liable so long as water is in the communication pipes of the houses. But when we see that the words in sect. 58, "shall, during such time as the same shall be supplied with water by the company, be liable to the payment of the rates," also apply to parts of houses occupied as separate tenements, it seems clear that such a construction could not have been intended by the Legislature. In my opinion the decision of the magistrate must be reversed.

Appeal allowed.

Solicitors for the appellants, *Watson, Sons,* and *Room.*

Solicitors for the respondents, *Lanfear* and *Stewart.*

April 23 *and May* 7, 1888.

(Before Field and Wills, JJ.)

Reg. *v.* The Commissioners of Inland Revenue; *Re* The Empire Theatre Licence. (*a*)

Licensing Acts—"Place of public entertainment other than a theatre"—Licensed place for music and dancing—Right of proprietor of, to obtain liquor licence from Commissioners of Inland Revenue under 5 *&* 6 *Vict. c.* 39, *s.* 7—*Licensing Act* 1872 (35 *&* 36 *Vict. c.* 94), *ss.* 3, 72, 74.

Sect. 7 *of* 5 *&* 6 *Will.* 4, *c.* 39, *authorises and empowers the Commissioners and Officers of Excise to grant retail licences to any person to sell beer, spirits, and wine in any theatre established under a Royal Patent, or in any theatre or other place of public entertainment licensed by the Lord Chamberlain, or by justices of the peace.*

Sect. 3 *of the Licensing Act* 1872 *provides that "No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorised by his licence to sell the same;" and by sect.* 74 *a "licence" is defined to be a licence granted by justices.*

Sect. 72 *provides (as a saving clause) that "Nothing in this Act shall affect or apply to . . . . (4) The sale of intoxicating liquor by proprietors of theatres in pursuance of the Acts in that behalf."*

Held, that, as the exemption in sect. 72 *of the Act of* 1872 *specified "theatres," but omitted "other places of public entertainment," it must be taken that "places of public entertainment other than theatres" do not come within the exemption of that section, and therefore require a justices' licence under sect.* 3 *of the Act of* 1872, *before intoxicating liquors can be sold therein, and the Commissioners of Excise have no longer the right, under sect.* 7 *of* 5 *&* 6 *Will.* 4, *c.* 39, *to grant liquor licences to proprietors of "places of public entertainment other than theatres."*

(*a*) Reported by Henry Leigh, Esq., Barrister-at-Law.

Rule to show cause why a writ of *mandamus* should not issue to the Commissioners of Inland Revenue, directing them to grant an excise licence for the sale of intoxicating liquors to the proprietor of the Empire Theatre, pursuant to sect. 7 of 5 & 6 Will. 4, c. 39.

In October 1886 an application was made on behalf of the proprietor of a building called the Empire Theatre of Varieties, Leicester-square, in the county of Middlesex, for a music and dancing licence. This application was refused by the quarter sessions, the chief reason for the refusal being that there was no liquor licence, and that a music and dancing licence would be useless without a liquor licence, so that a liquor licence should first be obtained.

In March 1887 an application was made to the licensing justices at the annual general licensing meeting for a licence for the sale of liquors, but this licence was refused, not upon the merits, but because the justices thought that a music and dancing licence should precede the granting of the liquor licence.

In October 1887 an application was made to the quarter sessions for a music and dancing licence, and a music and dancing licence was then granted under sect. 2 of the Act 25 Geo. 2, c. 36.

Application was then made to the Commissioners of Inland Revenue to grant the liquor licence under sect. 7 of 5 & 6 Will. 4, c. 39; but the commissioners, though desirous to grant the licence so far as they could by law do so, refused to grant it on the ground that the section referred to was not now applicable to the case, and that they had no power to grant a liquor licence to a "place of public entertainment other than a theatre."

Sect. 7 of 5 & 6 Will. 4, c. 39, provides

That it shall be lawful for the Commissioners and Officers of Excise, and they are hereby authorised and empowered, to grant retail licences to any person to sell beer, spirits, and wine in any theatre established under a Royal Patent, or in any theatre or other place of public entertainment licensed by the Lord Chamberlain, or by justices of the peace, without the production, by the person applying for such licence or licences, of any certificate or authority for such person to keep a common inn, alehouse, or victualling house; anything in any Act or Acts to the contrary notwithstanding.

Sect. 3 of the Licensing Act 1872 (35 & 36 Vict. c. 94), dealing with "Illicit Sales," provides that

No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorised by his licence to sell the same. Any person selling or exposing for sale by retail any intoxicating liquor, which he is not licensed to sell by retail, or selling or exposing for sale any intoxicating liquor, at any place where he is not authorised by his licence to sell the same, shall be subject to the following penalties; that is to say, &c.

Sect. 72 (saving clause) provides that

Nothing in this Act shall affect or apply to—

(4) The sale of intoxicating liquor by proprietors of theatres in pursuance of the Acts in that behalf.

Sect. 74 defines a licence, as follows:

"Licence" means a licence for the sale of intoxicating liquors granted by justices in pursuance of the Intoxicating Liquor Licensing Act 1828, including a certificate of justices granted under the Wine and Beerhouse Acts, and including a licence for the sale of sweets, which is hereby authorised to be granted in the same manner as if sweets were wine, and including a licence for the retail of spirits granted to a wholesale spirit dealer by the justices in pursuance of this Act.

and

"Licensed person" means a person holding a licence as defined by this Act.

Sir *Edward Clarke*, Q.C. (S.-G.) (with him Sir *R. Webster*, Q.C. (A.-G.) and *R. S. Wright*) showed cause against the rule.—By an early Act, a restriction was placed upon theatres; they were not permitted in certain places without a licence from the Lord Chamberlain, and any place of public entertainment, including within the programme of its entertainment anything in the nature of a stage play, required the Lord Chamberlain's licence; and at the same time other licences have been granted by the magistrates for places for music and dancing in different localities. That is the Act 5 & 6 Will. 4, c. 39. Sect. 7 of that Act deals with different classes of cases. The Commissioners of Excise are empowered to grant retail licences to any person to sell beer, spirits, and wine in any theatre established under a Royal Patent, or in any theatre or other place of public entertainment licensed by the Lord Chamberlain, or by justices of the peace. Now, that being then the state of the law, the Licensing Act 1872 was passed, and sect. 3—the penal and effective section of that Act—provides that "No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not duly authorised by his licence to sell the same." This licence is not an excise licence, but a licence granted by justices; so that the effect of sect. 3 is that a person shall be subject to a penalty for selling liquor without being duly licensed. Then in sect. 74 there is a definition of a licence, but that is not now material, because in the case of a theatre, licensed by the Lord Chamberlain, there can be no doubt that the commissioners still have the authority to grant a licence. The point here is, that we are dealing with a place which has been licensed, not by the Lord Chamberlain, but by the magistrates, and which is not a theatre requiring a licence from the Lord Chamberlain. The saving clause in sect. 72 of the Act of 1872 is most important in the present case. It provides that nothing in the Act shall affect or apply to (4) "the sale of intoxicating liquor by proprietors of theatres in pursuance of the Acts in that behalf." The question is, whether that saving clause is to be read as including in its saving effect all the institutions which are dealt with by 5 & 6 Will. 4, c. 39, s. 7. This building, though called a theatre, is not a theatre at all. If it were, a licence from the Lord Chamberlain would be required. The justices have no power to license a theatre in the city of Westminster; they can only license for music and dancing, and if upon the stage of this theatre anything were performed in the nature of a stage play the proprietor would be liable to prosecution. A music and dancing licence is given under sect. 2 of 25 Geo. 2, c. 36. The object of the saving clause in the Act of 1872 clearly is to limit the area within which these licences may be granted by the commissioners, and there is good reason for so limiting it. Under the Lord Chamberlain's licence, the holder of it may, under 5 & 6 Will. 4, c. 39, obtain from the Commissioners of Excise a liquor licence, and the place being under the control of the Lord Chamberlain, he attaches the condition that intoxicating liquor shall only be sold during the hours when the theatre is open for public performance. But, if this saving clause were held to include music places licensed by the justices, the justices could not control the times at which intoxicating liquors should be sold, so that the place could be used as a public-house. Now, sect. 7 of the Act of Will. 4 speaks of "theatres," or "other places of public entertainment," but in the saving clause of the Act of 1872 an exemption is made in favour of theatres, while nothing is said as to "other places of entertainment," which are therefore omitted from the benefit of the saving clause. This clearly shows the intention of the Legislature that theatres should, but "other places of public entertainment" should not, be exempted. The result is, that sect. 3 of the Act of 1872 prohibits any person selling intoxicating liquor without a justices' licence, unless he comes within the exemptions of sect. 72, which provides an exemption in favour of proprietors of "theatres" (which can still be licensed by the Commissioners of Excise under the Act of Will. 4), but is silent as to proprietors of "places of public entertainment other than theatres," which do not come within the exemption, and which therefore require a justices' licence.

Sir *Charles Russell*, Q.C. (with him *Forrest Fulton*) in support of the rule.—The question is, whether the commissioners had power to grant a liquor licence to a house already licensed by the justices as a house of entertainment for music and dancing. Reading sect. 7 of the Act of Will. 4, it cannot be doubted that, if that statute be unaffected by subsequent legislation, the Commissioners of Excise would have authority, on being satisfied that this was a public place of entertainment licensed by the justices, to grant a liquor licence. The commissioners took that view, and admitted that they would have had power under that statute, if it stood alone, to grant the liquor licence; but they thought that such power was taken away by sect. 72 of the subsequent Licensing Act 1872. Now, it is contended that there is here a deliberate omission by the Legislature of the words "other place of public entertainment," and that this exemption was intended to be restricted to theatres alone. The first point to notice is, that this is a saving clause. The earlier section (sect. 3) says, "No person shall sell or expose for sale, &c." That is a general provision directed against "illicit sales;" it is not directed to altering the authority which shall license. It is a penal section, which provides what shall be the penalties if there be an unlicensed, that is, an illicit sale. [Field, J.—What licence do you say you have to get?] The licence which we get from the Commissioners of Excise under sect. 7 of the Act of Will. 4, an excise licence, and there is nothing in the Act which suggests the contrary. The Act of 1872 was not intended to regulate the new licensing authority at all, and in the saving clause in sect. 72 there is no

express repeal of sect. 7 of 5 & 6 Will. 4, c. 39, either wholly or partially. But it is said there is a repeal of a part of that section by the limitation in the saving clause by the use of the words "proprietors of theatres," and that a restriction to theatres operates as a taking away of the power of the Commissioners of Inland Revenue to grant licences to others than to the owners of licensed theatres. But if the Legislature had intended that, it would have done it in clearer and less ambiguous language. Again, the word "theatre" is there used in its popular sense, as expressive of the class of places of public entertainment. In sect. 7 of the Act of Will. 4 "theatre" is treated as one of the places of public entertainment. "Theatre," in popular language, is simply a place where there are spetacular shows, or singing, or dramatic stage pieces. In a statute which is cognate to this in its provisions relating to the same matters, in Ireland, the Legislature used, as I contend they intended to use in the Act we are now construing, the words "theatres or places of entertainment," so that they never intended to make this alteration which it is said they have made. Again, in the Statute Law Revision Act 1874, the Act 5 & 6 Will. 4, c. 39, is repealed as to sects. 1, 2, and 8, leaving sect. 7 untouched as if it were still of statutory force. There was, therefore, the power to grant this licence by the Act of Will. 4, and the Act of 1872 did not intend to, and did not in fact, take away that power.

Sir *E. Clarke* in reply.—There is another question raised here, viz., whether a *mandamus* would lie to the Commissioners of Inland Revenue. I should submit that it does not lie to the commissioners in this case, as the Act 5 & 6 Will. 4, c. 39, places the granting of these excise licences in their discretion. But for the purposes of the present case, and for the present case only, I waive the question as to the *mandamus*, as the commissioners desire to obtain a decision on the other point. [He was stopped.]

Field, J.—I think that this order must be discharged. It is an order calling upon Her Majesty's Commissioners of Inland Revenue to show cause why they should not grant to the applicant an excise licence. The state of facts, under which the question arises, is as follows: The applicant is the proprietor of "The Empire" Theatre, which, although it is called a "theatre," is not a theatre established under any Royal patent, or licensed by the Lord Chamberlain, or a theatre licensed by justices of the peace, but is a place of public entertainment, which has been licensed by justices of the peace, under the 25 Geo. 2, under what is called a music and dancing licence. It is conceded on the part of the Commissioners of Inland Revenue that, if this statute had stood by itself and there had been no other legislation, they would without any demur, if they had power at all, have granted a licence to the keepers of that house. There is no reflection whatever made upon the persons applying for this licence: in fact, the same persons have, as we understand, received the sanction of the licensing justices to sell spirits by retail under the Act of 1828 and subsequent Acts. So there is no reflection cast upon them or upon their conduct, or in any way as showing that they are not proper persons, or that their premises are not fit premises on which excisable liquors may and should be sold by retail. But the difficulty which the commissioners have felt which has necessitated this application arises upon the legislation of 1872. The commissioners have been desirous all along to grant the licence, but they were advised that they had no power to do so in the existing state of legislation, and they concurred fully in the suggestion that this court should be applied to for a *mandamus* to obtain an authoritative decision as to whether or not they were justified in their refusal to grant the licence. At one time I thought that the Crown intended to rely upon the want of power in this court to issue a *mandamus* to Her Majesty, or to those who represent Her Majesty; but the learned Solicitor-General has waived that question for the purposes of the present case. Our decision, therefore, is not to be taken in any way as disposing of that point if at any future time it should be thought right on the part of the Crown to take the objection. It is waived for the present purpose, and of course, under those circumstances, we can have no personal objection to decide the point, which both parties are desirous of having a decision upon, and which it is very important should be decided. It is conceded that, if legislation had remained where it was in 1835, the licence ought to be granted. But then the objection taken by the Inland Revenue Commissioners is, that that state of things has been altered by the legislation of 1872. In order to appreciate the effect of that legislation it is necessary to consider what has been the legislation prior to and up to the time when that Act was passed. The Act of 1828 (9 Geo. 4, c. 61) deliberately dealt with three particular classes of people—keepers or persons about to be keepers of inns, alehouses, or victualling-houses, and then it consolidated them all together, and said most distinctly that they must not sell excisable liquors by retail without having the licence of the justices to be granted at the annual general licensing meeting. But that licence by itself does not enable the keepers of those inns to sell beer, cider, and other things of that kind, because they are all excisable liquors. Her Majesty claims to receive, and does receive, a very large revenue from them, and therefore by the Act of 1828 no persons could sell excisable liquors, unless they were able to obtain an excise licence for that purpose. Sect. 17 of the Act of 1828 enacted that no licence for the sale of excisable liquors by retail to be drunk or consumed on the premises of the person licensed should be granted by the Commissioners of Excise to any person whatsoever unless such person should have previously obtained from the justices a licence under that Act; and sect. 18 enforced that by a penalty on every person who should sell excisable liquors by retail without being duly licensed so to do. That state of things existed up to 1830, when the Legislature for the first time authorised the sale of three particular excisable liquors, namely, beer, ale, and porter, upon premises which should be the subject of a particular licence; so that a person might go to the commissioners and say, "Give me a licence to sell beer, ale, and porter upon these particular premises." In 1830, and until 1834, that right was general and unrestrained by any condition. In 1834, however, the evils of unrestrained sale of

that character presented themselves to the Legislature, and in that year a condition was imposed that no such excise licence should be granted without a certificate of good character, which was to be deposited with the Excise Commissioners, signed by six rated inhabitants of the parish, and certified by one of the overseers. That statute was passed just one year only before the Act of 1835, that we have been dealing with, by sect. 7 of which latter Act licences may be granted, not as to all excisable liquors, nor all intoxicating liquors, but only "to sell beer, spirits, and wine, in any theatre;" and the commissioners might grant retail licences to sell them in certain specified places, one of them being a theatre, and another being a place of public entertainment, licensed by the Lord Chamberlain or by justices of the peace. Now the Act of 1872 was a very well-considered Act, and was a kind of qualifying Act. It brought in all intoxicating liquors, and a new set of people and houses, and a new set of articles to be sold, and various other matters; it brought them all into one code. It began by saying, "Whereas it is expedient to amend the law for the sale by retail"—no longer now the words "for the sale of beer, wine, cider, porter or spirits," but "of intoxicating liquors, and the regulation of public-houses,"—and this is very important with reference to what we have now to consider—"and other places." The legislation of 1828 was limited to inns, alehouses, and victualling-house. The legislation of 1830 instituted a different place—a beerhouse. The Act of 1872 sought to strike at not only public-houses, but all other places in which intoxicating liquors were sold, and then by sect. 3 prohibited what in the heading of the section are called "illicit sales," which means unlawful sales. That section says, "No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same." But for the definition clause we might have had a good deal of discussion as to what the meaning of that was; but the definition clause (sect. 74) removes all difficulty on that head, because it explains most distinctly what the meaning is, first of all defining "intoxicating liquors" to mean all excisable liquors. Intoxicating liquors and excisable liquors therefore come to the same thing exactly, for it says, "intoxicating liquors" means spirits, wine, beer, porter, &c., and any fermented, distilled, or spirituous liquor which cannot, according to any law, for the time being in force, be legally sold without a licence from the Commissioners of Inland Revenue." That seems to make "intoxicating liquor" and "excisable liquor" really identical in their definition. What, then, is the meaning of "licence?" "Licence" means not any licence, but a licence for the sale of intoxicating liquors granted by justices in pursuance of the Intoxicating Liquor Licensing Act 1828, including a certificate of justices granted under the Wine and Beerhouse Acts. But then it was thought desirable by a saving clause (sect. 72) to take out certain things from the general prohibition contained in the Act, and to make an exception in their favour; for instance, the privileges enjoyed by any university in England, or the respective, chancellors or scholars of the same; by the mayor or burgesses of the borough of St. Albans; by the master, wardens, and commonalty of the vintners of the city of London; also the sale of a liquor called "spruce or black beer;" and also (and this is the important exception), "the sale of intoxicating liquor by proprietors of theatres in pursuance of the Act in that behalf." Now the present application is not by the proprietor of a theatre, but by the proprietor of a place of public entertainment licensed by the justices. Therefore it is quite clear, if those words are read in their natural and ordinary sense, that the present applicant does not fall within them. That is too plain to be denied; but it is said, as it is often said, "these words are not to be read in their ordinary sense, but in a popular sense." I always begin to be distrustful when I am asked to construe an Act of Parliament in a popular sense. It may be so in the case of a will, which is very often so construed, but an Act of Parliament I have more difficulty about. Sir Charles Russell says, these words must be construed in a general sense, and that under the heads of "theatre" we must include a place of public entertainment. I think that is disposed of at once by the language of the 5 & 6 Will. 4, which draws a distinction between a "theatre" and "other places of public entertainment." A theatre may be a place of public entertainment; sometimes I think it is, though not always. There is a distinction therefore drawn between the one and the other. But then Sir C. Russell tried to strengthen his argument by saying that there is in the Act of 1835 a declared intention of the Legislature to give to proprietors of places of public entertainment the right to obtain a licence to sell beer, wine, and spirits therein; and that there is no clear language in the Act of 1872 repealing that section. But it is a maxim of construction that, if two Acts themselves are inconsistent with each other, then of necessity an implied repeal is operative. Does that arise here? If this had not been new legislation altogether the argument would have been perhaps strong, that there being no change at all in the elements of legislation, no new provisions in this, with regard to control or regulation and things of that kind, you might say that these two Acts might stand together, and that this second Act was not an implied repeal of the first. But I think for that purpose you must consider what took place under the Act of 1872, and the Solicitor-General has fully satisfied me that there was included in that Act a great quantity of new legislation, new elements of control, all of which seem to me to have been covered by the express determination of the Act that no sale of liquors should take place unless certain events occurred. Those events have no existence here unless we alter the language of sect. 72, and say, as Sir C. Russell asked us to say, that we must read into those words the words "or other place of public entertainment." I think that is going far beyond any rule of construction I am aware of. I think we must read it in this way, that the Legislature here did intend, first of all, to create new penalties, new disabilities, with regard to articles and places themselves, and that they did not intend deliberately to extend the privileges of granting or continuing exceptions from the prohibition of selling liquors of that kind to places of public entertainment; if they had intended to do so, they would have said so. At one time I was not quite prepared to see the reason why the

express repeal of sect. 7 of 5 & 6 Will. 4, c. 39, either wholly or partially. But it is said there is a repeal of a part of that section by the limitation in the saving clause by the use of the words "proprietors of theatres," and that a restriction to theatres operates as a taking away of the power of the Commissioners of Inland Revenue to grant licences to others than to the owners of licensed theatres. But if the Legislature had intended that, it would have done it in clearer and less ambiguous language. Again, the word "theatre" is there used in its popular sense, as expressive of the class of places of public entertainment. In sect. 7 of the Act of Will. 4 "theatre" is treated as one of the places of public entertainment. "Theatre," in popular language, is simply a place where there are spetacular shows, or singing, or dramatic stage pieces. In a statute which is cognate to this in its provisions relating to the same matters, in Ireland, the Legislature used, as I contend they intended to use in the Act we are now construing, the words "theatres or places of entertainment," so that they never intended to make this alteration which it is said they have made. Again, in the Statute Law Revision Act 1874, the Act 5 & 6 Will. 4, c. 39, is repealed as to sects. 1, 2, and 8, leaving sect. 7 untouched as if it were still of statutory force. There was, therefore, the power to grant this licence by the Act of Will. 4, and the Act of 1872 did not intend to, and did not in fact, take away that power.

Sir *E. Clarke* in reply.—There is another question raised here, viz., whether a *mandamus* would lie to the Commissioners of Inland Revenue. I should submit that it does not lie to the commissioners in this case, as the Act 5 & 6 Will. 4, c. 39, places the granting of these excise licences in their discretion. But for the purposes of the present case, and for the present case only, I waive the question as to the *mandamus*, as the commissioners desire to obtain a decision on the other point. [He was stopped.]

Field, J.—I think that this order must be discharged. It is an order calling upon Her Majesty's Commissioners of Inland Revenue to show cause why they should not grant to the applicant an excise licence. The state of facts, under which the question arises, is as follows: The applicant is the proprietor of "The Empire" Theatre, which, although it is called a "theatre," is not a theatre established under any Royal patent, or licensed by the Lord Chamberlain, or a theatre licensed by justices of the peace, but is a place of public entertainment, which has been licensed by justices of the peace, under the 25 Geo. 2, under what is called a music and dancing licence. It is conceded on the part of the Commissioners of Inland Revenue that, if this statute had stood by itself and there had been no other legislation, they would without any demur, if they had power at all, have granted a licence to the keepers of that house. There is no reflection whatever made upon the persons applying for this licence: in fact, the same persons have, as we understand, received the sanction of the licensing justices to sell spirits by retail under the Act of 1828 and subsequent Acts. So there is no reflection cast upon them or upon their conduct, or in any way as showing that they are not proper persons, or that their premises are not fit premises on which excisable liquors may and should be sold by retail. But the difficulty which the commissioners have felt which has necessitated this application arises upon the legislation of 1872. The commissioners have been desirous all along to grant the licence, but they were advised that they had no power to do so in the existing state of legislation, and they concurred fully in the suggestion that this court should be applied to for a *mandamus* to obtain an authoritative decision as to whether or not they were justified in their refusal to grant the licence. At one time I thought that the Crown intended to rely upon the want of power in this court to issue a *mandamus* to Her Majesty, or to those who represent Her Majesty; but the learned Solicitor-General has waived that question for the purposes of the present case. Our decision, therefore, is not to be taken in any way as disposing of that point if at any future time it should be thought right on the part of the Crown to take the objection. It is waived for the present purpose, and of course, under those circumstances, we can have no personal objection to decide the point, which both parties are desirous of having a decision upon, and which it is very important should be decided. It is conceded that, if legislation had remained where it was in 1835, the licence ought to be granted. But then the objection taken by the Inland Revenue Commissioners is, that that state of things has been altered by the legislation of 1872. In order to appreciate the effect of that legislation it is necessary to consider what has been the legislation prior to and up to the time when that Act was passed. The Act of 1828 (9 Geo. 4, c. 61) deliberately dealt with three particular classes of people—keepers or persons about to be keepers of inns, alehouses, or victualling-houses, and then it consolidated them all together, and said most distinctly that they must not sell excisable liquors by retail without having the licence of the justices to be granted at the annual general licensing meeting. But that licence by itself does not enable the keepers of those inns to sell beer, cider, and other things of that kind, because they are all excisable liquors. Her Majesty claims to receive, and does receive, a very large revenue from them, and therefore by the Act of 1828 no persons could sell excisable liquors, unless they were able to obtain an excise licence for that purpose. Sect. 17 of the Act of 1828 enacted that no licence for the sale of excisable liquors by retail to be drunk or consumed on the premises of the person licensed should be granted by the Commissioners of Excise to any person whatsoever unless such person should have previously obtained from the justices a licence under that Act; and sect. 18 enforced that by a penalty on every person who should sell excisable liquors by retail without being duly licensed so to do. That state of things existed up to 1830, when the Legislature for the first time authorised the sale of three particular excisable liquors, namely, beer, ale, and porter, upon premises which should be the subject of a particular licence; so that a person might go to the commissioners and say, "Give me a licence to sell beer, ale, and porter upon these particular premises." In 1830, and until 1834, that right was general and unrestrained by any condition. In 1834, however, the evils of unrestrained sale of

that character presented themselves to the Legislature, and in that year a condition was imposed that no such excise licence should be granted without a certificate of good character, which was to be deposited with the Excise Commissioners, signed by six rated inhabitants of the parish, and certified by one of the overseers. That statute was passed just one year only before the Act of 1835, that we have been dealing with, by sect. 7 of which latter Act licences may be granted, not as to all excisable liquors, nor all intoxicating liquors, but only "to sell beer, spirits, and wine, in any theatre;" and the commissioners might grant retail licences to sell them in certain specified places, one of them being a theatre, and another being a place of public entertainment, licensed by the Lord Chamberlain or by justices of the peace. Now the Act of 1872 was a very well-considered Act, and was a kind of qualifying Act. It brought in all intoxicating liquors, and a new set of people and houses, and a new set of articles to be sold, and various other matters; it brought them all into one code. It began by saying, "Whereas it is expedient to amend the law for the sale by retail"—no longer now the words "for the sale of beer, wine, cider, porter or spirits," but "of intoxicating liquors, and the regulation of public-houses,"—and this is very important with reference to what we have now to consider—"and other places." The legislation of 1828 was limited to inns, alehouses, and victualling-house. The legislation of 1830 instituted a different place—a beerhouse. The Act of 1872 sought to strike at not only public-houses, but all other places in which intoxicating liquors were sold, and then by sect. 3 prohibited what in the heading of the section are called "illicit sales," which means unlawful sales. That section says, "No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same." But for the definition clause we might have had a good deal of discussion as to what the meaning of that was; but the definition clause (sect. 74) removes all difficulty on that head, because it explains most distinctly what the meaning is, first of all defining "intoxicating liquors" to mean all excisable liquors. Intoxicating liquors and excisable liquors therefore come to the same thing exactly, for it says, "intoxicating liquors" means spirits, wine, beer, porter, &c., and any fermented, distilled, or spirituous liquor which cannot, according to any law, for the time being in force, be legally sold without a licence from the Commissioners of Inland Revenue." That seems to make "intoxicating liquor" and "excisable liquor" really identical in their definition. What, then, is the meaning of "licence?" "Licence" means not any licence, but a licence for the sale of intoxicating liquors granted by justices in pursuance of the Intoxicating Liquor Licensing Act 1828, including a certificate of justices granted under the Wine and Beerhouse Acts. But then it was thought desirable by a saving clause (sect. 72) to take out certain things from the general prohibition contained in the Act, and to make an exception in their favour; for instance, the privileges enjoyed by any university in England, or the respective, chancellors or scholars of the same; by the mayor or burgesses of the borough of St. Albans; by the master, wardens, and commonalty of the vintners of the city of London; also the sale of a liquor called "spruce or black beer;" and also (and this is the important exception), "the sale of intoxicating liquor by proprietors of theatres in pursuance of the Act in that behalf." Now the present application is not by the proprietor of a theatre, but by the proprietor of a place of public entertainment licensed by the justices. Therefore it is quite clear, if those words are read in their natural and ordinary sense, that the present applicant does not fall within them. That is too plain to be denied; but it is said, as it is often said, "these words are not to be read in their ordinary sense, but in a popular sense." I always begin to be distrustful when I am asked to construe an Act of Parliament in a popular sense. It may be so in the case of a will, which is very often so construed, but an Act of Parliament I have more difficulty about. Sir Charles Russell says, these words must be construed in a general sense, and that under the heads of "theatre" we must include a place of public entertainment. I think that is disposed of at once by the language of the 5 & 6 Will. 4, which draws a distinction between a "theatre" and "other places of public entertainment." A theatre may be a place of public entertainment; sometimes I think it is, though not always. There is a distinction therefore drawn between the one and the other. But then Sir C. Russell tried to strengthen his argument by saying that there is in the Act of 1835 a declared intention of the Legislature to give to proprietors of places of public entertainment the right to obtain a licence to sell beer, wine, and spirits therein; and that there is no clear language in the Act of 1872 repealing that section. But it is a maxim of construction that, if two Acts themselves are inconsistent with each other, then of necessity an implied repeal is operative. Does that arise here? If this had not been new legislation altogether the argument would have been perhaps strong, that there being no change at all in the elements of legislation, no new provisions in this, with regard to control or regulation and things of that kind, you might say that these two Acts might stand together, and that this second Act was not an implied repeal of the first. But I think for that purpose you must consider what took place under the Act of 1872, and the Solicitor-General has fully satisfied me that there was included in that Act a great quantity of new legislation, new elements of control, all of which seem to me to have been covered by the express determination of the Act that no sale of liquors should take place unless certain events occurred. Those events have no existence here unless we alter the language of sect. 72, and say, as Sir C. Russell asked us to say, that we must read into those words the words "or other place of public entertainment." I think that is going far beyond any rule of construction I am aware of. I think we must read it in this way, that the Legislature here did intend, first of all, to create new penalties, new disabilities, with regard to articles and places themselves, and that they did not intend deliberately to extend the privileges of granting or continuing exceptions from the prohibition of selling liquors of that kind to places of public entertainment; if they had intended to do so, they would have said so. At one time I was not quite prepared to see the reason why the

Legislature had dropped those places from the privilege granted by the 5 & 6 Will. 4. On the other hand, the Solicitor-General has pointed out many reasons why new legislation has taken place. Undoubtedly some little difficulty has been created by going into the intention of the Legislature. In my opinion we are not at liberty to consider the intention of the Legislature otherwise than by construing the language which they have used, and if the language used is clear, as I think it is, I cannot go any further than I have in this case. The Irish Act created a good deal of difficulty, and I cannot see my way out of it. [Sir *E. Clarke*.—I can give your Lordships a clue to that in a moment. The last sentence of sect. 77 of the Act of 1872 I think explains the whole matter. Sect. 77 applied the Act to Ireland, but it concluded with a proviso introducing a qualification which applied to Ireland only, which had the effect of keeping the statute of Will. 4 in full effect in that country.] I am much obliged for the information, which no doubt you would have given us before if we had not stopped you. Under these circumstances I think that this order must be discharged and with costs.

WILLS, J.—I am of the same opinion. Although this case has occupied a great deal of time in discussion, it seems to me to be perfectly plain, and that the position taken by the Commissioners of Inland Revenue is right. Previous to the Act of the 5 & 6 Will. 4, the proprietor of a theatre, or of a place of public entertainment, if he wanted to sell beer, spirits, and wine, must have had an excise licence. Then in 1834 (4 & 5 Will. 4) it was said that he could not get that excise licence unless he got a certificate of character from the licensing justices to enable him to do so. Then came the 5 & 6 Will. 4, which says that, notwithstanding that prohibition, it shall be lawful for the Commissioners of Excise in the case of a theatre, whether a patent theatre, or a theatre or other place of public entertainment, licensed by the Lord Chamberlain or justices of the peace, to grant a licence for the sale of beer, spirits, and wine, without the proprietor producing any certificate of character. From that time down to 1872 the proprietor of a place of public entertainment would have been entitled to go to the Commissioners of Excise and ask them for a wine, beer, and spirit licence without getting such a certificate of character as was previously required. Then came the Act of 1872, the terms of which it appears to me are far too clear for mistake or qualification. It says that "no person shall sell intoxicating liquor." That term comprehends those that I have just mentioned, as well as a great number of other liquors. "No person shall sell intoxicating liquors without being duly licensed to sell the same." Then the interpretation clause says, under this Act, a person licensed means a person who has a licence from the magistrates under the Act of 1828; and, but for the exception which exempts the proprietors of theatres from being under the obligation of this Act, in this respect it is perfectly clear that after that, neither the proprietor of a theatre, nor the proprietor of a place of public entertainment other than a theatre, would be entitled to a licence without producing a certificate of character. But then, the saving clause of the Act of 1872 seems to me to be just as specific, and just as free from any doubt or mistake as all the rest in this respect. It says, that "nothing in this Act shall affect or apply to the sale of intoxicating liquor by proprietors of theatres in pursuance of the Acts in that behalf." But the present applicants are not proprietors of a "theatre;" they are proprietors of a "a place of public entertainment other than a theatre," and the distinction is perfectly well established and well drawn. It seems to me to be quite clear that they are not within that saving clause; and, as they are not within it, they are affected by the legislation. It is inconsistent with the Act of 1835, and therefore it amounts *pro tanto*, so far as that is concerned, to the repeal of that Act. I confess that, notwithstanding the very long and very energetic argument of Sir Charles Russell, I have never been able to see that there was room for the least doubt about this matter.

Rule discharged with costs.

Solicitor, *The Solicitor of Inland Revenue.*

Solicitors for the Empire Theatre, *Tyrrell, Lewis,* and *Co.*

Tuesday, June 12, 1888.

(Before MANISTY and STEPHEN, JJ.)

REG. *v.* DE WINTON AND OTHERS AND TAYLOR. (*a*)

Bastardy order—"Last place of abode"—Service of summons against putative father at—Certiorari—The Bastardy Laws Amendment Act 1872 (35 *& 36 Vict. c.* 65), *s.* 4.

The complainant was delivered of a child on the 11*th May* 1887. *A bastardy summons was issued against the defendant, who had for some years been living at his father's house, as the putative father. This summons was dismissed on the* 29*th July, the defendant appearing and swearing that he was not the father of the child. A second summons was dismissed, having been taken out in a wrong name, the solicitor for the complainant then stating that he would issue another summons, and on the same day, the* 8*th Oct., a third summons was taken out and served at the house of the defendant's father. This summons was heard on the* 5*th Nov., and an order made against the defendant. To the constable who served the summons the father said that his son had gone away, and that he did not know where he was. On the* 10*th Dec. a warrant was issued against the defendant charging him with perjury committed on the hearing of the first summons. On the* 12*th May* 1888, *being one year and one day after the birth of the child, the defendant surrendered to the warrant. From the* 8*th Oct. till the* 12*th May the complainant was unable to discover where the defendant was. The defendant himself made an affidavit, in which he said that in September he left his father's house, as he had found employment with a farmer at Gloucester; that he had no intention of returning, and that from the* 26*th Sept. until the* 12*th May he had lived continuously in lodgings where he was employed, and that he knew nothing of the third summons until the* 16*th Nov. when his sister sent him a newspaper containing a report of the case.*

Held, by Manisty, J., that his father's house was the "last place of abode" of the defendant, and

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

that the service there was good, following Reg. *v.* Higham (26 *L. J.* 116, *M. C.*; 7 *E. & B.* 557; 3 *Jur. N. S.* 691); *but*

Held, by Stephen, J., that the defendant's "last place of abode" was at Gloucester, and that the service at the father's house was bad, following Reg. *v.* Evans (19 *L. J.* 151, *M. C.*).

Rule for a *certiorari* to remove a bastardy order into the High Court for the purpose of having the same quashed, on the ground that the bastardy summons had not been served on the defendant, the putative father, nor left "at his last place of abode," as required by sect. 4 of 35 & 36 Vict. c. 65 (the Bastardy Laws Amendment Act 1872).

The complainant, Ellen Taylor, a single woman, lived in a village in Herefordshire, and the defendant, John Bagot, jun., lived in the same village, where he had for several years lived in the house of his father John Bagot, who was a farmer there.

The complainant was delivered of a child on the 11th May 1887, of which, as she alleged, the defendant was the father.

A bastardy summons was issued against the defendant, and this summons was heard on the 29th July, when the case was dismissed. At this hearing the defendant appeared and swore that he was not the father of the child.

A second bastardy summons was issued and served at the house of the defendant's father, but in this summons the word "junior" was omitted, the person named in the summons being John Bagot. At the hearing of this summons on the 8th Oct. the defendant's father appeared and affected to believe that the summons was issued against him, and asked to have it dismissed.

The complainant's solicitor thereupon asserted that the case was not against the father, and withdrew the summons, at the same time saying that a fresh summons would be issued; and on the same day a third summons was taken out against the defendant John Bagot, jun., and served by a policeman at the house of the defendant's father, as being the last place of abode of the defendant.

This summons was heard before the justices on the 5th Nov., when the case was proceeded with *de novo*, and the justices, after hearing the evidence, made an order against the defendant for the payment of 2*s.* 6*d.* a week to the complainant, which is the order now complained of.

On the 10th Dec. a warrant was issued against the defendant, charging him with perjury committed on the hearing of the first summons.

On the 12th May 1888, being one year and one day after the birth of the child, the defendant surrendered to the warrant, and he is now in custody awaiting his trial upon that charge.

From the 8th Oct. until the 12th May the complainant was unable to discover where the defendant was.

By the evidence of the constable who served the summons at the house of the defendant's father, the father said that the son had gone away, and that he did not know where he was.

The defendant made an affidavit in which he said that in September he left his father's house, as he had found employment with a farmer at Gloucester, that he went direct to Gloucester, and that he had no intention of returning, and that from the 26th Sept. until the 12th May following he had lived continuously in lodgings near Gloucester, where he was employed, and that he knew nothing of the third summons until the 16th Nov., when his sister sent him a newspaper containing a report of the proceedings in the case, and that the summons had not been served upon him.

It was admitted that the summons had not been served on the defendant, and the question now was, whether it had been "left at his last place of abode."

A rule for a *certiorari* was obtained on behalf of the defendant upon the ground that the bastardy summons on which the order was made was not "left at his last place of abode."

Sect. 4 of the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65) provides:

> After the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person, or *left at his last place of abode*, six days at least before the petty session, the justices in such petty session shall hear the evidence of such woman, and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child, &c.

Mead showed cause against the rule.—The evidence shows that the defendant left his father's house simply for the purpose of evading the service of the summons. It is unlikely that he was ignorant of what was going on, as his family must have known his address, and must have been in communication with him, as is clear by the fact that his sister knew where to send the newspaper containing a report of the case. His father's house where he had lived for years was clearly his "last place of abode," as he merely left that house for a time, and with the intention of returning. He did not disclose his place of residence, nor surrender to the warrant for his apprehension until the 12th May, just one year after the birth of the child, when he thought that no further proceedings could be taken against him. In *Reg.* v. *Brown* (24 J. P. 5) it was held that, if the summons be left at the last place of abode, the justices have jurisdiction, and that the court had no power to grant a *certiorari*, as there was no defective jurisdiction appearing on the face of the order. In *Reg.* v. *Higham* (7 E. & B. 557; 26 L. J. 116, M. C.; 3 Jur. N. S. 691), where a man having reason to anticipate proceedings against him, as the putative father of a bastard child born in the previous November, on the 17th July left his father's house where he had hitherto lived, and went to reside with a farmer in another part of the country where he assisted in the farm, having no intention when he left to return to his father's house, and where a bastardy summons was left at the father's house on the 29th July, it was held to be a good service "at the last place of abode." Here the defendant went away when he found proceedings were to be taken against him, and he came back only when he thought the danger was over. No member of his family had made an affidavit that they had not warned the son of the pending proceedings. The defendant does not swear that his lodgings at Gloucester were his permanent place of abode. He merely says that the order was made in his absence. His father's house

had been his place of abode for six or seven years before this time, and it was so when the summons was served there. His absence was only a temporary one, and he had the intention of returning.

Gwynne James in support of the rule.—The question is, whether there was any evidence before the justices on which they could come to the conclusion that the father's house was the last place of abode of the defendant. [Stephen, J. —The question is certainly a narrow one, whether the summons was left at his last place of abode. The case cited does not quite apply to this case. Manisty, J.—There are circumstances which tend to show that he kept out of the way to conceal his place of abode.] The question is, whether he was keeping out of the way on the 8th Oct. The statute requires that there must be proof given of the last place of abode before the justices can make the order The justices have no jurisdiction to make the order unless such proof be given, and here there was no evidence that any such proof was given. The case of *Reg.* v. *Higham* (*ubi sup.*), already cited, is quite different from the present, as there the defendant himself admitted in his affidavit that he left his father's house because he anticipated further proceedings against him. Here there is nothing of the kind. The defendant swears that he had entered into a service; he gave the place of service, and that he had no intention of returning. These three points distinguish that case from the present. In *Reg.* v. *Evans* (19 L. J. 151, M. C.) it was held that the summons must be left at the defendant's present place of abode, if he has any at the time of the service; at his last place of abode, if he has none; it was also held there that proof of the proper service of the summons is essential to give the justices jurisdiction. [Stephen, J.—I understand that it is admitted that he resided at his father's house up to the 16th Sept.] Yes. He swears that he had no intention of returning. His last place of abode is his present place of abode, that is his present permanent place of abode. [Stephen, J.—Do you say that, as soon as the defendant arrives at Gloucester, that is his place of abode, whether as soon as he gets into a new permanent place of abode, if only next door, his father's house ceases to be his last place of abode? You must contend that. You must contend that his last place of abode means his present place of abode.] Yes, his present permanent place of abode. There is no hardship to the girl, as she can apply to the magistrates to adjourn the case from time to time. There was no suggestion here that the defendant knew that there was any other summons to be issued against him. Under these circumstances the defendant's last place of abode was at Gloucester, where the summons ought to have been served. He also referred to

Reg. v. *Lee*, 52 J. P. 344.

[Manisty, J.—That case is against you.]

Mead was not called upon to reply.

Stephen, J.—In this case I am sorry to say that the court is divided. The Act of Parliament says that the summons is to be left at the defendant's "last place of abode." The meaning of the words "last place of abode" was much discussed in *Reg.* v. *Evans* (*ubi sup.*), and the court there held that the summons must be left at the defendant's present place of abode, if he has any at the time of the service; at his last place of abode, if he has none. In that case the service was at a house where the defendant formerly lodged, but where he did not lodge at the time of the service, and it appeared that the summons did not reach him until after the day on which the order was made, and it was held that the service was not at the "last place of abode." Now, in the present case, it seems to me that the uncontradicted affidavit of the defendant is that he resided with his father, then went away and resided at Gloucester, and that he did not return, and had no intention of returning. It appears to me that, according to the authority of *Reg.* v. *Evans* (*ubi sup.*), the defendant's last place of abode was at Gloucester, where he was then living. The case of *Reg.* v. *Higham* (*ubi sup.*) decides the other way. These cases directly contradict each other. *Reg.* v. *Evans* (*ubi sup.*) gives a perfectly plain exposition of the statute, but *Reg.* v. *Higham* (*ubi sup.*) does not to my mind do so. I therefore adopt *Reg.* v. *Evans* (*ubi sup.*). At the same time, however, I wish to say that the view taken by my brother Manisty is more in accordance with justice in this particular case. But I look at what the Act of Parliament says, and what this particular case decides, and I come to the conclusion that this rule ought to be made absolute.

Manisty, J.—I am very sorry to be compelled to differ from my learned brother, but I follow the more recent case of *Reg.* v. *Higham* (*ubi sup.*). I think that case is founded on common sense and also on justice. No doubt this sect. 4 of the Act 35 & 36 Vict. c. 65, was intended to provide, as it seems to me, for the service of the summons when a person has gone away, and has at the time no known place of abode. The section does not say so in words, but the object of the statute is clearly so. To evade the statute, the defendant went away and kept himself concealed, and the question is whether a person does not evade the statute who leaves his father's house and goes to some distant place, knowing that a charge was made against him, because he knew that, although one summons was dismissed, another summons would be taken out, and his relations knew well where to find him, as they knew where to send the newspaper, but they did not know where to send the summons. This was done to evade the statute. But it is unnecessary to base my judgment on this. I base my judgment on the case of *Reg.* v. *Higham* (*ubi sup.*). In *Reg.* v. *Higham* it appeared by the affidavits that the defendant had resided at his father's house up to the 13th July 1856, when, having reason to anticipate further annoyance from the complainant, he determined to leave his father's residence and obtain employment in a different part of the country. Accordingly, on that day, he left and went to reside with a farmer in Bedfordshire, and assisted him in his farm, and had no intention, when he left, of returning to reside with his father. The complainant was delivered of a child on the 23rd Nov. 1855, and a summons against the defendant was dismissed on the 14th Jan. 1856. On the 14th July 1856 another summons was taken out, which was left, on the 29th July, at the house of the father, and the defendant did not become aware of it till the 11th Aug., the day on which the order was made against him. Nevertheless the

court held in that case that the summons had been left at the defendant's last place of abode. I quite agree with the recent case of *Reg.* v. *Lee* (*ubi sup.*), in which Hawkins, J. adopts the decision in *Reg.* v. *Higham* (*ubi sup.*), saying that that was a strong case. In *Reg.* v. *Lee* (*ubi sup.*) the mother was delivered of the child on the 18th April 1887, and she obtained a summons against Lee, the alleged putative father, which was served on the 18th May 1887, at the house of a baker at Sunbury. Lee had been in the service of the baker, and resided there from the 25th Sept. 1886 to 20th April 1887. When a constable left the summons, the baker told him that Lee had left that place, and his place of residence was not known, but that Lee had called at his place on the 14th May to take away some things he had left there. Lee stated in his affidavit that he had left Sunbury on the 20th April to better himself, that he went to Southampton and remained there till the 19th May, when he got a situation in a ship and sailed for the West Indies. Under these circumstances, it was there held that the service was valid, as the summons had been left at the last place of abode. I think we may fairly act upon these cases, and hold the summons here was left at the last place of abode of the defendant. I think therefore that this rule should be discharged.

Rule discharged.

Solicitors for the complainant, *Crowders* and *Vizard*, for *Corner* and *Corner*, Hereford.

Solicitors for the defendant, *Thomas White* and *Sons*, for *Garrold*, Hereford.

June 19 *and* 20, 1888.

(Before MANISTY and STEPHEN, JJ.)

HENDERSON *v.* PRESTON. (*a*)

False imprisonment—Governor of prison—Time from which sentence runs—Prisons Acts 1865 (28 *&* 29 *Vict. c.* 126) *and* 1877 (40 *&* 41 *Vict. c.* 21).

The plaintiff, who had been sentenced by the magistrates at Rochdale, on the 24th Aug., to a term of imprisonment for seven days, sued the defendant, the governor of Strangeways prison, for false imprisonment.

The plaintiff was taken into custody at Rochdale on the 24th Aug., and was received into the defendant's custody on the 25th Aug. under a warrant of commitment addressed to the defendant, which ordered "that the plaintiff be imprisoned in Her Majesty's prison at Strangeways, and there kept for the space of seven days." The plaintiff was released on the 1st Sept.

Held, that the terms of the warrant protected the defendant, and that he was justified in detaining the plaintiff in custody for seven days from the time when he was received into the prison.

ARGUMENT of a point of law raised by the pleadings, by consent of the parties, under R. S. C. 1883, Order XXV., r. 2.

This was an action to recover damages against the defendant, who was the governor of Strangeways prison, Manchester, for alleged false imprisonment of the plaintiff.

The plaintiff was on the 24th Aug. 1887 sentenced at the petty sessions at Rochdale to a fine of 5*s.* and costs, for obstructing a public highway, or in default to be imprisoned for seven days. There not being sufficient distress to satisfy the fine and costs, the plaintiff was imprisoned in the police cell at Rochdale until the 25th Aug., when he was taken under a warrant to Strangeways prison, where he was detained in custody till the 1st Sept., when he brought this action, contending that he ought to have been released on the 31st Aug.

The pleadings in the action alleged as follows:

STATEMENT OF CLAIM.

1. The defendant was the governor of Her Majesty's prison at Strangeways, in the county of Lancaster, on the 31st Aug. 1887.

2. The plaintiff's claim is for damage and injury suffered by the plaintiff by reason of his being wrongfully, and without just or proper cause, imprisoned and kept and detained as a prisoner under sentence of imprisonment by the defendant in the said prison on the 31st Aug. 1887.

The plaintiff claimed damages.

DEFENCE.

1. Not guilty, by statute, Prisons Acts 1865 and 1877.

2. The defendant denies every allegation contained in paragraph 2 of the plaintiff's statement of claim.

3. The defendant, as governor of Her Majesty's prison at Strangeways, received the plaintiff under the following warrant of commitment:

"In the County of Lancaster—Petty Sessional Division of Middleton.—To each and all of the constables of the township of Spotland, in the county of Lancaster, and to all other constables and police officers in the said county, and to the governor of Her Majesty's prison at Strangeways, Manchester, Alexander Henderson (hereinafter called the defendant) was this 24th day of August 1887 before the Court of Summary Jurisdiction, sitting at the Town Hall, Rochdale, in the said county, convicted for that he, on the 11th day of August 1887, at the township of Spotland, in the said county, unlawfully and wilfully did obstruct the free passage of a certain public highway there situate, called Church-street, Whitworth, contrary to the statute in such case made, and it was adjudged that the defendant for his said offence should forfeit and pay the sum of 5*s.*, and should also pay the sum of 14*s.* 6*d.* costs forthwith; and default having been made in payment, and it appearing to this court that the defendant has no sufficient goods whereon to levy distress, it is ordered that the defendant be imprisoned in Her Majesty's prison aforesaid, and there kept for the space of seven days, unless the said sum and all costs and charges of his commitment and of his conveyance to the said prison be sooner paid, and you the said constables are hereby commanded to take the defendant and convey him to the said prison and there deliver him to the governor thereof, together with this warrant; and you, the governor of the said prison, to receive the defendant into your custody and keep him for the space of seven days, unless the said sum and all costs and charges of his commitment and of his conveyance to the said prison be sooner paid.

"Dated the 24th day of August 1887.

"(Signed) J. I. HEAPE, J.P. for the county of Lancaster.

"Conveyed to prison on the 25th inst.

"(Signed) HENRY GREEN, P.C. 121 D.

"Endorsed, 25/8/87—4134.

"ALEXANDER HENDERSON. 7 days—31/8/87."

4. The said sum and all costs and charges of the plaintiff's commitment and conveyance to the said prison were not paid before the expiration of the said period in the said warrant named in that behalf nor on or before the 31st Aug. 1887.

5. The plaintiff upon such receipt as aforesaid became and was, and thenceforth until and during the 31st Aug. 1887 continued, in the custody of Her Majesty's Principal Secretary of State by virtue of the Prisons Act 1877.

REPLY.

1. The plaintiff joins issue on all the allegations contained in the defendant's statement of defence except

(*a*) Reported by ALFRED H. LEFROY, Esq., Barrister-at-Law.

those in paragraph 3, which he admits, and except such as are admissions of allegations in the plaintiff's statement of claim.

2. The plaintiff was on the 24th Aug. taken into custody by a constable in pursuance of the warrant set forth in paragraph 3 of the statement of defence, and was kept and detained continually in custody till the 31st Aug., upon which day the plaintiff was imprisoned and kept and detained by the defendant as in the statement of claim mentioned.

3. The plaintiff will object at the trial that the matters stated in the statement of defence do not disclose in law any answer or defence to the plaintiff's claim.

Gye and *Waghorn* for the plaintiff.—The authorities show that imprisonment dates from the day of arrest:

Migotti v. *Colvill*, 40 L. T. Rep. N. S. 747; 4 C. P. Div. 233;
Re Bowdler, 12 Q. B. 614.

It was the duty of the gaoler to ascertain the time of arrest:

Re Fletcher, 1 Dow. & L. 726;
Braham v. *Joyce* 4 Ex 487.

If the gaoler failed to ascertain the time of arrest, and detained the prisoner beyond the term of his sentence, he did so at his peril. They also referred to

Reg. v. *Cutbush*, 36 L. J. N. S. 70, M. C.

R. S. Wright for the defendant.—The term of imprisonment ran from the time the prisoner was lodged in gaol. It has always been held that the governor of a prison is bound by the terms of a warrant, and is protected, provided he did not exceed his authority under it. He cited

Ex parte Foulkes, 15 M. & W. 612.

Manisty, J.—This is an action brought by the plaintiff against the defendant, who is governor of Her Majesty's prison at Strangeways, in the county of Lancaster, for false imprisonment. The plaintiff alleges that he was detained in prison by the defendant a day longer than the term for which he was sentenced by the magistrate. The plaintiff objects that the matters stated in the defendant's defence do not disclose any answer at law to the plaintiff's claim. Firstly, the defendant says that on the 25th Aug. 1887 he, as governor of Her Majesty's prison at Strangeways, received the plaintiff into such prison under the following warrant of commitment. [His Lordship read the warrant of commitment.] The plaintiff, it appears, was taken into custody on the 24th Aug. and his contention is that the imprisonment took effect from that date. The defendant denies this, and says that he was ordered on the 25th Aug. to detain the plaintiff for the term of seven days, and that that term did not expire till the 1st Sept. I have come to the conclusion that the defendant is right. The language of the warrant is as plain as possible. It was addressed to the defendant, and ordered that the plaintiff be imprisoned in Her Majesty's prison at Strangeways, and there kept for the space of seven days. The plaintiff was received on the 25th Aug. and kept for seven days. But for authorities I should feel no doubt at all. I must exercise common sense in dealing with authorities. Suppose a constable should arrest a man at 11.55 p.m. and take ten minutes conveying him to prison, could it be contended that that should count as one day? In the case of *Re Fletcher* (1 Dow. & L. 726), decided in 1843, the warrant was held bad because it had no date. In *Re Bowdler's* case (12 Q. B. 612), decided in 1848, it was held that the time of imprisonment was to be calculated from the time the prisoner was taken into custody, but in that case the order for commitment was not in the same language as the warrant in the present case. In 1846, in the case of *Ex parte Foulkes* (15 M. & W. 612), it was held that the time was to run from the time of lodgment in prison. In the case of *Braham* v. *Joyce* (4 Ex. 487), decided in 1849, Parke, B. referred to *Re Bowdler*, and held that the period of imprisonment was to be calculated from the time the party was taken into custody. In that case the warrant had no date, and it strikes me as highly probable that the prisoner was taken to gaol when he was given into custody, but there is a great deal of ambiguity surrounding the case. In the case of *Migotti* v. *Colvill* (40 L. T. Rep. N. S. 747; 4 C. P. Div. 233), decided in 1879, the terms of imprisonment were cumulative, and I do not think that that case touches the present one. It is plain that under the terms of this warrant the plaintiff was to be imprisoned in Strangeways prison, and there kept seven days. I think, therefore, that judgment should be entered for the defendant.

Stephen, J.—I am of the same opinion. Under the circumstances of this case the warrant is good and protects the governor. I wish to read a few words from the judgment of Lord Denman in *Bowdler's* case: "With respect to the want of date on the warrant, my brother Patteson thought this a fatal objection in the case of *Re Fletcher*, but the subject has been much canvassed since, and he is now of a different opinion, and in that I agree. The officer bearing a warrant may not be able to find the party named, and if it were held necessary that the warrant should contain a date from which the imprisonment is to run, it might as well be said expressly that a debtor shall be relieved from imprisonment if he is not to be found. The debtor is to be confined from the time when he is actually taken, and the time of taking is matter of evidence." The order of commitment in that case was less special than it is here, and the attention of the court was not drawn to the distinction of time. The same remarks apply to the case of *Braham* v. *Joyce*. I think that judgment should be entered for the defendant on the point of law.

Solicitors for the plaintiff, *Ranger* and *Burton*.
Solicitor for the defendant, *Solicitor to the Treasury*.

June 25 and 29, 1888.

(Before Wills and Grantham, JJ.)

Ex parte Lewis. (a)

Justices—Summons for indictable offence—Refusal by justices to grant—Application for rule under 11 & 12 Vict. c. 44, s. 5—Bonâ fide exercise of discretion by justices—Right of public meeting in Trafalgar-square—53 Geo. 3, c. 121—7 & 8 Vict. c. 60.

Upon a motion for a rule, under 11 & 12 Vict. c. 44, s. 5, to compel a magistrate to hear and determine an application for a summons for an indictable offence,

Held, that where a magistrate has bonâ fide exer-

(a) Reported by F. A. Crailsheim, Esq., Barrister-at-Law.

cised his discretion, and refused to grant such summons, in such a case the court has no jurisdiction to compel the magistrate to review his decision, or to order him to exercise his discretion in any particular way.

Semble, that there is no right of public meeting in Trafalgar-square, the care, control, management, and regulation of the said square being vested in the Commissioners of Her Majesty's Works and Buildings.

This was an *ex parte* motion, under 11 & 12 Vict. c. 44, s. 5, for a rule calling upon Mr. Vaughan, the magistrate of the Bow-street Police-court, to show cause why he should not hear and determine an application for summonses against the Right Hon. Henry Matthews, Her Majesty's Secretary of State for the Home Department, and Sir Charles Warren, the Chief Commissioner of the Metropolitan Police, for certain indictable offences alleged by the applicant to have been committed by them, in their conduct in issuing certain notices in relation to the prohibition and suppression of certain meetings and processions in and about Trafalgar-square. The learned magistrate had refused to grant the summonses, he being of opinion that the informations disclosed no legal offence. The applicant accordingly moved the Divisional Court for a rule under 11 & 12 Vict. c. 44, s. 5, by which it is enacted that

In all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party requiring such act to be done to apply to Her Majesty's Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice or justices, and also the party to be affected by such act, to show cause why such act should not be done; and if, after due service of such rule, good cause shall not be shown against it, the said court may make the same absolute, with or without or upon payment of costs, as to them shall seem meet.

On the 8th and 12th Nov. 1887 the following notices were issued by Sir Charles Warren, and extensively posted in all parts of London:

Notice.—Meetings in Trafalgar-square. — In consequence of the disorderly scenes which have recently occurred in Trafalgar-square, and of the danger to the peace of the metropolis from meetings held there, and with a view to prevent such disorderly proceedings, and to preserve the peace, I, Charles Warren, the Commissioner of Police of the metropolis, do hereby give notice, with the sanction of the Secretary of State and the concurrence of the Commissioners of Her Majesty's Works and Public Buildings, that until further intimation no public meetings will be allowed to assemble in Trafalgar-square, nor will speeches be allowed to be delivered therein; and all well-disposed persons are hereby cautioned and requested to abstain from joining or attending any such meeting or assemblage; and notice is further given that all necessary measures will be adopted to prevent any such meeting or assemblage, or the delivery of any speech, and effectually to preserve the public peace, and to suppress any attempt at the disturbance thereof. This notice is not intended to interfere with the use by the public of Trafalgar-square for all ordinary purposes, or to affect the regulations issued by me with respect to Lord Mayor's day.—Charles Warren, the Commissioner of Police of the Metropolis, Metropolitan Police Office, 4, Whitehall-place, 8th November 1887.

Notice. — Police Regulation. — In exercise of the powers vested in me under the Act 2 & 3 Vict. c. 47, I hereby make the following regulation: No organised procession shall be allowed to approach Trafalgar-square on Sunday the 13th instant.—Charles Warren, the Commissioner of Police of the Metropolis, Metropolitan Police Office, 4, Whitehall-place, 12th November, 1887.

The further facts and the arguments appear sufficiently in the judgment.

Mr. Lewis, the applicant, appeared in person.

Cur. adv. vult.

The judgment of the court (Wills and Grantham, JJ.) was delivered by

Wills, J.—In this case Mr. Lewis, a solicitor, has moved for a rule calling upon Mr. Vaughan, the magistrate at Bow-street, to show cause why he should not hear and determine an application for summonses against the Right Hon. Henry Mathews, Her Majesty's Secretary of State for the Home Department, and Sir C. Warren, the Chief Commissioner of the Metropolitan Police, for indictable offences which he alleges they have committed, and says appear from certain informations, nine in number, sworn before Mr. Vaughan, and exhibited to an affidavit of the applicant, Mr. Lewis. We asked Mr. Lewis what specific offences he had alleged before Mr. Vaughan. His answer was, that Mr. Vaughan, having read the informations, refused summonses before he had specified the charges. We asked, therefore, for what offences Mr. Lewis wishes now to obtain summonses. We give the answer in his own words: (1) For conspiring by unlawful violence and other unlawful means to prevent divers of Her Majesty's subjects from exercising their constitutional and lawful rights; (2) conspiring to endanger the public safety and peace, and to injure, annoy, and disturb the public in the enjoyment of their civil rights; (3) a nuisance at common law, stopping the processions, preventing by force the lawful use of the thoroughfares, or enjoyment of public rights and privileges, causing inconvenience to Her Majesty's subjects in reference to their personal safety and comfort; (4) conspiring to inflict grievous bodily harm by using violence in excess of what the occasion lawfully required. We observe, in passing, that as to charges 1 and 2, they answer themselves. No conviction for an offence so described could possibly be maintained. From charges 3 and 4, as formulated, offences known to the law, though inartificially described, may be collected. It appears from Mr. Lewis's affidavit that he was himself the prosecutor before Mr. Vaughan, and not acting in any way as the solicitor for anyone else. It is, of course, only in the character of a person putting in force the criminal law on his own account that he can be heard. Upon applications of this kind it has been the practice to allow a prosecutor to make the motion in person, notwithstanding the well-known rule in respect of *mandamus*, for which the present proceeding is a substitute, that the application can only be made by counsel. Our experience in this case makes us almost doubt the wisdom of the relaxation of the old rule, as our time was taken up for two and a half hours by arguments founded largely on legal solecisms of the wildest kind—as, for instance, on the assertion that the owner of land could make an effectual dedication of it to the public for any lawful object or use; that fairs and markets owe their origin to dedication; that a resolution of one House of Parliament was a declaration of the law as binding as the decision of one of the Superior Courts; and that the law under which the judges hold their appointments *quamdiu se bene gesserint*, instead of *durante bene placito*—a cardinal provision of the Act of Settle-

ment, 12 & 13 Will. 3, c. 2—rests upon no more solid foundation than a resolution of the House of Commons. From arguments based upon such notions of law and history the court can derive no assistance, while they necessarily involve a great waste of time. There are, in our opinion, more answers than one to the application. In the first instance, it comes very late. The public notices issued by the Home Secretary and Sir C. Warren, upon which this complaint was based, were made in Nov. 1887; Mr. Vaughan's refusal of the summonses was given on the 15th Feb. 1888. The motion has been attempted once or twice before on materials presenting some fatal defect, and it was only on the 25th June, more than four months afterwards, that the application was at length in a condition to be heard. When it was heard Mr. Lewis was uncertain what he wanted, and asked for an order, among other things, to Mr. Vaughan to hear an application for summonses against officers of the police force, whom his affidavit shows that he had never intended to charge before Mr. Vaughan. Such motions must always be made with reasonable promptitude. We can find from the affidavits no explanation of the delay, and it seems to us altogether unreasonable. But passing by this objection, and coming to matters of more substance, we think it clear from a perusal of the shorthand notes of Mr. Vaughan's statement when refusing the summonses, that he had considered the informations, and was of opinion that they disclosed no legal offence. The reference he made to Charles, J.'s summing up at the Old Bailey in *Reg.* v. *Graham and Burns* shows clearly that he had not only read the informations, which he said he had done, but that he had applied his mind to the question whether any legal offence on the parts of Mr. Matthews and Sir Charles Warren was disclosed; and that, applying to the facts disclosed the principles laid down by our brother Charles as to the right of occupying Trafalgar-square for the purposes of public meeting, he was of opinion that they showed no legal offence. No one can doubt that Charles, J.'s ruling had a material bearing upon the case before Mr. Vaughan. It is true that he said it was useless for him to hear Mr. Lewis, as he understood that Mr. Lewis wished to convince him that Charles, J. had laid down bad law, but that he should feel himself bound by that statement of the law, whatever Mr. Lewis might say. Mr. Lewis did not ask to be allowed to distinguish that case. "You may say it is bad law," said the magistrate, and it is clear that that was what Mr. Lewis was anxious to contend. The magistrate was right in saying that it was in vain for him to hear an argument on that point. He added: "You can have your application to grant summonses considered by the Superior Court, and I shall then be content to grant them." But this was a mistake on the part of the learned magistrate, for nothing can be clearer or more settled law than that if the justices have really and *bonâ fide* exercised their discretion and brought their minds to bear upon the question whether they ought to grant the summonses or not, this court is no Court of Appeal from the justices, and has no jurisdiction to compel them to exercise the judgment in a particular way: (see *Reg.* v. *Adamson*, 33 L. T. Rep. N. S. 840; 1 Q. B. Div. 201; *Reg.* v. *Ingham*, 14 Q. B. 396.) The case of *Reg.* v. *Adamson* (*ubi sup.*) was relied upon by Mr. Lewis; but there the court came to the conclusion that the justices had refused the summonses, not because they had really exercised their judgment upon the facts and the law, but from considerations apart from the facts which they ought not to have taken into account. *Ex parte Wason* (L. Rep. 4 Q. B. 573) was also relied upon. "If the matter brought before the magistrate," said Cockburn, L.C.J., "had been matter cognisable by the criminal law, and upon which an indictment might have been preferred, the magistrate would have had no discretion, but would have been bound to proceed as directed by the statute." He is speaking of a totally different matter, and with reference to the Vexatious Indictments Act (22 & 23 Vict. c. 17), s. 2, which provides that when any charge shall be made before one or more justices that any person has committed one of the specified offences, and he shall refuse to commit, he shall, upon the application of the prosecutor, take his recognisance to prosecute. The language of the learned Lord Chief Justice is perfectly accurate with reference to that enactment, but he never meant to say that the magistrate had, when a complaint was laid before him, no judicial discretion to exercise as to whether a legal offence had been made out, or that, if he had exercised his judgment wrongly, either as to the law or the facts, the Superior Court would sit on appeal from his decision. "I take the law in substance," said the learned magistrate in this case, "to be as laid down by Charles, J.; and if that be the law I think the informations disclose no offence." If that is not exercising jurisdiction, we are at a loss to say what is so, and we have no jurisdiction in such a case to correct his law, even if wrong, and to direct him to alter his decision. This being so, a decision by us of the other questions raised by Mr. Lewis is beyond our competence. We must not, however, allow our silence to be construed into anything like acquiescence in the views put forward by Mr. Lewis. A great deal was said about the right of public meeting, unnecessarily, inasmuch as it is a right which has long passed out of the region of discussion or doubt. As to the suggested right of holding public meetings in Trafalgar-square, which is in other words a suggestion of a right on the part of as many of Her Majesty's subjects as may be so disposed to occupy Trafalgar-square whenever and so often as they may wish for a public meeting, or possibly for more than one public meeting, to be held by persons of conflicting views and sympathies (for the right, if it exists, must be common to every member of the public), all we wish to say is, that if the right is to be made out, it must be established by materials and considerations very different from any that were laid before us. We were informed by Mr. Lewis that there was no statute conferring or recognising such rights, although Trafalgar-square owes its very existence and origin to legislation no earlier than the beginning of this century. He alleged that they rested on "dedication." It is, however, a species of dedication at present unknown to the law, and of which there is no trace in our law books. The only "dedication" in the legal sense that we are aware of, is that of a public right of passage of which the legal description is—"a right for all Her Majesty's

subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance." A claim on the part of persons so minded to assemble in any numbers and for so long a time as they please to remain assembled, to the detriment of others having equal rights upon a highway, is in its nature irreconcilable with the right of free passage; and there is, so far as we have been able to ascertain, no authority whatever in favour of it. It was urged that the right of public meeting and the right of occupying any unoccupied land or highway that might seem appropriate to those of Her Majesty's subjects who wish to meet there were, if not synonymous, at least correlative. We fail to appreciate the argument, nor are we at all impressed with the serious consequences which it was said would follow from the contrary view. There has been no difficulty experienced in the past, and we anticipate none in the future, where the only and legitimate object is public discussion, and no ulterior and injurious results are likely to happen. Things are done every day in every part of the kingdom without let or hindrance which there is not and cannot be a legal right to do, and which not unfrequently are submitted to with a good grace because they are in their nature incapable, by whatever amount of user, of growing into a right. Upon the materials brought before us by Mr. Lewis it would appear that Trafalgar-square as an open space owes its existence to a modern Act of Parliament, 53 Geo. 3, c. 121, which defines by reference to a plan its limits and the rights of way over it, expressly extinguishing others not shown upon the plan. It appears from the recital of 7 & 8 Vict. c. 60, to have been vested in Her Majesty, her heirs and successors. By the terms of that Act it was vested in Her Majesty, her heirs and successors, as part and parcel of the hereditary possessions and revenues of Her Majesty in right of her Crown within the ordering and survey of the Court of Exchequer; and in the Commissioners of Woods and Forests was vested the care, control, management, and regulation of the square. These powers are now vested in the Commissioners of Her Majesty's Works and Buildings. Trafalgar-square, therefore, is completely regulated by Act of Parliament, and whatever rights exist must be found in the statutes, if at all. The right of public meeting is not among them. The right of control appears to be unqualified except by what else is to be found in the Acts, and must therefore cover the right of saying under what circumstances and for what purposes, other than the public rights of passage given by the Acts, it shall be used; and while we abstain from pronouncing a judgment upon that, which we think it is not under the circumstances for us to decide, we think it only right to say that, so far as Mr. Lewis's arguments are concerned, they have not only failed to convince us that there is any right to hold public meetings in Trafalgar-square, but have gone far to establish that the Commissioners of Works have a right to say whether or not it shall be so used. We think it right further, in justice to the public servants whose conduct has been called in question by Mr. Lewis, to say that he has, in our opinion, shown no grounds whatever for charging them, or either of them, with a criminal conspiracy, or with criminal misconduct of any kind. Under these circumstances, we are of opinion that this application must be refused.

Application refused.

Wednesday, April 11, 1888.

(Before FIELD and WILLS, JJ.)

FARMER AND OTHERS (Overseers of the Poor of the Township of Salford) *v.* THE LONDON AND NORTH-WESTERN RAILWAY COMPANY. (*a*)

Lands compulsorily taken — Rates — "Borough rate"—"County rate" — Deficiency in assessment to poor rate—Liability of promoters of undertaking to make up the deficiency in the "borough rate" and in the "county rate"—Lands Clauses Consolidation Act 1845 (8 *&* 9 *Vict. c.* 18), *s.* 133—15 *&* 16 *Vict. c.* 81, *s.* 26 *and schedule—Union Chargeability Act* 1865 (28 *&* 29 *Vict. c.* 79), *s.* 11—*Municipal Corporations Act* 1882 (45 *&* 46 *Vict. c.* 50), *s.* 145.

Sect. 133 *of the Lands Clauses Consolidation Act* 1845 *provides, that, if the promoters of the undertaking become possessed of any lands charged with the land tax, or liable to be assessed to the poor's rate, they shall, until the works are completed and assessed, be liable to make good the deficiency in the several assessments for land tax and poor's rate, by reason of such lands having been taken or used for the purposes of such works.*

Held, that the promoters are bound, under this section, to pay contributions both to the "borough rate" and to the "county rate," so as to make up any deficiencies therein, as such deficiencies are deficiencies in the poor rate, the money assessed for contribution to the "borough rate" being chargeable upon, and payable out of, the poor rate, and the money assessed for contribution to the "county rate" being raised by the overseers, and therefore also a part of the poor rate.

ACTION brought to recover the sum of 951*l.* 16*s.* 3*d.*, alleged to be payable by the defendants, under the provisions of the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), as deficiency in a poor rate, made the 31st March 1886, payable in respect of lands taken by the defendants under the powers of the London and North-Western Railway (New Railways, &c.) Act 1878 (41 & 42 Vict. c. 182), and by the order of Master Butler, made on the 19th April 1887, the following case has been stated pursuant to Order XXXIV., r. 1.

CASE.

1. In the year 1878 the defendants, in accordance with the powers conferred upon them by the London and North-Western Railway (New Railways, &c.) Act 1878, acquired and entered into possession of certain lands, tenements, and hereditaments, situate in the township of Salford, for the purposes of executing the works authorised by the said Act.

2. The Lands Clauses Consolidation Act 1845 is incorporated with the said London and North-Western Railway Act 1878, and the said lands, tenements, and hereditaments, taken and used by the defendants for the purposes of the works authorised by the said special Act, were liable to be assessed to the poor rate in the said township of Salford.

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

3. The said lands, tenements, and hereditaments were at the time of the passing of the said special Act valued for rating purposes at the total sum of 4966*l.*, as the rental or net rateable value of the same.

4. By reason of the said lands, tenements, and hereditaments having been taken or used for the purposes of the said works, a deficiency arose during the year 1886-7 in respect of the assessment for poor rate upon the said lands, tenements, and hereditaments, within the meaning of sect. 133 of the Lands Clauses Consolidation Act 1845, which provides as follows:

5. If the promoters of the undertaking become possessed, by virtue of this or the special Act, or any Act incorporated therewith, of any lands charged with the land tax, or liable to be assessed to the poor's rate, they shall, from time to time, until the works shall be completed and assessed to such land tax or poor's rate, be liable to make good the deficiency in the several assessments for land tax and poor's rate, by reason of such lands having been taken or used for the purposes of the works, and such deficiency shall be computed according to the rental at which such lands with any building thereon, were valued or rated at the time of the passing of the special Act, and on demand of such deficiency the promoters of the undertaking, or their treasurer, shall pay all such deficiencies to the collector of the said assessments respectively.

6. The township of Salford aforesaid is wholly within the borough of Salford, which is a borough to which the Municipal Corporations Act 1835 and the Municipal Corporations Act 1882 apply, and wherein, by the said Acts, a borough rate may be levied and made.

7. (Sets out the Act 7 Will. 4 & 1 Vict. c. 81, "An Act to provide for the levying of rates in boroughs in towns having municipal corporations in England and Wales.")

8. The said Act is repealed by the Municipal Corporations Act 1882, and in lieu of the powers therein contained it is, by sect. 144, sub-sects. 1, 2, 3, and 4, of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), enacted as follows:

(1.) If the borough fund is insufficient for the purposes to which it is applicable under this Act or otherwise by law, the council shall from time to time estimate, as correctly as may be, what amount, in addition to the borough fund, will be sufficient for those purposes.

(2.) In order to raise that amount, the council shall, subject to the provisions of this Act, from time to time order a rate, called a borough rate, to be made in the borough.

(3.) A borough rate may be made retrospectively, in order to raise money for the payment of charges and expenses incurred, or which have come in course of payment, at any time within six months before the making of the rate.

(4.) The council shall assess the contributions to the borough rate on the several parishes and parts of parishes in the borough in proportion to the total annual value of the hereditaments in each parish or part which are rateable to the poor, or in respect of which a contribution is made to the poor's rate.

9. The purposes to which the borough fund is applicable are specified in sect. 140 of the said Act, and in sect. 5 of the said Act, and include (*inter alia*) all expenses charged in the borough fund by any Act of Parliament or otherwise by law.

10. Sect. 145 of the last-mentioned Act provides as follows:

(1.) Where a parish is wholly in a borough, the council may from time to time, if they think fit, order the overseers to pay the contribution of the parish to the borough rate out of the poor rate made or to be made for the parish.

(2.) The overseers shall pay the contribution to the council or as they order.

(3.) If the overseers fail to pay as ordered, the amount may be levied off the goods of them or any of them, by distress, by virtue of a warrant signed by the mayor and sealed with the corporate seal, or signed by two justices in and for the borough.

11. (Sets out 55 Geo. 3, c. 51, s. 12.)

12. The said last-mentioned Act was repealed by the 15 & 16 Vict. c. 81, intituled "An Act to consolidate and amend the statutes relating to the assessment and collection of county rates in England and Wales," by sect. 21 of which it is enacted as follows:

From and after the passing of this Act, it shall be lawful for the justices of the peace of the several counties or divisions of counties in England and Wales, assembled at their general or quarter sessions, or at any adjournment or adjournments thereof, and they are hereby authorised and empowered, whenever circumstances shall appear to require it, to order and direct a fair and equal county rate to be made for all the purposes to which the county stock, or rate, is now or shall hereafter be made liable by law according to the basis or standard for the time being in force in such county or division of a county, and for that purpose to assess and tax every parish, township, and other place, whether parochial or extra-parochial, within the respective limits of their commission, or within such divisions, rateably and equally, according to a certain pound rate to be from time to time fixed and publicly declared by such justices, upon the basis or standard hereinbefore mentioned, of the full and fair annual value of the properties, lands, tenements, and hereditaments rateable to the relief of the poor therein, or which in any place, not maintaining its poor, would be liable to be rated for the relief of the poor if the said last-mentioned place were a parish, any law or statute to the contrary notwithstanding, and the justices of the peace shall, in all cases where the same may be necessary, appoint proper persons within such extra-parochial or other places for the assessing, taxing, and rating such extra-parochial property, lands, tenements, and hereditaments, and levying, collecting, and paying over such assessment, taxes, or rates.

13. And by the 26th section of the last-named Act it is provided as follows:

When and as often as justices of the peace within the respective limits of their commission in England, have made a county rate, a printed list of the parishes and places assessed to such rate, and the amount of the rateable value upon which each such parish and place shall have been respectively assessed, shall be sent to the overseers of the poor, constables, or other persons charged with the collections or levy of the county rate, in every parish and place within the county. And such justices, assembled at their general or quarter sessions, or at any adjournment thereof, shall order precepts, in the form shown in the schedule annexed to this Act, or as near thereto as may be, to be issued to the guardians of every union of parishes, of which union any parish is situate within such limits, stating the sum or sums assessed and charged for each such rate in each parish in the union, the whole of which parish is situate within such limits, and to the guardians of every single parish situate within such limits, stating the sum or sums assessed and charged on such parish for each such rate, and requiring the guardians of such union or parish respectively, within such time as may be limited in such precepts, to cause the aggregate of the said several sums so stated to be paid by them out of the moneys held by them on behalf of each such parish, to the treasurer of the county or place for which such justices act, and may cause such precepts to be sent by post or otherwise to such guardians, and such precepts shall have force in every such union, so far as concerns such parishes as are within the limits of the commission of the said justices, notwithstanding that the place of meeting of such guardians may not be situated within such limits, and without being indorsed with the signature of any justice of the peace having ordinary jurisdiction in the place of meeting of the guardians, and such guardians shall raise the money required by such precepts to be paid in like

manner as the money required by such guardians for the relief of the poor, and shall pay such moneys at the time limited and in the manner prescribed by such precepts. And if the treasurer of such guardians, or any person on his or their behalf, tender to the treasurer of the county or place for which such justices act the aggregate of the said several sums, or if he so tender the whole sum assessed on every such parish or parishes, in respect of any such rate or rates, together with a copy of such precept, in which are specified the parish or parishes and the rate or rates in respect of which the same is so tendered, the treasurer of the county shall receive the sum tendered, notwithstanding that the sums required to be paid on behalf of other of such parishes or of other of such rates be not then tendered, and shall give a receipt for the sum or sums received by him accordingly, but he shall not receive any sum on behalf of any such parish less than the whole of the sum assessed and charged thereon in respect of one such rate. And the receipt of the treasurer of such county or place shall be a good discharge for the payment of the sums specified in any such precept, or of any of them.

14. By sects. 2 and 9 of the said Act, the justices of a county at quarter sessions, are empowered to appoint a committee for the purpose of preparing a basis or standard for assessing county rates, and the committee, so appointed by the justices, are empowered to cause new valuations to be made as often as they think fit, in order to ascertain the value at which property liable to be assessed towards the county rate ought to be charged.

15. The form of precept given in the schedule of the said Act, and referred to in the 26th section, is as follows:

County of to wit.—To the Guardians of the Union.—These are to require you the guardians of the Union from and out of the moneys paid into the hands of the treasurer of your union, for the uses and purposes of the said union, to pay or cause to be paid on or before the day of into the hands of A. B., treasurer of the said county, appointed to receive he same, the sum of being the amount of the several and respective sums of money hereunder set down and expressed opposite to and against the names of the several parishes, townships, or places, comprised within your said union, the said several sums being respectively charged and assessed thereon, as the proportion of the several parishes, townships, or places towards the general county rate at in the pound, made at the last quarter sessions (or general sessions) of the peace held at in and for the said county.

(Signature of the Clerk of the Peace.)

Names of Parishes. County rate at in the pound.

16. By the Union Chargeability Act 1865 (28 & 29 Vict. c. 79), s. 11, it is provided, that the Poor Law Board shall, as soon as convenient, make all such orders as may be requisite to render the provisions of the said Act applicable to the proceedings and accounts of the guardians of unions, and of overseers of parishes comprised therein.

17. By the Consolidated Order Amendment Order, dated 26th Feb. 1866, the Poor Law Board, in pursuance of the powers given them as aforesaid, ordered as follows:

Art. 1. The clerk (that is the clerk of the board of guardians of a union) shall as soon as convenient before the 25th day of March next, and thenceforth four weeks before the 29th September and the 25th of March respectively in each year, estimate the probable amount of the expenditure in the relief of the poor and other charges by the guardians on behalf of the union as well as any separate expenditure chargeable against any parish therein during the then next ensuing half-year, and estimate the probable balance due to or from each parish at the end of the current half-year, and shall apportion the sums to be contributed by the several parishes comprised in the union, according to the law for the time being in force therein, and shall prepare the orders on the overseers or other proper authorities of the several parishes, for the payment of such respective contributions, and of any such separate expenditure as aforesaid, and the orders, so prepared, shall be laid before the guardians for their consideration a reasonable time before the expiration of the current half-year.

Art. 2. The guardians shall make orders on the overseers or other proper authorities of every parish in the union at the commencement of each half-year ending on the days above mentioned, and from time to time as occasion may arise, for the payment to the guardians of all such sums as may be required by them as the contribution of the parish to the common fund of the union, and for any other expenses separately chargeable to the guardians on the parish, and in such orders the contributions shall be directed to be paid in one sum, or by instalments on days to be specified in such orders as to the guardians may seem fit.

18. On the 25th March 1886 the plaintiffs made the poor rate for the year ending the 25th March 1887, which was intituled as follows:

An assessment comprising volumes 1 and 2 for the relief of the poor of the township of Salford in the county of Lancaster, and for other purposes chargeable thereon according to law, made the 31st day of March 1886, after the rate of 3*s.* 10*d.* in the 1*l.*, from the date hereof to the 25th March 1887;

and demand notes were subsequently served upon the defendants in respect of the lands, tenements and hereditaments hereinbefore referred to, of which the material part is as follows:

Township of Salford.—In the Salford Union.—The London and North-Western Railway Company.—The overseers of the poor hereby respectfully demand payment of a poor rate, at 3*s.* 10*d.* in the pound, made 31st March 1886, as below, now due from you.

Particulars of the rate, or purposes for which the above rate has been made at in the pound respectively: Poor, 1*s.* 6½*d.* Borough, 2*s.* 0½*d.* County, 3½*d.*

19. The plaintiffs, in laying the said rate, took into consideration the amounts which the would be called upon to pay as the contribution of the said township to the borough rate of the said borough of Salford, and as the contribution of the said township to the county rate of the said county of Lancaster, under the provisions of the Acts hereinbefore set forth respectively, for the period for which the said rate was laid, as well as the amount which they could for the like period be called upon to pay to the guardians of the said Salford Union under the Poor Law Amendment Act (4 & 5 Will. 4, c. 76), as the contribution of the township of Salford to the common fund of the Salford Poor Law Union for the relief of the poor of the said union.

20. On the 7th April 1886 the plaintiffs were served with precepts from the council of the said borough of Salford, requiring the plaintiffs to pay the contribution of the township of Salford towards the borough rate of the said borough. One of such precepts was under the corporate common seal of the borough of Salford, and signed by the mayor, and the other of such precepts was under the hand and seal of the head constable of the borough.

21. The said precepts were in the following form, that is to say:

Borough of Salford in the county of Lancaster to wit.—To the Overseers of the Poor of the township of Salford.—In pursuance of an order of the council of the borough of Salford, duly made under the authority of the Act or Acts of Parliament now in force in that behalf, you the overseers of the poor of the township of Salford, being a township wholly within the said borough of Salford, and you the said overseers being the persons

who by law may make a poor's rate for the said township, are hereby ordered and required to pay out of the poor's rate made and collected, or to be made and collected, for the said township of Salford, the sum of 36,560*l.* 8*s.* 3*d.*, being the amount for which the said township is liable of or towards a certain borough rate duly made for the said borough of Salford, and to which said amount the said township hath been duly assessed and rated. Given under my hand, and under the corporate common seal of the borough of Salford, this 7th April 1886.

22. On the 13th Aug. 1886, and on the 11th Feb. 1887, the guardians of the poor of the Salford Union, under the provisions of the said 15 & 16 Vict. c. 81, and the said order of the Poor Law Board of the 26th Feb. 1886, enabling them in that behalf, served upon the plaintiffs their precept requiring the plaintiffs to pay the contribution of the township of Salford towards the general county rate.

23. The following is the form of the precept served upon the plaintiffs on the 13th Aug. 1886, as aforesaid, that is to say:

Guardians' Order for County Rates.—Salford Union.—To the Overseers of the Poor of the township of Salford (the plaintiffs).—You are hereby ordered and directed to pay to on behalf of the guardians of the poor of the Salford Union, on or before the 25th Aug. 1886, the sum of 2260*l.* 3*s.* 11*d.* from the poor rate of the township of Salford, to defray the several and respective sums of money hereunder set down and expressed, the sums being respectively charged and assessed upon the said township as their proportion towards the general county rate and towards the other purposes hereunder set down and expressed, and which sums are by a precept of the clerk of the peace for the said county to the said guardians, dated the 27th July 1886, required to be paid by the said guardians to the treasurer of the said county.

24. The precept served upon the plaintiffs by the said guardians on the 11th Feb. 1887 was in similar form to the precept lastly set forth.

25. The total deficiency which arose in respect of the rate so laid by the plaintiffs for the year 1886-7 in respect of the assessment of the said rates upon the said lands &c., so taken by the defendants under the powers of their Act, computed at the net rateable value of the same at the time of the passing of the said special Act, amounted to the sum of 951*l.* 16*s.* 3*d.*, which the plaintiffs duly demanded from the defendants.

26. The defendants refused to pay the said sum of 951*l.* 16*s.* 3*d.*, and thereupon, on the 5th March 1887, the plaintiffs commenced this action against the defendants for the recovery of the whole of the said deficiency by a specially indorsed writ.

27. The defendants have paid into court the sum of 377*l.* 12*s.* 9*d.*, the amount of the said deficiency apportionable to the amount paid by the plaintiffs to the said guardians as the contribution of the said township of Salford to the common fund of the Salford Poor Law Union, and contend that that sum is all that they are liable to pay, under the 133rd section of the Lands Clauses Consolidation Act 1845.

28. Copies of the Act of Parliament referred to in this case, and of the pleadings, and of the particulars of the plaintiffs' claim delivered in the action, accompany and are to be taken as part of this case.

29. The amount claimed on account of borough rate is at 2*s.* 0½*d.* in the pound, or say 506*l.* 19*s.* 5*d.*; the amount claimed on account of county rate is at 3¼*d.* in the pound, or say 67*l.* 4*s.* 1*d.*

The question for the opinion of the court is, whether the plaintiffs are entitled to recover the said said sums or either of them.

If the court is of opinion that the plaintiffs are entitled to recover the said sums or either of them, judgment is to be entered accordingly for the plaintiffs with costs. If the court is of opinion that the plaintiffs are not entitled to recover anything beyond the sum paid into court, judgment is to be entered for the plaintiffs for the amount paid into court, with costs incurred down to the date of such payment, less the costs of the defendants, to be taxed, incurred subsequently to the date of the said payment.

Henn Collins, Q.C. (*Sutton* with him) for the plaintiffs.—The plaintiffs are overseers of the township of Salford, and the defendants have taken certain lands for the purposes of their works, and have thereby annihilated them for rating purposes, and the question here arises under the 133rd section of the Lands Clauses Consolidation Act 1845, which provides that in such a case the defendants shall be liable to make good any deficiency that may arise in the assessment to the land tax or poor rate in consequence of the lands being so taken by them. The question is, whether what we now claim is a deficiency in the several assessments for poor rate. We are claiming the deficiency between the old rateable value and the rate which we have now made upon them, and the defendants admit our right to any deficiency in poor rate properly so called, but they say we are demanding from them something which is not poor rate at all, namely, a contribution to the borough rate, and a contribution to the county rate. The machinery by which these sums are raised, and the only machinery which the overseers can put in operation, is the poor rate, and the overseers have to make a rate which must cover all those sums which for any reason they are bound to pay out of the poor rate. Now, they are bound by the Act of Parliament to pay out of the poor rate part of the borough rate. [FIELD, J.—There seems to be this difference between the borough rate and the county rate, that the borough rate comes out of the poor rate, whereas the county rate is only to be levied in the same manner as the poor rate.] The guardians are to raise it in the same manner, but they have to do so through the machinery of the overseers; that appears by the form of the precept in paragraph 15 of the case. As to the borough rate, the case seems quite clear, because the borough rate is in terms payable out of the poor rate; as to the county rate, I admit it stands on a different footing. But when we look at the machinery which the Legislature has provided, it is clear that the fund from which that sum should be paid was the poor rate, because the machinery is this: Precept to the guardians to provide a certain fund; power to the guardians to raise that fund by precepts to the overseers; power exercised by the guardians in the form of the precept, directing them in terms to raise it out of the poor rate. The overseers have no power to make any rate except the poor rate, and although the guardians raise the money, it is through the overseers, as appears by article 2, in paragraph 17. The overseers stand as they were before, with power to levy the poor rate; the guardians come to them and say, "We require so much, give it to us," and there is no fund except the poor rate. [FIELD, J.—

It is something like a case which I think went to the Court of Appeal, in which the statute made the expenses of an election petition, or election commission, payable out of the poor rate of the city of Oxford. The undergraduates have no vote for the city of Oxford, but an order was made upon the heads of colleges, ordering them to pay a proportion of the expenses of this election petition. The heads of colleges thought it very hard that, as they had no vote and took no part in the election, they should be compelled to pay a part of the cost; but it was quite clear that the Legislature had thrown the incidence of it on the poor rate, and we held, and the Court of Appeal also held, that they must pay that proportion which was caused by this election petition.] There is no case exactly decisive of the point, but there are some observations on the subject, made by Lord Chelmsford, in the case of

The East London Railway Company v. *Whitechurch*, 30 L. T. Rep. N. S. 414; 7 App. Cas 90; 43 L. J. 159, M. C.; 22 W. R. 665.

Bosanquet, Q.C. (*Moon* with him) for the defendants.—The liability imposed by the 133rd section is confined to land tax and poor rate. The intention of the statute was its intention in the year 1845, when it was passed. In the year 1845, certain Acts were in force—general Acts—rendering parishes and places liable to certain well-known rates, the poor rate, the borough rate, the county rate. There were in 1845 at least those three well-known rates, besides other rates which I need not now mention. Then the 133rd section is passed, which imposes on the promoters a liability to make good two things, namely, land tax and poor rate, clearly not providing at that time that the promoters should be liable for the local taxes. At that date, when there were these well-known rates, nothing is mentioned in the way of rate, except poor rate. I will take the county rate, and that was provided for generally by the Act set out in paragraph 11 of the case, which was in force in 1845, and under that Act the county rate was not levied as part of the poor rate. Poor rate is a tax on those who possess property for the benefit and maintenance of paupers. The object of the county rate is different; the difference between the poor rate and other rates is this, that those who pay poor rates get no benefit themselves from the rate, but those who pay other rates do get a benefit. If there was no liability in 1845 upon the defendants to pay these rates, then there must be some clear enactment which puts that tax upon them. I contend there is no such enactment; the Act on which my friend relies for levying the county rate is a mere matter of machinery, and that does not alter the incidence of the tax. Then as to the borough rate, the Municipal Corporations Act of 1882 provides how the borough rate, which was created in 1836 and existed in 1845, may be raised, and as up to 1882 the rate was not chargeable on the poor rate, so the Act of 1882 does not make it so. In this statute of 1882 the law remains as before, with alternative powers of raising the rate, but that was only machinery for raising it, and this is still a separate borough rate; and not chargeable on the poor rate, and therefore the defendants are not liable to pay it.

FIELD, J.—This is a special case, raising two important questions—very important indeed—namely, whether or not the respondents, the London and North-Western Railway Company, are liable to make good the deficiency arising on the assessment of certain property which they have taken and used for the purposes of their railway. There has been no appeal by the railway company against the rate. Of course, if there were any improper purposes in that rate which ought not to be there, it would have been open to them to have appealed against it, and thereby obtained any relief which they were entitled to in that respect. Perhaps, in this particular property, it might or might not be so; we have not to discuss that question now. What we have to discuss is, as to the amounts, which are in the poor rate assessment in respect of moneys payable as and for borough rate, and as and for county rate—whether the defendants are entitled to deduct those moneys, seeing that they are not liable under the Act for them. The question turns upon the true construction to be placed upon the 133rd section of the Lands Clauses Consolidation Act 1845, and of the subsequent Acts of Parliament, that have been referred to, and which are stated in the case. Now the section itself is very plain. It is true it was passed in the year 1845, and that has caused Mr. Bosanquet a good deal of anxiety, because he wants to contend, that because it was passed in 1845, at a time when there was no subsequent legislation, therefore this case does not fall within the purview of that section. But, of course, although, at that time the borough rate and the county rate were not chargeable out of the amount of the assessment by the poor rate, still it was quite competent to the Legislature to make it so afterwards, and Mr. Henn Collins asserts that they have done so. The question is, whether they have or not. Now what are the words of the enactment itself? The learned Judge then read sect. 133 of the Lands Clauses Consolidation Act.] It is under that last clause that the present action is brought, and the questions for our decision divide themselves into two: first of all, with regard to the borough rate, is the amount which is contributed by the overseers to the guardians of the union in respect of the borough rate, and is the amount which is to be contributed in like manner with reference to the county rate, to be taken into account in ascertaining what the amount of the deficiency is? Mr. Henn Collins says that those amounts are to be taken into account, because he says that the effect of subsequent legislation has been to make those two things chargeable by law upon the assessment for the poor. The words of the Parochial Assessment Act—that is, in the schedule—specify the heading of every rate, and the heading of that rate is correctly stated in paragraph 18 of this case. It is an assessment for the relief of the poor, and for other purposes chargeable thereon according to law. Now, I think there is certainly a difference between the borough rate and the county rate. The borough rate seems to me exceedingly simple and clear, because this is the way it stands. No doubt, as Mr. Bosanquet has said, the borough rate was a creation of 5 & 6 Will. 4, but later on, in the 7th of Will. 4, a special Act was passed, to provide for the levying of rates in boroughs and towns having municipal corporations. Salford is a borough or town having a municipal corporation, and therefore this Act applies to Salford. Reciting the old Act, giving

authority to make a borough rate, it goes on to say: "Whereas no authority is thereby given to the churchwardens or overseers of the poor of any parish or places or other persons, who may thereby be legally ordered to pay or levy such rate, to pay the same out of the poor rate of such respective parishes or places, or otherwise to levy the same upon the inhabitants thereof." There was an Act of Parliament which said they were to do it in this way; they were not to put their hands in their own pockets. This is the mode in which they were to get that money: "Be it therefore enacted, that, in all cases whereby a borough rate may be made, the council may order the churchwardens and overseers . . . to pay the amount of such part and portion of such rate . . . . out of the poor rate made and collected, or to be made or collected, for such parish or place." That was the legislation in the 7 Will. 4 & 1 Vict. Later on the Act was repealed, and later, in 1882, these provisions were made in lieu of it: First of all, as to the estimation of the amount, and secondly, "in order to raise that amount the council shall, subject to the provisions of this Act," order a rate, called a borough rate, to be made in the borough. How is that to be made? The council are "to assess the contributions to the borough rate on the several parishes and parts of parishes in proportion to the total annual value of the hereditaments which are rateable to the poor, or in respect of which the contribution is made to the poor rate." If the matter had stood there, I should have thought that Mr. Bosanquet's contention would have been sound, because that would only be a mode of levying the rate in proportion, in the same manner, and in accordance with it, and not an assessment for the relief of the poor rate. The very next section proceeds to give an alternative. I believe there never was known what are called rates in aid, whereby public authorities are empowered to levy contributions: it never could be done, because they had not got the same machinery as the churchwardens and overseers had. Therefore sect. 145 intends to provide for that. Sect. 145 says: "Where a parish is wholly in a borough," as Salford is, "the council may from time to time, if they think fit, order the overseers to pay the contribution of the parish to the borough rate out of the poor rate made or to be made for the parish." The next section is not stated here, but it was very properly referred to by Mr. Bosanquet. It applies to divided parishes. I think Mr. Bosanquet's observation is not unreasonable, taking it by itself, that you would not expect to have found that the sum that a railway company ought to pay in respect of a deficiency should differ in the case of a place where the parish is wholly within the boundaries, and a place part of which is within the boundaries and part not. It may be—I do not say that it is so, or is not so, but it may be—that, where parishes are partly within and partly without, a railway company may not be liable for the deficiency. I shall not decide that question one way or the other; but I think from the appearance of the section, it is highly probable that such is the state of things. Undoubtedly, that makes it necessary to see whether the Legislature have said it, and in this case it seems to me clear that they have said it. They have said most distinctly that the borough rate is to be paid out of the poor rate made or to be made for the parish. Again, says Mr. Bosanquet, it seems not altogether reasonable that this discretion should be left to the council—if it should please the council of the borough whether they would make a railway company liable or not to the deficiency, because, if the council chose to make a rate, it could be strongly contended that the company would not be liable for a deficiency then. Again, all I can say is, that the Legislature is in the habit of trusting to councils of boroughs in very many and important respects, and I assume they consider that that discretion is properly vested in them. If in point of fact, by the language of the Legislature, the money assessed for contribution to the borough rate is chargeable by law upon the assessment of the poor rate, then it seems to me that the case falls within the 133rd section, and the money paid in then would be regarded as a deficiency in the assessment for the poor rate. That is how the matter seems to me to stand with regard to the borough rate. With regard to the county rate, the matter is not so clear as it is with regard to the borough rate. I am not going through the Acts of Parliament. This is the short history of them. Originally there was a distinct county rate—a county rate made, not upon individuals, but upon the total assessment of the parish. That being the state of things, how was that assessment to be raised? The section of the 15 & 16 Vict. lays down the mode in which it is to be done. They are to cause a printed list of the parishes to be sent to the overseers of the poor; they are to order precepts to issue to the guardians of every union, stating the sum charged for each such rate. That is again the county rate, and no doubt the precept there assists Mr. Bosanquet to some extent. It keeps up, as far as the precept is concerned, the difference between the county rate and the poor rate, because it says that the money is charged and assessed thereon as the proportion of the several parishes towards the general county rate. If it stopped there, I should still have been doubtful whether I could have arrived at the same conclusion as that which I have arrived at now. But it does not stop there. Then another Act of Parliament is passed. This says that the guardians of the poor are to raise the money in like manner as the money required by the guardians for the relief of the poor. Again, there comes in a subsequent consolidated order, which seems to provide for that, because it distinctly says, by article 2, that the guardians shall make orders on the overseers or other proper authorities of every parish in the union, at the commencement of each half-year, ending on the days above mentioned, and from time to time as occasion may arise, for the payment to the guardians of all such sums, as may be required by them as the contribution of the parish to the common fund of the union, and for any other expenses separately chargeable to the guardians on the parish, and in such orders the contributions shall be directed to be paid in one sum or by instalments, on days to be specified in such orders, as to the guardians may seem fit." Therefore, the guardians of the union are to raise moneys by precepts in like manner as the money required for the relief of the poor. How is that money raised? It is raised by a precept to the overseers. The overseers are com-

manded by the precept to pay the moneys. It must be out of the poor rate, because they have no other moneys in their hands. If there were a separate rate, and if there were moneys standing to their credit at the separate rate, that would cease to be money payable out of the poor rate. It seems to me, although not very clearly put, that the true effect of that legislation is, that the only moneys that are impressed with the liability to make up this deficiency are payable out of the poor rate. In principle it is like the case I spoke of just now—the Oxford case. The same thing occurred there. Although it seemed to be inequitable that the heads of colleges and graduates should have to pay the expenses of inquiring into an election in which they took no part whatever, and in which they had no vote, yet the Legislature thought it right—finding there is, as they know there is, one general fund produced by a simple system of rating over an area, by which every individual is reasonably brought to bear his share of the taxation in question—having got the general fund to apply to, the Legislature seemed to think, and did evidently think, that it is more in the public interest that moneys of that kind should be paid out of that specific fund, although it might happen that there may be inequalities, or that there may be some apparent want of reason for that particular mode of doing it; the Legislature seemed to think that it is for the general convenience of the public that there should be one rate, one assessment, one payment—everything simplified in that way. Therefore the Legislature seemed to think it better to charge everything upon those funds that are already in existence with an existing and well-known machinery, than to have separate funds created for that purpose. The question we have to deal with now is, whether, in the present state of legislation, these moneys are moneys raised within the language of the section. Are they deficiencies in the assessments of the poor rate? It seems to me that they are those deficiencies, and that therefore judgment must be for the plaintiffs.

WILLS, J.—I am of the same opinion. In the events which have happened, the railway company are bound, under the Act of Parliament, to make good the deficiency in the amount of the assessment to the poor rate. If therefore the poor rates are properly applicable to the subject-matter now under discussion, namely, to supplement the borough rate, and to supplement the county rate, the railway company cannot complain. They must make good the deficiency in the poor rate, for whatever purposes that poor rate is applicable according to law. As to the borough rate, it seems to me absolutely beyond all possibility of question that the poor rate is properly made applicable to pay the contribution of the parish towards the borough fund, because the Acts of Parliament—originally the Municipal Corporations Act of 1837, and subsequently the Act of 1882, in different language but the same in substance—have empowered the council to direct that the contributions of the parishes towards the borough rate should be paid out of the poor rate. If so, the poor rate is properly made applicable to those charges. Therefore the poor rate must be applied to that purpose, and if there is not enough to pay it without the extra contribution of the railway company, they must make it good, although it happens that the proportion of the poor rate is applied to pay the borough rate, which clearly would not be a poor rate, or part of a poor rate, except for the specific claim. When the Legislature has once enacted that it shall be paid out of poor rate, or may be paid out of poor rate, and events have happened, which make it payable out of poor rate, I cannot see on what ground the exemption that has been contended for can be established. Then the case of the county rate is undoubtedly a little more difficult. At the time when the Lands Clauses Act was passed, it is clear that under the old Act of Geo. 3—at least it seems to me clear—no part of the county rate could have been paid out of the poor rate. Therefore the railway company could not have been called upon to make good the deficiency indirectly in the county rate. Then the Act of 15 & 16 Vict. came, and that puts the county rate upon altogether a different footing. Whereas by the former Act, after apportioning it among the parishes, the overseers were to collect it as a separate county rate, after the 15 & 16 Vict. that was no longer to be so. The county rate was divided amongst the parishes, and there it stopped, as a county rate, under ordinary circumstances. Without discussing the provisions which were made to apply to the cases of divided parishes, and areas specially situated, to which the machinery of the poor law was not applicable, it went on to say that, in place of the former machinery, the guardians were to receive precepts from the justices, and that they should raise the money, required by such precepts to be paid, in like manner as the money required by the guardians for the relief of the poor is paid. There it stops. There is no further machinery provided. It may be rather a defective way of expressing what the Legislature intended, but it never seems to have created any difficulty in practice, nor can I conceive that, with a little goodwill, there is any difficulty in arriving at what was meant. It meant that the ordinary machinery of the poor law should be put in motion, and that this charge should be added to the sums to be collected by way of poor rate. What seems to me to be quite conclusive upon that point is, that, unless it is lumped with the poor rate, and made part of it, there is no machinery for collecting it at all. For all practical purposes it is not a rate, unless the liability to pay it can be enforced by summons and distress and all the rest of the ordinary machinery, and the very fact that no such machinery is provided seems to me to be conclusive that the Legislature meant it should now become part of the poor rate, and be collected as poor rate—not as a separate rate, but as part of it, because, unless it is part of it, the only machinery provided by law for recovering such rates would be inapplicable to that portion of the rate which is irrecoverable; and that observation is strengthened when one observes that, in the case of divided parishes, and other parishes where the machinery of the poor law cannot be applied, or does not exist, special provisions are given, giving not only power of distress and powers of enforcement, but giving the same sort of relief as is given to the persons aggrieved by poor rate. One sees how exactly right that is, because, if it is part of the poor rate, the only question which the parishioner is entitled to raise is, whether he

is fairly charged with the rest of the parishioners liable to be charged. If he has an objection of that kind, he raises it by appeal against the poor rate as effectually and as well as if he had specific machinery to do it; whereas, when he is made liable to a new rate which is not the ordinary poor rate, and which is levied in places and under circumstances to which the poor rate machinery is not applicable, then he comes to have an opportunity of raising the same question, and that opportunity is given to him specifically in such cases. It seems to me clear, when you come to look at it carefully, and to examine it, that the Legislature did mean that from and after the passing of the 15 & 16 Vict. this county rate should be, for the purposes of collection and payment, part of the poor rate. If so, it must be paid out of the poor rate, and therefore, if there is a deficiency in the poor rate, it will be a deficiency which applies to this just as much as to any other subject-matter to which the poor rate is applicable. It seems to me, therefore, that our judgment must be for the plaintiffs, and with costs.

Judgment for the plaintiffs for 574*l.* 3*s.* 6*d.*, *with costs.*

Solicitors for the plaintiffs, *Chester, Mayhew, Broome*, and *Griffiths*, for *Brett* and *Barclay*, Manchester.

Solicitor for the defendants, *C. H. Mason.*

Dec. 15, 19, 20, 1887, *and April* 24, 1888.

(Before Pollock, B. and Hawkins, J.)

Bray (Surveyor of Taxes) (app.) *v.* The Justices of the County of Lancaster (resps.). (*a*)

Revenue — Income tax — Schedule A. — County lunatic asylum provided under the Lunatic Asylums Act 1853 (16 *&* 17 *Vict. c.* 97)—*Parts occupied by officers with income of* 150*l. or more*—16 *&* 17 *Vict. c.* 34, *sched. A.*

The justices of a county are rightly assessed under schedule A. of the Income Tax Acts on such portions of the public buildings, offices, and premises belonging to the county lunatic asylum established under the Lunatic Asylums Act 1853 (16 *&* 17 *Vict. c.* 97) *as are occupied by officers whose whole income amounts to or exceeds* 150*l. per annum.*

This was a case stated for the opinion of the court under 43 & 44 Vict. c. 19, s. 59.

The case was, so far as material, as follows:—

At a meeting of the Commissioners for General Purposes of the Income Tax Acts for the Division of Amounderness, in the county of Lancaster, held at the office of the said commissioners on the 15th Oct. 1887, the justices of the county of Lancaster, by Frederick Campbell Hulton, clerk of the peace, appealed against an assessment made upon them under schedule A. of the Income Tax Acts for the parish of Whittingham, in the said division, for the year ending the 5th April 1888, whereby they were assessed in respect of certain parts of Whittingham Lunatic Asylum, for the county of Lancaster, used as apartments by the medical superintendent, medical officers, and steward of the said asylum, and in respect of a separate house occupied by the chaplain.

By 5 & 6 Vict. c. 35, s. 61, No. 6, it is provided that allowances are to be made in respect of the said duties in schedule A; for the duties charged on any hospital, public school, or almshouse in respect of the public buildings, offices, and premises belonging to such hospital, public school, or almshouse, and not occupied by any individual officer or the master thereof, whose whole income, however arising, estimated according to the rules and directions of this Act, shall amount to or exceed 150*l.* per annum, or by any person paying rent for the same, &c.

The Whittingham Asylum is a county lunatic asylum established under an Act of 16 & 17 Vict. c. 97, and is a hospital and house provided for the reception and relief of poor persons; that is to say, for the lodging, maintenance, medicine, clothing, care, and treatment of pauper lunatics.

The committee of the asylum duly appointed the medical superintendent, medical officers, steward, and chaplain under sect. 55 of the last-mentioned Act.

The medical superintendent, medical officers, steward, and chaplain are each respectively charged to the income tax under schedule E. in amounts exceeding 150*l.* per annum.

The apartments occupied by the medical superintendent, medical officers, and steward are situated in and form part of the asylum buildings.

The chaplain occupies a house separate from the asylum buildings, but situate in the asylum grounds.

The apartments occupied by the medical superintendent, medical officers, and steward, and the house occupied by the chaplain are not rated or charged in the poor rate assessment, in accordance with the provisions of sect. 35 of the Lunatic Asylums Act 1853.

The clerk of the peace contended that neither the county justices nor the committee of visitors were liable to pay income tax under schedule A. in respect of the apartments occupied by the medical superintendent, medical officers, and steward, and the house occupied by the chaplain upon the following grounds:

1. The medical superintendent is bound by Act of Parliament to be resident in the asylum, and the medical officers and steward are also bound to reside within the building by order of the committee of visitors.

2. The medical superintendent, the steward, and medical officers may be transferred by order of the justices, or in the case of the medical officers and steward, by order of the medical superintendent, at a moment's notice, from one set of rooms to another.

3. The medical officers have not exclusive occupation of their apartments, the medical superintendent, the steward, and housekeeper, each having a master key thereto.

4. There is no such occupation, either by the committee of visitors or the justices, or by the medical officers, as contemplated by the Act 5 & 6 Vict. c. 63, No. 9, r. 2.

5. The chaplain is bound to reside in the house which has been built expressly for the purposes of a chaplain's house.

6. The furniture in the case of the medical officers and steward is supplied wholly, and in the case of the medical superintendent and chap-

(*a*) Reported by Joseph Smith, Esq., Barrister-at-Law.

lain chiefly, by the justices. The medical officers and steward are also boarded at the expense of the county rates. The medical superintendent and chaplain are not so boarded.

7. The justices are bound by 16 & 17 Vict. c. 97, to provide an asylum for pauper lunatics, and the building is erected out of the county rates, and there is no beneficial occupation on the part of any of the officers, they being servants of the justices or of the committee of visitors, and their occupation being compulsory.

8. The medical superintendent and other officers were not removable by order of the justices to any other asylum within the county, but were liable to be discharged at three months' notice.

And in support of his case the clerk of the peace quoted the cases of *Jepson* (app.) v. *Gribble* (resp.), (34 L. T. Rep. N. S. 493; 1 Ex. Div. 151); *Bent* (app.) v. *Roberts* (resp.), (37 L. T. Rep. N. S. 673; 3 Ex. Div. 66); *Coomber* v. *The Justices of Berkshire* (47 L. T. Rep. N. S. 687; 50 L. T. Rep. N. S. 405; 9 Q. B. Div. 17; 10 Q. B. Div. 267; 9 App. Cas. 61).

The surveyor, in reply, contended that the county justices were the occupiers of the whole of the asylum within the meaning of the Income Tax Acts, although a permissive right of enjoyment had been given for the time being to the several officers, and that the justices were liable to the duty charged for so much of the said asylum as is occupied by the officers having an income of 150*l.* a year.

After hearing the statements of the appellant and the surveyor, the said commissioners being of opinion that the assessment could not lawfully be maintained, discharged it.

The surveyor being dissatisfied with the decision, requested that a case should be stated for the opinion of the court, and the case above set out was thereupon stated by the commissioners.

On the hearing of the appeal the case was referred back to the junior counsel to see how far they were agreed upon facts alleged, but not specifically found by the case, and for the questions for the opinion of the court to be added.

The following additions were thereupon made by consent to the case as originally stated:

It is admitted that statements of fact made by the clerk of the peace under heads of his contentions, numbered respectively 1, 2, 3, 5, 6, and 8, are true and correct.

It is further admitted, as stated in his seventh contention, that the asylum building has been erected out of the county rates, and, except as stated in the case, there is no occupation on the part of any of the officers, they being servants of the justices or of the committee of visitors, and their occupation being compulsory.

It is further admitted that, as prescribed by the County Property Acts 1858 and 1871, the legal estate of the land upon which the asylum is built has been conveyed to and is now vested in the clerk of the peace of the county of Lancaster in trust for the purposes of the Lunatic Asylum Acts.

The questions for the opinion of the court are: Whether the asylum, or any part thereof, is properly assessable to the income tax under schedule A.? If the asylum, or some part thereof, is properly assessable to income tax, are the justices for the county for the time being chargeable with income tax in respect of the said asylum, or part thereof, under schedule A.? If the said asylum, or any part thereof, is properly assessable to income tax under schedule A., and the said justices are not chargeable with income tax, whether the committee of visitors for the time being, or the officers residing in the asylum, or the clerk of the peace, or the inhabitants or ratepayers of the county, or any other person or body of persons, are chargeable with such income tax? If part only of the asylum is chargeable, what part is chargeable, and in what capacity, and how is the amount to be assessed? Whether the assessment can in law be maintained, and whether the commissioners' decision was right?

The *Attorney-General* (Sir R. E. Webster, Q.C.), the *Solicitor-General* (Sir E. Clarke, Q.C.), and *Dicey* for the appellant.

Gainsford Bruce, Q.C. and *Smyly* for the respondents.

The arguments sufficiently appear in the judgment of the court.

April 24, 1888.—The judgment of the court (Pollock, B., and Hawkins, J.), was delivered by

Pollock, B.—This is an appeal from the decision of the Income Tax Commissioners for the Amounderness division of the county of Lancashire, made on the 15th Oct. 1887, whereby they discharged an assessment of income tax made on the justices of Lancashire, for the year ending 5th April 1888, in respect of certain parts of the Whittingham County Lunatic Asylum, used as apartments for the medical superintendent, medical officers, and stewards, and in respect of a separate house occupied by the chaplain. The case was argued before my brother Hawkins and myself in December last, and we took time to consider our judgment. The assessment appealed against was under schedule A., and in the following form: "Justices of the County of Lancaster. Whittingham Asylum, confined to such portions of the public buildings, offices, and premises belonging to the asylum as are occupied by officers whose whole income amounts to or exceeds 150*l.* per annum." The facts material to our decision are as follows: The Whittingham Asylum is a county lunatic asylum established under the 16 & 17 Vict. c. 97. The committee of visitors of the asylum (appointed by the justices under sects. 2 and 21 of the Act) duly appointed the medical superintendent, medical officers, stewards, and chaplain, under sect. 55 of the last-mentioned Act. The medical superintendent, medical officers, stewards, and chaplain are each respectively charged to the income tax under schedule E., in amounts exceeding 150*l.* per annum. The apartments occupied by the medical superintendent, medical officers, and stewards, are situated in and form part of the asylum buildings. The chaplain occupies a house separate from the asylum buildings, but situated within the asylum grounds. The medical superintendent is bound by sect. 55 of the above Act to be resident in the asylum. The medical officers and steward are bound to reside within the building, by order of the committee of visitors. The medical superintendent, the steward, and medical officers may be transferred by order of the justices, or in the case of the medical officers and stewards, by order of the

medical superintendent, at a moment's notice from one set of rooms to another. The medical officers have not exclusive occupation of their apartments, the medical superintendent, the steward, and housekeeper each having a master key thereto. The chaplain is bound to reside in the house which has been built expressly for the purposes of a chaplain's house. The furniture in the case of the medical officers and stewards is supplied wholly, and in the case of the medical superintendent and chaplain, chiefly by the justices. The medical officers and stewards are also boarded at the expense of the county rates. The medical superintendent and chaplain are not so boarded. The justices are bound by 16 & 17 Vict. c. 97 to provide an asylum for pauper lunatics, and the building is erected out of the county rates, and there is no beneficial occupation on the part of the officers, they being servants of the justices or of the committee of visitors, and their occupation being compulsory. The medical superintendent and other officers are not removable by order of the justices to any other asylum within the county, but are liable to be discharged at three months' notice. The liability to assessment under schedule A., arises as follows: By the Income Tax Act 1853 (16 & 17 Vict. c. 34) the duties are granted for and in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, and to be charged for every twenty shillings of the annual value thereof. The duties granted by the said Act are, by sect. 5, to be assessed and collected under the regulations and provisions of the Income Tax Act 1842 (5 & 6 Vict. c. 35). By schedule A., rule No. 1 of the latter Act, the annual value of lands and tenements charged under schedule A. is to be understood to be, if the same are not let at rack rent, at the rack rent at which the same are worth to be let by the year; which rule shall be construed to extend to all lands, tenements, hereditaments, or heritages capable of actual occupation of whatever nature, and for whatever purpose occupied, or enjoyed, and of whatever value. By rule 2 of No. 9 every person having the use of any lands or tenements shall be taken and considered for the purposes of this Act as the occupier of such lands or tenements; and by sect. 70 the several duties are to the assessed on all lands, tenements, and hereditaments whether occupied at the time of assessment or not. Unless, therefore, the apartments in question are exempted by common law, or by the reversion of some statute, it seems clear that they are subject to income tax under schedule A. as coming within the words, "all lands, tenements." The only exemption by statute which has any apparent reference to the present case is that contained in 5 & 6 Vict. c. 35, s. 61 (No. 6), providing that allowance is to be made under schedule A. for the duties charged on any hospital, public school, or almshouse in respect of the public buildings, offices, and premises belonging to such hospital, public school, or almshouse, and not occupied by any individual officer or the master thereof, whose whole income, however arising, estimated according to the rules and directions of this Act, shall amount to or exceed 150*l.* per annum, or by any person paying rent for the same. It seems only necessary to read this section to see that the apartments occupied by the medical superintendent, medical officers, and steward, and the house occupied by the chaplain, each of whose income exceeds 150*l.* per annum, come within the scope of the Income Tax Acts, and not within the allowance provided for. A more serious question arises when we come to consider the objection made by the respondents upon the ground that the apartments are in the nature of Crown property, and are solely used for Crown purposes. The principle upon which this exemption depends is thoroughly established, and may be said to rest upon the well-known rule of law that the Crown (by virtue of its prerogative) is not bound by any statute unless it be expressly named. This is explained by Lord Kenyon in *R.* v. *Cook* (3 T. R. 519), where it was held that the post-horse duty imposed by the 25 Geo. 3, c. 51, was not payable in respect of horses employed in forwarding public expresses on the service of the Crown. Since that decision there have been many instances in which public buildings used for Government purposes only have been held to be exempt from poor rates. Thus the Horse Guards (*Lord Amherst* v. *Lord Somers* 2 T. R. 372); the Post-office (*Smith* v. *Birmingham*, 7 E. & B. 483); the Admiralty (*Reg.* v. *Stewart*, 8 E. & B. 360), have all been held to be exempt from poor rates upon this ground. In some of the cases which followed these the court appears to have gone further, and allowed the exemption in favour of premises occupied by improvement commissioners and others who used them for public purposes other than Crown or Government purposes, but in the case of the *Tyne Improvement Commissioners* v. *Chirlton* (1 E. & E. 516) these cases were all brought to the attention of the court, and Lord Campbell, in giving judgment, distinctly rests the right to exemption upon the ground that "the purposes for which the property is occupied are purposes created by the Government of the country;" and in the *Mersey Docks and Harbour Board* v. *Cameron* (12 L. T. Rep. N. S. 643; 11 H. L. Cas. 443) the House of Lords gave effect to and confirmed this distinction. Blackburn, J., in delivering the opinion of the judges, states that the exemption depends entirely upon the occupier and not on the title to the property, and after reviewing the authorities he says that: "In all cases in which the exemption has been allowed, the purposes of the occupation are public purposes of that kind which by the constitution of this country falls within the province of Government, and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered in *consimili casu*." And Lord Westbury, at page 505, says that the public purposes to make good an exemption "must be such as are required and created by the Government of the country, and are therefore to be deemed part of the use and service of the Crown." In *Coomber* v. *The Justices of Berkshire* (47 L. T. Rep. N. S. 687; 50 L. T. Rep. N. S. 405; 9 Q. B. Div. 17; 10 Q. B. Div. 267; 9 App. Cas. 61) the Court of Queen's Bench, the Court of Appeal, and the House of Lords all held that the question whether premises are liable to be rated for the relief of the poor, and whether they are liable to be taxed for income tax, is for the above purposes identical. They also agreed that, in order to establish an exemption in either case, the premises in question must be such that they can be properly treated

as being occupied by the Crown or for Crown purposes, or for public purposes of such a kind as to fall within the province of Government. The only remaining point for consideration on this part of the case is, what is the character and purpose of the lunatic asylum in which are the apartments which are assessed to income tax. It is a county lunatic asylum, built and conducted under the Lunatic Asylums Act 1853 (16 & 17 Vict. c. 97). By sect. 2 of this Act the justices of every county not already having a lunatic asylum are bound to provide one, and for this purpose to give notice to appoint at general or quarter sessions a committee of justices to provide an asylum for the pauper lunatics of such county. By sect. 3 the justices are bound to appoint the said committee to superintend the erecting or providing of the asylum, with power to treat and agree for uniting with another county or counties, alone or together with the subscribers to any existing or future hospital established for the reception of lunatics, and jointly erecting or providing a lunatic asylum for the purposes of the Act, and to agree for the joint use of any such asylum or hospital, or, where they think fit, for enlarging the same. Sects. 4 to 20 contain further provisions in regard to the county lunatics, by uniting with another county or counties, or with the subscribers to any lunatic hospital. By sect. 21 the committee elected to superintend the erecting or providing of an asylum is to be deemed the committee of visitors until visitors be duly elected. A number of sections then follow which provide for the duties of the visitors; and, by sect. 43, when any asylum can accommodate more than the lunatics of the county, the visitors may order the admission of other pauper lunatics belonging to other counties or boroughs upon payment for their lodging, maintenance, &c. By sect. 55 the visitors of every asylum are to appoint a chaplain, who is to discharge certain duties provided by that section. They are also to appoint a medical officer who shall be resident in such asylum, and a clerk and treasurer, and such other officers and servants for the asylum as the committee may think fit. The effect of these provisions is, that the justices of every county are required and empowered to maintain a lunatic asylum, with a proper staff of officers, for the maintenance and care of pauper lunatics within the county. This is, no doubt, a matter of public interest, and in some cases essential for the public welfare; but, as a matter of duty and necessity, the justices, in carrying out the requirements of the Act, cannot be said to be discharging the functions which belong to the Crown or the Government of the country at large, any more than when they are doing many other things, either in obedience to a statute or otherwise, which are requisite for the well-being of their county. Another point was raised by the respondents, which we do not think need be dealt with at any great length. It was said that the Crown has by its prerogative the custody of lunatics, and that the requirements of the County Lunatic Asylums Act were but an assignment to the justices of the different counties of that prerogative, and, therefore, that the asylum and all its apartments were exempted from income tax. There is no doubt as to the existence of the prerogative of the Crown with respect to the custody of lunatics. It has been doubted and discussed whether its origin was of common law or by statute, but that the right exists is beyond all doubt. The nature of it is stated in Bacon's Abridgment, tit. "Idiots and Lunatics" (7th edit. vol. 4, p. 272): It seems to be agreed at this day that the king, as *parens patriæ*, has the protection of all his subjects, and that in a more particular manner he is to take care of all those who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves. This, in some books, is called a prerogative in the Crown, and in others a *regium munus* or duty, which the king owes his subjects in return for their subjection and allegiance to him, for which he cites Stanford's Prerogative, 2nd Institute, and other authorities. In modern times this prerogative has been exercised by the Court of Chancery when dealing with the property of lunatics, and more directly by the Commissioners of Lunacy acting under statutes which have been passed from time to time, and also by the judges and others holding criminal courts, when carrying out the statutory provisions relating to criminal lunatics; but there is no trace in our law books or elsewhere of the Crown having taken upon itself the general custody and maintenance of persons of unsound mind. Until the passing of the modern Acts relating to lunatic asylums, both pauper and other lunatics were habitually maintained in private houses, hospitals, and poorhouses, and even now the relations of a lunatic or others who do so without profit may keep and maintain a lunatic in a private house without any licence to do so. If the contention of the respondents were to be given effect to, it would seem to follow that a father or mother could not maintain in their cottage an imbecile child without exercising the prerogative of the Crown, and partially acquiring for their home the privilege of a royal residence. The fallacy of this argument consists in confounding two distinct matters: one, the prerogative, privilege, and duty of the Crown to protect, and, if necessary, to control lunatics; the other, the duty which belongs to parents, parishes, and counties to maintain them if paupers. In respect to this latter obligation, the duty is identical, whether the pauper who is maintained be a lunatic or a person of unsound mind, and therefore it cannot correctly be said that the magistrates, when providing for the custody and maintenance of pauper lunatics in the county lunatic asylum, are exercising a prerogative of the Crown, or discharging a duty which appertains to the public Government of the country. The last objection urged by the respondents is one of a more technical character, but it not the less requires to be answered before judgment can be given for the appellants. It is this, that, even if it be admitted that the apartments in question are properly assessed to income tax, the justices of the county of Lancaster are not such a body as can be assessed — they are not strictly a corporation. But this does not seem to us to assist the respondents' argument much, for, if they are a body known to the law and to the Legislature, it would seem to follow that, where apartments in respect of which income tax is payable are occupied by them—that is, by their officers and servants — the justices are the persons who, as a body, ought to be assessed. If it were

not so, this curious consequence would follow: that there would be apartments in respect of which income tax is payable, a body of persons occupying them, and beneficially occupying them, since, if these apartments did not exist, the justices would be compelled to obtain others, and yet no person, or body of persons, would be assessable—a conclusion so inconvenient and improbable that one would be slow to adopt it. But it was further said, How is the claim of the Crown to be enforced; can the magistrates be made liable personally or collectively? No practical difficulty seems to present itself as to this, for the Crown can always enforce payment of income tax due and unpaid by distress upon the premises by virtue of its prerogative, and also under the provisions of the Taxes Management Act 1880 (43 & 44 Vict. c. 19), s. 86; and in this particular case provision is made by the Income Tax Act 1842, s. 70, that, so far as respects the duties chargeable under schedule A. in case any lands charged to the said duties shall be unoccupied, and no distress can be found on the same at the time such duties shall be payable, it shall be lawful for the collector of the parish or place where the said lands are situate for the time being at any time after to enter upon the said lands where there shall be any distress thereupon to be found, and the distress to seize and sell, under the like powers as he might have distrained on the same lands if in the occupation of such person at the time the duties became due. Is there, then, any sufficient ground or reason in law why the magistrates as a body should not be assessed? Their functions in reference to the county lunatic asylum are created and regulated by the provisions of the statute already referred to (16 & 17 Vict. c. 97), and it will be seen, on reference to these, that, although the justices are empowered by sect. 3 to appoint a committee to superintend the erection of the county lunatic asylum, and by sect. 22 to elect visitors annually, the duty of providing the asylum is by sect. 2 cast upon the justices generally. Looking therefore to the general objects of the Act as evidenced by its provisions, it seems that the intention is to cast a responsibility upon the justices of every county to provide county lunatic asylums, and to depute a selected number of their body for the building and maintenance of such asylum, including the appointment of officers and provision for their residence, which would seem to involve the imposition upon the justices, as a body, of all fiscal responsibilities necessarily arising out of the position in which they are placed, and as between the justices generally and the committee of visitors the view that the parties are liable is strengthened by the consideration of the fact that a fresh committee of visitors is elected annually (sect. 22), and the justices have power from time to time to fill up the vacancies (sect. 28), and also by the fact that the justices, not the committee of visitors (sect. 46 and following) have power to defray the moneys, costs, and expenses payable for the purposes of this Act out of the rates. There is not much authority affecting this question, but as far as it goes it seems to be in favour of the assessment. In *Reg.* v. *The Justices of Worcestershire* (11 Ad. & E. 57) it was held that the justices as a body were not liable to poor rate in respect of the county hall, but this was upon the ground that the only purposes for which the justices used the hall as a body were for the administration of justice, and, although some of them individually used the building for dining and sleeping, this was not an occupation by the whole body; but in giving judgment Williams, J. says: "The magistrates form a body which is in the nature of a corporation for public purposes only." In *Reg.* v. *The Overseers of Fulbourn* (12 L. T. Rep. N. S. 344; 6 B. & S. 451) the question was fully discussed whether the committee of visitors of a pauper lunatic asylum were liable to poor rates beyond the value at which the land was assessed at the time of its purchase. It was held that they were not, but any point such as is now raised was not taken either by counsel or by the judges who decided that case. In *The Justices of the County of Lancaster* v. *Cheetham* (8 B. & S. 548; L. Rep. 3 Q. B. 14) it was held that the justices of the county were rateable to the relief of the poor for the courts built for the Manchester Assizes in respect of an amount which they received for the accommodation required for the City Quarter Sessions, and for the City Court of Record. In *Coomber* v. *The Justices of Berkshire* (*ubi sup.*) the point now under consideration does not appear to have been discussed at the bar, or to have been decided by either of the learned judges, Grove, J. and Huddleston, B., before whom the case was argued in the Queen's Bench Division. In the Court of Appeal, Brett, L.J. appears to have expressed a clear opinion that the justices could not be assessed, upon the ground that they are not a corporation, nor are they an association of persons at all, unless they be assembled in quarter sessions. The justices, he goes on to say, have no property belonging to them as justices upon which anything could be levied, and it can hardly be maintained, I should think, that this tax could be recovered from them individually and personally. Baggallay, L.J., after saying that he adopts the view that the justices must be regarded as the occupiers of the premises, adds: "I am, however, unable to assent to the proposition that there is any beneficial occupation of the premises by the justices, or that the premises are capable of beneficial occupation or enjoyment by anyone. In any view of the case, it can hardly be disputed that the justices have not any beneficial occupation or enjoyment of the premises; and, inasmuch as by virtue of the statute 21 & 22 Vict. c. 92, and of the conveyance made thereunder in 1859, the assize-courts and the police-station were on the 6th April 1859, and have ever since been, vested in the clerk of the peace, upon trust for the public uses or purposes of the county, they have been, and are, incapable of any such beneficial ownership or occupation as could render the owner or occupier liable to be charged in respect thereof." The decision of the above case, however, in all the courts turned upon the point that the apartments in question were occupied for Crown purposes; and therefore the above dicta, though entitled, we need scarcely say, to every possible respect and consideration, are not binding; and when the case came before the House of Lords, the learned lords by whom it was decided appear to have declined to deal with the question of who could properly be made liable as occupiers, provided an assessment could legally have been made; and Lord Blackburn (50 L. T. Rep. N. S. 408;

9 App. Cas. 72) says: "I do not think it necessary to say anything on what I may call the technical answers on which the respondent's counsel—and, I think, to some extent, Lord Justice Brett—relied. I do not doubt that, if these premises were taxable, means would be found for obtaining payment." Lord Watson appears also to have differed from the observations made by the judges in the Court of Appeal upon this part of the case. The case is not without some difficulties in whatever light it may be viewed; but, for the reasons we have given, it appears to us that the Crown is entitled to the judgment of the court. Since this judgment of my brother Hawkins and myself was written there is a case of *Tunnicliffe and others* v. *The Overseers of Birkdale* (59 L. T. Rep. N. S. 190; 20 Q. B. Div. 450), which came before the Master of the Rolls and Fry and Lopes, L.JJ. in the Court of Appeal. I need only say that was a case in which that court took the same view as we have done with regard to the occupation of a reformatory school. The same arguments were there used; but the judges came to the conclusion that a reformatory school could not be considered as a school occupied for Crown purposes. There will be judgment therefore for the Crown, and with costs.

Solicitor for the appellant, *The Solicitor to the Inland Revenue.*

Solicitors for the respondent, *Ridsdale* and *Sons*, for *Wilson* and *Hulton*, Preston.

Wednesday, May 9, 1888.

(Before Lord Coleridge, C.J., Field and Wills, JJ.)

Re Alice Woodall. (*a*)

Extradition—Fugitive criminal—Surrender of, to United States—Provision that criminal should not be tried for offence other than the offence for which surrender was granted—Whether there is such provision in the law of the United States—The Extradition Act 1870 (33 *&* 34 *Vict. c.* 52), *s.* 3, *sub-sect.* 2, *and s.* 27—*The Ashburton Treaty of* 1842, *art.* 10.

A fugitive criminal was committed to prison under the Extradition Act of 1870 *for forgery, alleged to have been committed in the State of New York.*

A rule nisi for a habeas corpus was obtained on behalf of the prisoner, on the ground that there was not sufficient provision made by the Government of the United States that the prisoner should not be tried for an offence other than the offence for which her surrender was demanded, a provision required by sub-sect. 2 *of sect.* 3 *of the Extradition Act of* 1870.

Held (discharging the rule), that, since the decision of the Supreme Court of the United States in the case of the United States *v.* Rauscher (12 *Davis's Sup. Ct. Rep.* 407), *a judgment binding upon all courts, both State Courts and Federal Courts, within the limits of the United States, the required provision has been made by the law of the United States, and that such provision was to be read in the words of the Ashburton Treaty, and that the Ashburton Treaty was to be construed as if that provision were incorporated into the* 10*th article of the Treaty, and that, consequently, provision was made by the law of the United States that the fugitive criminal shall only be tried for those offences for which he is surrendered, as required by sub-sect.* 2 *of sect.* 3 *of the Extradition Act of* 1870.

(*a*) Reported by Henry Leigh, Esq., Barrister-at-Law.

Rule *nisi* for a writ of *habeas corpus* to discharge the prisoner, Alice Woodall, who was in custody, upon an application made under the 10th section of the Extradition Act 1870, upon two charges of forgery, alleged to have been committed in the State of New York.

The rule had been obtained on behalf of the prisoner, upon the ground that there is no sufficient provision made by the Government of the United States that she may not be tried for an offence other than that for which she might be extradited, as required by sub-sect. 2 of sect. 3 of the Extradition Act 1870, which is as follows:

A fugitive criminal shall not be surrendered to a foreign State, unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign State, for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded.

Sect. 27 provides:

The Acts specified in the third schedule to this Act are hereby repealed as to the whole of Her Majesty's dominions, and this Act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the Acts so repealed) shall apply (as regards crimes committed either before or after the passing of this Act), in the case of the foreign States with which those treaties are made, in the same manner as if an Order in Council referring to such treaties had been made in pursuance of this Act, and as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this Act.

Amongst the Acts so repealed is an "Act for giving effect to a Treaty between Her Majesty and the United States of America for the apprehension of certain offenders" (6 & 7 Vict. c. 76), 22nd Aug. 1843. The preamble of this Act sets out the 10th article of the Ashburton Treaty of 1842 as follows:

It was agreed that Her Majesty and the said United States should, upon mutual requisition by them, or their Ministers, officers, or authorities respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either of the high contracting parties, should seek an asylum, or should be found within the territories of the other, provided that this should only be done upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and commitment for trial, if the crime or offence had been there committed, and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or magistrates respectively, to the end that the evidence of criminality might be heard and considered, and if on such hearing the evidence should be deemed sufficient to sustain the charge, it should be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant might issue for the surrender of such fugitive.

Sir *R. Webster*, Q.C. (A.-G.), Sir *E. Clarke*, Q.C. (S.-G.), and *R. S. Wright* with him) showed cause against the rule.—The ground upon which this rule was obtained was that there can be no extra-

dition in this case, because there is no arrangement with America, under sub-sect. 2 of sect. 3 of the Extradition Act of 1870. The defendant was arrested on a charge of forgery, and there can be no doubt that forgery is one of the offences for which extradition can take place between England and America, so that the only point that now arises is, whether or not there is any objection to this prisoner being extradited, upon the ground mentioned in sub-sect. 2 of sect. 3 of the Act. I have to submit that there is, by a law of the United States of America, a provision that a prisoner is not to be tried for any other offence, until he has had an opportunity of returning to the place from which he has been extradited. If it is necessary to argue the point, I should submit that the matter is governed by the provisions of the Ashburton Treaty of 1842, the rights under which were saved by sect. 27 of the Act of 1870; and, if it were necessary, I should submit that, by the law recognised both in England and America, n regard to these matters, a prisoner surrendered under the Ashburton Treaty would not be tried for an offence other than that for which he was extradited. I merely mention this second point because I think it will turn out that it will not be necessary to discuss it, having regard to what I am going to argue on the first point. Leaving the Treaty of 1842 for the present outside the question, I will deal with some of the cases on the subject. The first case I will refer to is the case of the *United States* v. *Rauscher* (12 Davis's Sup. Court Reports 407), decided on the 6th Dec. 1886. In that case the defendant Rauscher, charged with murder on board an American vessel on the high seas, fled to England, and was demanded of the Government of that country, and surrendered on the charge of murder. The Circuit Court of the United States for the Southern District of New York, in which the prisoner was tried, did not proceed against him for murder, but for a minor offence not included in the Treaty of Extradition. The prisoner was indicted by a grand jury for having, on the high seas, within the Admiralty and maritime jurisdiction of the United States, he being then and there second mate of a certain American vessel, unlawfully assaulted one of the crew of the vessel of which he was an officer, and having unlawfully inflicted upon him cruel and unusual punishment. The two judges of that court, who were divided in opinion upon the question, certified to the Supreme Court for its judgment, whether that could be done, having reference to the Ashburton Treaty of 1842, between Great Britain and the United States. The chief point then arising was, whether the prisoner, having been extradited upon a charge of murder, the Circuit Court had jurisdiction to put him on trial upon an indictment charging him with cruel and unusual punishment of the same man, such punishment consisting of the identical acts proved in the extradition proceedings. The judgment of the Supreme Court (Waite, C.J. dissenting) was delivered by Miller, J., and, according to the head-note of the case, it was held—(1) That a treaty to which the United States is a party is a law of the land of which all courts, State and national, are to take judicial notice, and by the provisions of which they are to be governed, so far as they are capable of judicial enforcement; (2) that, on a sound construction of the Treaty, under which the defendant was delivered to this country, and under the proceedings by which this was done, and Acts of Congress on that subject, he cannot lawfully be tried for any other offence than murder; (3) the Treaty, the Acts of Congress, and the proceedings by which he was extradited, clothe him with the right to exemption from trial for any other offence until he has had an opportunity to return to the country from which he was taken for the purpose alone of trial for the offence specified in the demand for his surrender. The national honour also requires that good faith shall be kept with the country which surrendered him; (4) the circumstance that the party was convicted of inflicting cruel and unusual punishment on the same evidence which was produced before the committing magistrate in England, in the extradition proceedings for murder, does not change the principle. [Lord Coleridge, C.J.—I take it that the Supreme Court is a Court of Appeal, at all events, as a rule, only from its own courts, that is, from the Federal Courts, because in each State the State courts have an appeal court, and that is supreme in all State matters.] Cases can be taken to the Supreme Court if the question is international. [Lord Coleridge, C.J.—Yes, because that is Federal; but I mean, take a case between A. and B. in the State of New York, raising no Federal question, that case goes to the Court of the State of New York, and their decision is final, and there is no appeal from that to the Court at Washington; an ordinary criminal case could not go to the Court at Washington.] If it is against a Congress statute, I think it can go to the Supreme Court. [Lord Coleridge, C.J.—That may be, because that again is a Federal matter, as again all Admiralty questions—which in America include all lakes and rivers—go to the Supreme Court. As far as I understand, there are whole classes of cases in which the jurisdictions of the States are ousted, and the jurisdiction of the Federal body alone arises; there are the State Courts and the Federal Courts, the Federal Courts dealing with all Federal questions, and the State Courts dealing with State questions, and whenever any question arises between State and State, or where there is a conflict of jurisdiction, those are matters tried by the Federal judges, and the appeal is to the Supreme Court. Field, J.—In *Rauscher's* case, the offence was committed on the high seas, and of course I quite understand why that case should go to the Federal Courts. Here, Alice Woodall is charged with having committed a forgery within the State of New York; now suppose she had not come to England at all, what would have happened to her? The charge would have been brought before the grand jury in the ordinary way.] Yes, if she had been tried in America, the case never would have come to the Supreme Court at all, but the State Court would have been bound by the judgment of the Supreme Court in *Raucher's* case, and although her particular case would not have gone to the Supreme Court on appeal, the State Court would have been bound by the decision of the Supreme Court. If a Federal question arises, or if there be a breach of a Congress statute, the case would be tried in a Federal Court, or if tried in a State Court, the State Court would be bound by the decision of the Supreme Court applicable to

Federal Courts. As a summary of the result of the decisions bearing on the case, the Court, at p. 429 in the report of *Rauscher's* case, say: "Upon a review of these decisions of the Federal and State Courts, to which may be added the opinions of the distinguished writers which we have cited in the earlier part of this opinion, we feel authorised to state that the weight of authority and of sound principle are in favour of the proposition, that a person who has been brought within the jurisdiction of the court, by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken, under those proceedings." From this decision in *Rauscher's* case Waite, C.J. alone dissented, so that these seven judges are in favour of the view I am now supporting, and only one judge against that view. I submit, therefore, on this case, that the law applicable in any court of America is that the prisoner can only be tried for the offence for which he has been extradited, and if it were necessary to argue the matter *de novo*, I should submit the very cogent argument that the construction of the Ashburton Treaty leads to the same conclusion, and that this court ought not to adopt the suggestion that some court, at some future time, will be likely to adopt the opinion of Waite, C.J., instead of the opinion of the other seven udges. Field, J.—A subsequent Court of Appeal would be bound by this decision, without discussing the question whether it was right or wrong?] Yes. In 1876 the cases of *Lawrence* and *Winslow* arose, and were the subject of much discussion at the time. In consequence of Lawrence having been tried in the United States for offences other than those for which he was surrendered, our Government refused to surrender Winslow without a pledge that the prisoner should not be tried except for the offence for which he was extradited; the United States refused to give this pledge, and Winslow was never surrendered, but discharged. But since that time (1876) there have been various surrenders to the United States, and I am not aware that the United States have ever, since those cases, suggested the right to try for another offence; in fact, the question has not been raised on either side, but the British Government has been satisfied with the fact that, since those cases, there has been no attempt by the United States to try for another offence; and the President, in his message to the Congress in 1877, said, "Both the British and American Governments are now in accord on this question," and this shows that the diplomatic relations, which have culminated in the convention between Mr. Phelps and Lord Rosebery, are not in regard to any alteration of the law, but a more explicit explanation of what the law should be. There is one other contention I wish to argue if it becomes necessary. If my view of the American law be not correct, then we shall have to consider what the effect is of the saving clause with reference to the Ashburton Treaty. My contention is that a surrender under that Treaty is a surrender, and has always been recognised in this country as being a surrender, under which the person can only be tried for the offence for which he has been extradited, and it would be inconsistent with the provisions and language of the Ashburton Treaty to hold any other view, and I contend that the Treaty only recognises the state of the law I have been contending for; but if it were otherwise the Ashburton Treaty would be saved by sect. 27 of the Act of 1870, and this Treaty is still in existence by virtue of that section. The view taken by the late Cockburn, C.J., in the case of *Ex parte Bouvier* (27 L. T. Rep. N. S. 844; 42 L. J. 17, Q.B), was that whatever the Ashburton Treaty provided was saved by sect. 27, as I have already contended.

Sir *E. Clarke*, Q.C. (S.-G.) followed on the same side.—With regard to the question which has arisen as to the way this case would be binding upon the State Courts of the United States, I would refer to the case of *Kerr* v. *Illinois* (12 Davis' Sup. Rep. Ct., 436). That case was a case of error to the Supreme Court of the State of Illinois, and there a person being put upon his trial, and indicted in a State Court, pleaded that he had been brought from a foreign country to the United States, by proceedings which were a violation of the treaty between that country and the United States, and the court held that that raised the question that, if the right was asserted by the plaintiff, and pleaded, it was a matter in which the Supreme Court could review, by writ of error, the judgment of the State Court. In the judgment in that case, the ground taken by the court was that, if there is in fact a question of the construction of the treaty, which is part of the law of the United States as a treaty, then the Supreme Court can review upon a writ of error any judgment of a State Court, in which a construction has been given to that treaty, as it belongs to the Supreme Court to decide finally upon the law of the United States. The court held, however, in that case, that the person had not been surrendered under the treaty, and therefore no construction of the treaty arose; but they also held that if the question which was to be argued was a question of the interpretation of a treaty, then a writ of error would lie from a judgment of the State Court. The decision in *Rauscher's* case is there adopted, for in the judgment of the court it is said, at p. 443: "In the case of the *United States* v. *Rauscher* (*ubi sup.*), just decided, the effect of extradition proceedings under a treaty was very fully considered, and it was there held that, when a party was duly surrendered by proper proceedings, under the Treaty of 1842, with Great Britain, he came to this country clothed with the protection which the nature of such proceedings and the true construction of the Treaty gave him. One of the rights with which he was thus clothed was that he should be tried for no other offence than the one for which he was delivered under the extradition proceedings." Although the case of Rauscher is conclusive of the matter, I wish to refer to the case of the *United States* v. *Lawrence* (13 Blatchford Civ. Rep. 295), decided in 1876. Lawrence was arrested in Ireland on a charge of forgery committed in the United States, and was surrendered and tried in the United States. Directions were given by the Government of the United States that he should not be tried for any other offence than that for which he was surren-

dered. On his trial he pleaded that the offences for which he was tried were not those for which he was extradited. There was a replication, and it was admitted that the President gave the order relied on by the prisoner; but in the end the judgment was that a legal immunity from prosecution was not established, and that the order of the President had no effect in restricting the jurisdiction of the court; but Lawrence was never brought to judgment for any other offence than the one for which he was extradited. Soon after *Lawrence's* case Winslow, who was charged with forgery in the United States, had taken refuge in England, and on demand being made for his surrender, a pledge was required by this country that the prisoner should not be tried for any other offence than the forgery for which he was demanded. Mr. Fish, the United States Secretary, did not accede to this demand, and he was informed that the reason of the demand was that Lawrence, extradited under the same treaty, had been prosecuted in the courts of the United States for a different offence than the one for which his surrender was granted, and after a correspondence, as the United States refused to give the required pledge, the British Government refused to surrender Winslow, and he was discharged on *habeas corpus*. Whatever may be the effect of *Lawrence's* case, there is the decision of the Supreme Court in *Rauscher's* case, binding in all courts of the United States, enforceable by writ of error in any of the States, and binding upon the Executive. I may mention that when Lawrence was about to be surrendered, in 1876, Lord Derby asked for an engagement on the part of the United States that the accused should not be tried for any other offence than the one for which he was surrendered, upon the ground that there was an implied contract in the Treaty itself to that effect. The representative of the United States maintained the contrary view, but the Government of this country, having regard to the opinion expressed by Cockburn, C.J., in *Bowler's* case (*ubi sup.*), expressed their opinion that the Treaty was still in force, and accordingly they surrendered the prisoner without requiring any engagement with the American Government. Since that time negotiations for a treaty have been going on, and a convention was signed in June 1886 by Mr. Phelps and Lord Rosebery, representing the two Governments, but that convention has not yet been ratified.

Finlay, Q.C. (*Besley* and *David* with him) in support of the rule.—Two points have been taken, namely, that by the law of the United States, and of the State of New York, Alice Woodall cannot be tried for any other crime than that for which the extradition has been granted; and secondly, that the effect of the 27th section of the Act of 1870 is to continue in force the Ashburton Treaty, altogether free from the conditions imposed by the 3rd section of the Act of 1870—in short, that those conditions are, upon the view of American law contended for by the prisoner, inconsistent with the Ashburton Treaty, and, therefore, must be considered as abrogated by the terms of the 27th section. The result of the negotiations in 1876 was that the British Government maintained in the strongest terms that there was no power in the United States to try an extradited prisoner, except for the offence for which the extradition was granted, while the United States maintained, in equally strong terms, that there was such a power, and that the effect of holding otherwise would be to introduce a new condition into the Ashburton Treaty. [Lord Coleridge, C.J.—Has there been any such contention since *Rauscher's* case?] I am not aware that the point has arisen. [Lord Coleridge, C.J.—Could it arise? As at present advised I doubt if it could; the Supreme Court declares the law of the United States in a way that binds the Government.] I do not contest the point that error would lie in a matter of this kind to the Supreme Court, from a State court, as well as from a Federal Court, because it involves the construction of the Treaty, and anyone who was contending for a right under the treaty, and against whom the decision of the State Court was given, would have a right to bring a writ of error to the Supreme Court, but I submit that the decision of the Supreme Court in *Rauscher's* case may, on a future occasion, not be followed by that court itself. [Lord Coleridge, C.J.—Where is the authority for that?] In Kent's Commentaries, and I am referring to the legal tender cases, which I have here. My point is that the Supreme Court of the United States might on a future occasion, as they did in the legal tender cases, take a different view from that which they took in *Rauscher's* case. [Lord Coleridge, C.J.—I should have thought that very questionable, but even if it were so, as long as the judgment stands it is law; it is like a judgment of the House of Lords in this country, and is final.] I do not contest that this judgment is binding upon the State Courts in America. [Lord Coleridge, C.J.—Then in my opinion that ends the matter; when the law is declared by any competent court it is the law of the land.] Yes, as between the parties. [Lord Coleridge, C.J.—A Supreme Court is more than that—its decision is final because there is no appeal to anybody. I believe I was the only foreigner who had the privilege of sitting in the same chair as the judges of that court, and the case I heard was whether the State of Louisiana could make over a piece of land to a railway company, and the court unanimously held that it could not, and decided that the Parliament of a Sovereign State had gone beyond the power of that State, and the Supreme Court, without appeal, reversed and overruled an Act of Parliament of Louisiana.] I do not contest that, and it does not rest even there, because an Act of Congress, if beyond the power of the Constitution, would be held by the Supreme Court to be *ultra vires*. What I submit is this: that Alice Woodall, if surrendered, may be tried for another offence; she may be acquitted of forgery, and tried for another offence, and she may plead that she has been brought over under an extradition warrant on a charge of forgery alone, and the matter might then go to the Supreme Court, and that court might decide the other way, as it did in the legal tender cases, declining to follow the previous decision. The decision in *Rauscher's* case imports into the Ashburton Treaty a term which it does not contain.

Lord Coleridge, C.J.—I am of opinion that this rule must be discharged. A person has been taken up, and is proposed to be dealt with, under the provisions of 33 & 34 Vict. c. 52, intituled: "An Act for amending the law of extradition of

criminals;" and the short point for our determination in this: whether, under the circumstances, and upon the state of facts admitted between the parties, sub-sect. 2 of sect. 3 of that Act has been complied with. If it has been complied with, it is plain that this prisoner should be given up, and therefore the rule should be discharged. As I say, if the provision of sub-sect. 2 of sect. 3 has been complied with, it is clear that the prisoner should be given up by the Government of this country to the Government of the United States; but if sub-sect. 2 of sect. 3 has not been complied with, then it is equally clear that there should be a rule absolute, and that the Government of this country ought not to give up the fugitive to the Government of the United States. What is that provision? "A fugitive criminal," which is this case, "shall not be surrendered to a foreign State, unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign State for any offence committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded." The question here is, whether provision has been made by the law of the United States to carry that stipulation of the Act into effect. I am of opinion that, according to the clearest principles of law, provision has been made by the law of the United States. I do not go into the question of arrangement, because that may come hereafter, although it has not come at present. The matter now stands upon the Ashburton Treaty of 1842, and the provision of the Treaty of 1842 that refers to this matter is: "It is agreed that Her Britannic Majesty and the United States shall, upon mutual requisitions by them, or the Ministers, officers, or authorities respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers, committed within the jurisdiction of either, shall seek an asylum or shall be found within the territories of the other." Provided that the evidence shall be such—as it was, no doubt, in this case—as, if true, would convict the party accused of the offence, according to the law of the country where he is arrested. An argument not only might be, but in the opinion of a most eminent and learned judge was, properly raised upon those words to the effect that the Ashburton Treaty did not contain within it the provision which is made a condition precedent by the Act 33 & 34 Vict. c. 52. That might be contended, and was contended at length, and with ability; but the Supreme Court of the United States, having that very point before them, held the contrary. They held that, upon grounds stated in the judgment of that court, by necessary implication of law, the provision upon which reliance was based was to be read in the words of the Ashburton Treaty, and the Ashburton Treaty was to be construed, for reasons given by them (with the validity of which I am entirely satisfied, but which I do not think it necessary to repeat at length), as if that provision were incorporated into the 10th article of the Treaty. If that is so, provision is made by the law of the State to the effect that a fugitive criminal shall be tried only in respect of those offences for which he is surrendered. That being the case, the argument seems to me to be at an end, because it is admitted by Mr. Finlay, without going into questions of constitution between State and State, that the judgment of the Supreme Court is binding, not only upon all the Federal Courts, but upon all the State Courts within the ambit of the territories of the United States, and therefore, that, if Alice Woodall was put upon her trial before any State Court, or before any Federal Court within the ambit of the several Sovereign states which comprise the Union, she would be so put upon her trial contrary to the law of the United States, and if she was so, that would be a matter for diplomatic interference, and not a matter which this court could for a moment contemplate. This court must assume, and does assume, that the courts of the United States will be governed by the law declared by the supreme authority of that country. The supreme authority of that country has declared it, and, it seems to me, there is an end of the case. I should only like, as a matter of individual opinion—and my learned brethren will pardon me for indulging in it—to say with what respect I should treat any dissentient opinion of the late Chief Justice—a man whom I would venture to call my own honoured friend, and who, as far as I know, was universally respected throughout that great country.

FIELD, J.—I am entirely of the same opinion, and desire to add nothing to the grounds upon which my Lord has based his judgment. I would merely add this, that, if my attention had been drawn to *Rauscher's* case, I should certainly have entertained very great doubt before granting the rule.

WILLS, J.—I am entirely of the same opinion,

Rule discharged.

Solicitor for the Crown, *The Solicitor to the Treasury.*

Solicitors for the prisoner, *Rooks* and *Co.*, for *Hawkes, Weekes,* and *Howlett,* Birmingham.

Friday, May 18, 1888.

(Before FIELD and WILLS, JJ.)

BOALER *v.* THE QUEEN. (*a*)

Indictment—Libel—Indictment for publishing a libel knowing it to be false—Conviction for publishing the libel simply—Whether such is error on the record—Lord Campbell's Act (6 & 7 *Vict. c.* 96), *ss.* 4, 5—*Non-compliance with the provisions of the Vexatious Indictments Act* (22 & 23 *Vict. c.* 17, *s.* 1) *as to entering into recognisances—Whether such non-compliance can be raised on writ of error.*

On an indictment for publishing a defamatory libel knowing the same to be false, the defendant may be convicted of publishing a defamatory libel simply.

After conviction, the defendant cannot raise, on a writ of error, the objection that the provisions of the Vexatious Indictments Act, as to entering into recognisances, had not been complied with. It is then too late to take the objection.

WRIT of error upon the record of a judgment

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

given in the Central Criminal Court on an indictment for libel.

In the year 1884, a summons was granted by a police magistrate against a Mr. Boaler, for publishing a defamatory libel, knowing the same to be false. While the case was before the magistrate, the statement was made that the charge of publishing the libel, knowing the same to be false was abandoned, and before committal the charge was limited to one of publishing the libel simply. Boaler was then committed on the charge of publishing the libel simply.

An indictment, however, was preferred against him at the Central Criminal Court for publishing a defamatory libel, knowing the same to be false. Upon the case coming on for trial in Jan. 1885, no evidence was offered that Boaler knew the libel was false, and that part of the charge was abandoned. Proof of publication only was given, and the whole evidence on the part of the prosecution was the putting in of the libel, and a statement made by the defendant at the police-court. The defendant pleaded not guilty, and also a plea of justification which was found against him. He was found guilty of publishing a defamatory libel simply, the jury negativing the graver charge of publishing the libel knowing it to be false. The defendant moved the court in arrest of judgment and for a new trial, but his motion was refused, and he was sentenced to two months' imprisonment, which he underwent.

The question now was, whether the record did not show error on the face of it, as showing that the defendant was indicted for one offence, but convicted of a different offence; and also whether there was not error on the face of the record by reason of the provisions of the Vexatious Indictments Act (as to entering into recognisances) not having been complied with.

The assignments of error were: First, that the provisions of the Vexatious Indictments Act (22 & 23 Vict. c. 17, s. 1) were not complied with, inasmuch as neither the prosecution nor any of the persons presenting the indictment were bound by recognisance to prosecute or give evidence, nor was the defendant committed or detained in custody or bound over by recognisances to appear to answer to the indictment, nor was the indictment preferred or found with the consent or by the direction in writing of a judge of a superior court of law, or of the Attorney-General or Solicitor-General, nor were the provisions of the said statute in any way complied with. Secondly, that the indictment did not contain an averment that the defendant intended to provoke the prosecutor or prosecutors to commit a breach of the peace, and it was not proved at the trial that the defendant had published or sent the libel to any other person than Thomas Waram, the prosecutor. Thirdly, that by the record it appears that the verdict of the jury is not a conviction of the defendant of the offence charged in the indictment, and that the judgment appears to have been given against the defendant, whereas the judgment ought to have been given for the defendant.

The defendant in person.—Since the passing of Lord Campbell's Act there are two separate sets of offences, namely, publishing a libel knowing it to be false, and simply publishing the libel. [FIELD, J.—At common law libel is a misdemeanour, and at common law a sentence of two months' imprisonment might have been given. A case has been handed up to me somewhat similar to the present case—the case of *Reg.* v. *Hodgkiss* (21 L. T. Rep. N. S. 564; L. Rep. 1 C. C. 212; and in *Knowlden* v. *The Queen* (10 L. T. Rep. N. S. 691; 5 B. & S. 532; 9 Cox C. C. 483) it was held that this was not a matter of error.] On the first part of the case, the cases of *Reg.* v. *Bradlaugh* (38 L. T. Rep. N. S. 118; 3 Q. B. Div. 607) and *Reg.* v. *Fuidge* (9 L. T. Rep. N. S. 777; 33 L. J. 74, M. C.) are in point. On this part of the case, dealing with the non-compliance with the provisions of the Vexatious Indictment Acts, the court had no jurisdiction to try me, as those provisions were not complied with. My two points are: that by reason of the absence of a recognisance to prosecute for the offence charged, the proceedings are altogether void; and, secondly, that the indictment charges one offence and the conviction was for another offence.

Gill for the Crown.—I submit the only ground the defendant can rely on is error manifest on the record; he cannot rely on anything which may be wrong, which does not appear on the record. With regard to the first point, the case of *Knowlden* v. *The Queen* (*ubi sup.*) decides that it is not necessary that the performance of such conditions should be averred on the face of the indictment, and, therefore, it is not necessary that they should appear on the face of the record. In Archbold (20th edit.) p. 213, it is said that a writ of error lies for every substantial defect, appearing on the face of the record, for which the indictment might have been quashed, or which would have been fatal on demurrer, or in arrest of judgment, provided such defect is not cured by verdict. The conviction for publishing the libel is right. [FIELD, J.—There is such a thing as error in fact. It really comes to this: that the defendant has been convicted of one offence while indicted for another.] Libel remains the same as before the Act 6 & 7 Vict c. 96. It is an offence at common law. [FIELD, J.—What was the punishment at common law for a libel, or what was the meaning of those two sections of the Act?] The punishment at common law was unlimited imprisonment or fine without hard labour. Then came Lord Campbell's Act, sect. 4 of which created a new offence, namely, publishing a libel knowing it to be false; and then sect. 5 makes it an offence to publish the libel simply. [FIELD, J. referred to *Martin* v. *Pridgeon* (1 E. & E. 778; 28 L. J. 179, M. C.), where A. was summoned on a charge of being drunk and disorderly, and guilty of riotous behaviour, an offence punishable under the Towns Police Clauses Act. The justices convicted him of drunkenness under 21 Jac. 1, c. 7, and it was held that the conviction was bad, and that it was not a variance within 11 & 12 Vict. c. 43, s. 1. Before Lord Campbell's Act knowledge that the libel was false was immaterial. Then came the statute which said, if you knew the libel to be false, you shall have two years' imprisonment; if you did not know it, then one year's imprisonment. This surely creates two offences; the words left out are so material that it makes a difference of twelve months' imprisonment.] "It is not necessary to prove the offence charged in the indictment to the whole extent laid, provided the facts proved

constitute an offence punishable by law, and for which the defendant may by law be convicted on that indictment:" (Archbold, 20th edit. 240):

Rex v. *Holingberry*, 4 B. & C. 329; 6 D. & R. 345.

In *Reg.* v. *Taylor* (20 L. T. Rep. N. S. 402; L. Rep. 1 C. C. 194), where an indictment charged the prisoner, in the first count, with "unlawfully and maliciously wounding," and, in the second count, with "unlawfully and maliciously inflicting grievous bodily harm," and the jury found the prisoner guilty of an assault, it was held that the prisoner could be properly convicted of an assault on the indictment, as the offences charged were misdemeanours, and each of them necessarily included the lesser misdemeanour of an assault. Here both offences were misdemeanours, and therefore the prisoner could be properly convicted of the lesser offence, which was necessarily included in the other, just as on an indictment for murder the prisoner could be properly convicted of manslaughter, as both are felonies. So in *Reg.* v. *Guthrie* (22 L. T. Rep. N. S. 485; L. Rep. 1 C. C. 241), where the prisoner was indicted for assaulting and then unlawfully and carnally knowing and abusing a certain girl under the age of twelve years, and the offence of carnally knowing the girl being disproved, the jury found the prisoner guilty of a common assault, it was held that the prisoner might be properly convicted of a common assault, on the ground that the indictment charged two distinct misdemeanours, namely, of assaulting and also of carnally knowing the girl, and that the prisoner might be found guilty of either of them. In giving the judgment of the court in *Reg.* v. *Taylor* (*ubi sup.*), Kelly, C.B. said: "It is not necessary that matters of aggravation stated in the indictment should be proved, and, if not proved, the prisoner may be found guilty of the offence without the circumstances of aggravation." Here the offence is really publishing the libel, and knowing it to be false is only matter of aggravation, and, that being so, the prisoner, being indicted for the offence of publishing the libel knowing it to be false, may properly be convicted of the same offence without the matter of aggravation, namely, publishing the libel simply. [FIELD, J.—The decision of the Chief Justice in *Reg.* v. *Guthrie* (*ubi sup.*) is in your favour; the element of knowing the libel to be false is a creature of statute. On these cases I think we must hold that the conviction was good.] [He was stopped.]

The defendant replied.

FIELD, J.—I have come to the conclusion, both on the authorities cited by Mr. Gill and on principle, that our judgment must be for the Crown. The facts are these: The defendant was charged before a magistrate with publishing a defamatory libel knowing it to be false, but it was stated by the prosecution that they did not intend going on with that part of the case, which alleged that the defendant knew the libel was false. Ultimately the magistrate committed the defendant for what I may call the common law misdemeanour of publishing a libel, but the indictment contained the allegation that the defendant published the libel knowing the same to be false. The learned master of the Crown Office tells me that, before Lord Campbell's Act, that was the usual form in an indictment for libel at common law, and, acting upon that, no objection has been made until now, as to the form of the indictment. It is quite clear that, before Lord Campbell's Act, the knowledge of the untruth was immaterial in point of law, though, of course, it might be important as to the question of punishment, as it is an aggravation of the libel to publish it knowing it to be false. It was clearly not competent to a person charged with publishing a libel to seek to defend himself by saying that he did not know that it was false. This was amended by Lord Campbell's Act giving a person charged with libel power to allege that the libel was true, and that it was for the public benefit that it should be published. I have always thought that it was a salutary provision that the libel should be published only for the public interest. It seems to me that if it be made the law that it ceases to be necessary to aver that the publication of the libel was for the public interest, a great inroad would be made on the rights of the public. That, however, is for the Legislature. There are three sections of the Act important. The 3rd section deals with publishing, or threatening to publish, a libel with intent to extort money; the 4th section deals with publishing a defamatory libel, knowing the same to be false; and the 5th section deals with publishing a defamatory libel simply. Dealing with the two latter, in the 5th section the punishment is different. In the 4th section the punishment cannot exceed two years' imprisonment, whereas in the 5th section the punishment cannot exceed one year's imprisonment. At the trial counsel for the prosecution stated that he did not intend to offer any evidence that the defendant knew the untruth of the libel, and thereupon the case went to the jury, and the question substantially left to the jury was whether or not that libel was true. The jury found that the defendant had published the libel, but that he did not know it to be false, and, on that finding, judgment was entered for the Crown, and the defendant was called up and sentenced to two months' imprisonment, a term of imprisonment within both sections. If it had exceeded twelve months the case might have been different; but the punishment inflicted was within the statutory powers, and also within the common law jurisdiction. On that state of things this writ of error is brought. The writ of error set out what I have in effect stated. One of the assignments of error is that the provisions of the Vexatious Indictments Act have not been complied with. On this point we have been referred to the case of *Knowlden* v. *The Queen* (*ubi sup.*), which is an authority that error will not lie on such assignment. No doubt the Legislature intended that these conditions should be performed before trial, but it is quite clear, on the case of *Knowlden* v. *The Queen* (*ubi sup.*), that the performance of these conditions need not be averred on the face of the indictment, and the absence of such averment is not a subject of error. With regard to the second assignment of error, that the indictment did not contain an averment that the defendant intended to provoke the prosecutor to commit a breach of the peace, and that it was not proved at the trial that the defendant had sent the libel to any other person than the prosecutor, this seems to me to fail also, as it does not follow that because the libel was sent to the prosecutor it was sent to no

other person. Therefore, under these circumstances, we cannot say that there was error in that respect. The third assignment of error is that, by the record, it appears that the verdict of the jury is not a conviction of the defendant of the offence charged in the indictment. We have got to consider what is the offence charged in the indictment. It is a common law misdemeanour to publish a defamatory libel, and I am not aware, and there is no declaration in Lord Campbell's Act, that that does not continue an offence at common law. It is an offence at common law to publish a defamatory libel whether the person knew it to be false or not. The jury in this case have certainly negatived the allegation that the defendant knew the libel was false, and if that averment were essential, then the defendant would be right in his contention. I do not think it is. Under those circumstances, the real charge is the common law misdemeanour or the statutory misdemeanour, and it is competent to the jury to acquit on that part of the charge which is statutory, and to convict on that which is not. The cases cited by Mr. Gill for the prosecution show this. The first case is *Rex* v. *Hollingberry* (*ubi sup.*), where the defendants were indicted for conspiring falsely to indict one A. B. for keeping a gaming-house, for the purpose of extorting money from A. B. The jury found the defendants guilty of conspiring to indict A. B. for the purpose of extorting money, but not to indict him falsely, and there it was laid down that "in criminal cases it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law. This was an indictment for conspiring falsely to indict a person for the purpose of extorting money. The jury found the defendants guilty of conspiring to prefer an indictment for the purpose of extorting money whether the charge be or be not false." This is a conclusive authority for the proposition Mr. Gill contended for, as, applying it to this case, the jury found the defendant guilty of the misdemeanour of publishing a defamatory libel, whether he knew it was false or not. *Reg.* v. *Hodgkiss* (*ubi sup.*) is a case very like the last. A. was indicted for perjury in an affidavit made under the Bills of Sale Act for the purpose of getting a bill of sale filed, and was found guilty, and there it was held that, although the making of such false affidavit was not strictly perjury, and the prisoner could not be liable to punishment as for perjury, yet the taking of a false oath where an affidavit is required for the purposes of a statute is a misdemeanour at common law, and renders the guilty party liable to punishment as for a common law misdemeanour, and that the words in an indictment for perjury, "that the said A. B. did wilfully and corruptly commit wilful and corrupt perjury," may be rejected as surplusage, and if this is done the indictment sufficiently states a misdemeanour in taking a false oath, and Martin, B., in giving judgment, distinguished the case from *Rex* v. *Foster* (Russ. & Ry. 459), where the prisoner was convicted on an indictment for perjury, and the prisoner had in fact only taken a false oath, and the judges held that no punishment could be inflicted, the reason being because the indictment did not state facts sufficient to constitute the offence of taking a false oath. There are two other cases to the same effect, and decided on the same principle: *Reg.* v. *Taylor* (*ubi sup.*), where the prisoner was indicted for a misdemeanour upon an indictment, the first count of which was for "unlawfully and maliciously wounding," and the second count was for "unlawfully and maliciously inflicting grievous bodily harm," and the jury convicted him of an assault, and it was held that the prisoner could be properly convicted of a common assault on the indictment, as the offences charged were misdemeanours, and each of them included the lesser misdemeanour of an assault. Again, the case of *Reg.* v. *Guthrie* (*ubi sup.*), where the prisoner was indicted for unlawfully assaulting and then unlawfully and carnally knowing a certain girl under the age of twelve years, and the offence of carnally knowing the girl was disproved, and the jury found the prisoner guilty of a common assault, and it was held that he might be properly convicted of an assault, and Bovill, C.J. there said: "The indictment charges that the prisoner did 'unlawfully and carnally know and abuse' the girl, against the form of the statute, and it also charged an offence at common law, namely, an assault;" and the conviction was affirmed. I was in doubt for some time in consequence of the fact that, on an indictment for robbery, the defendant cannot be convicted of a common assault, but the correct answer has been given by Mr. Gill, and he has satisfied me that the reason of that is, that the one offence is a felony, and the other a misdemeanour. In the present case, the offence for which the defendant was indicted, and the one of which he was found guilty, are of the same kind, namely, both misdemeanours.

WILLS, J.—I am of the same opinion, and upon the same grounds. I only wish to state very shortly that upon principle it is impossible to distinguish this case from the case of a conviction for a common assault on an indictment for an assault causing bodily harm, under statutes which would render the offender liable to greater punishment than the punishment for a common assault. It seems to me that the two cases are identical. The only other ground of error that impressed me was that, in consequence of the hints thrown out in *Knowlden* v. *The Queen* (*ubi sup.*), there was no jurisdiction in the grand jury to entertain this bill, inasmuch as the provisions of the Vexatious Indictments Act had not been complied with. I think the proper answer to that is that it is now too late to take that objection. The proper remedy was to apply at the time of the trial to quash the indictment, and it seems to me that it is now too late to say that these things make the record bad for non-compliance with the provisions of that statute. I think, therefore, that that ground fails. As to the other highly technical objection, there is no ground for it at all. This case was formerly before my brother Day and myself, when we thought the defendant was put upon his trial for something more than he was convicted for. My present view is, that this conviction is a good conviction for the offence for which the defendant was convicted.

Judgment for the Crown.

Solicitors for the prosecution, *Wontner* and *Son.*

June 4 and 5, 1888.

(Before WILLS and GRANTHAM, JJ.)

STOTESBURY (app.) *v.* THE VESTRY OF ST. GILES (resps.). (*a*)

Metropolis Management Amendment Act 1862 (25 & 26 *Vict. c.* 102), *s.* 77—*Paving new street—Expenses—Apportionment—Power of vestry to apportion expenses at a different rate to different plots of land.*

By the 77th section of the Metropolis Management Amendment Act 1862 (25 & 26 *Vict. c.* 102) *it is provided that where any vestry or district board shall under the powers given by the* 105*th section of the Metropolis Management Act* 1855 (18 & 19 *Vict.* 120) *have paved, or be about to pave, any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses, or estimated expenses, of paving the same, as well as the owners of houses therein; provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do; and any such cost or expenses shall be apportioned by the vestry or board, and shall be recoverable, &c. A vestry having resolved to pave a new street under the powers of the above Acts, estimated the cost and apportioned it on the owners of land and houses abutting thereon. An owner of houses and land was required to pay at the same rate in respect of both, viz., at* 14*s.* 9½*d. per foot of frontage, while the apportionment upon other land abutting on the street owned by the Grand Surrey Canal Company was at a lower rate than on his land, viz., at* 2*s. per foot. He having refused to pay, on the ground that the vestry could not lawfully charge one owner of land at a lower rate than another, and that the apportionment was invalid:*

Held, on case stated, that the words "any such costs or expenses . . . shall be apportioned by the vestry" govern the whole section; that the earlier words "that it shall be lawful for the vestry to charge the owners of land in a less proportion than the owners of house property" do not mean that that is the only case in which equality is to be violated; and that, as no principle of apportionment is prescribed, the vestry are not bound to follow any principle, and their apportionment cannot, in the absence of arbitrary caprice or mala fides, be questioned upon that ground.

THIS was a case stated by Robert Henry Bullock Marsham, Esq., one of the police magistrates within the metropolitan police district, pursuant to the Act 42 & 43 Vict. c. 49.

CASE.

1. The appellant is the owner of land and houses situate in and abutting on a new street, known as Canterbury-road, which is within the district over which the respondents have authority and control.

2. The respondents having resolved to pave the said street in accordance with the powers vested in them by the Acts 18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102, estimated the cost of such work and apportioned the same upon the owners of land and houses abutting on the said new street. Notice was given to the appellant requiring him to pay the sum of 548*l.* 3*s.* 8*d.*

3. The appellant having refused to pay the said sum, was by summons required to appear before me and to answer the complaint made by the respondents in the matter aforesaid, and on the 2nd Feb. 1888 the said summons was heard before me, when the following facts were proved:

4. The sum of 548*l.* 3*s.* 8*d.* which was apportioned on the appellant was in respect of both houses and land, viz., 269*l.* 8*s.* in respect of land, and 278*l.* 15*s.* 8*d.* in respect of houses, being at the same rate in case of both houses and land, viz., 14*s.* 9½*d.* per foot, according to the frontage.

The apportionment upon other land abutting on the said new street, of which the owners are the Grand Surrey Canal Company, was at a lower rate than that on the appellant's land, viz., at the rate of 2*s.* per foot, according to the frontage.

5. By the said apportionment the Grand Surrey Canal Company were charged in respect to a frontage of 45ft. 6in. It was proved that the frontage of the land owned by the said company measured 45ft. 6in. in a straight line drawn from one side to the other of the said street, and that the length of the irregular boundary of the said company's land abutting on the said street was 48ft. 9in.

From the minutes of the respondents relating to the said street, a copy of which formed part of the case, it appeared that, at a meeting of the respondents on the 21st Dec. 1887, a resolution was passed accepting a report of the general purposes committee, which stated that, having regard to the decision of a magistrate that the land of which the Grand Surrey Canal Company were the owners abutting the termination of the road should be assessed, the committee were of opinion that, inasmuch as the land would form part of the road leading to the bridge which would shortly be constructed by the Metropolitan Board of Works, and under an arrangement would be given up by the company to effect a great public improvement, it was just and expedient to assess the land in a much less amount than the other owners.

6. It was contended on behalf of the appellants that the apportionment was invalid and bad upon two grounds: (1) That the respondents in exercising the power given to them by sect. 77 of the 25 & 26 Vict. c. 102, could not lawfully charge one owner of land in a less proportion or at a lower rate than that in or at which they charged another owner of land. (2) That the apportionment should have charged all owners according to the true measurement of their lands and houses which in this case the appellants contended was not done as above mentioned.

7. It was contended on behalf of the respondents (1) That the respondents in their discretion might legally apportion a larger proportion of the expenses on the appellants' land than on the land of the said company. (2) That the frontage of the land of the said company was properly measured. (3) That the court of summary jurisdiction had no power to entertain the question whether the apportionment was made upon a right principle.

8. I was of opinion that the apportionment was valid, and that I had no jurisdiction to inquire into the principle upon which the apportionment was made, and I ordered and adjudged that the

(*a*) Reported by H. D. BONSEY, Esq., Barrister-at-Law.

appellant should pay to the respondents the said sum of 548*l.* 3*s.* 8*d.* The question for the opinion of the court was, whether the said apportionment was valid.

The Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 105, provides as follows:

In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriageway and footpath thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair, and the owners of the houses forming such street shall on demand pay to such vestry or board the amount of the estimated expenses of providing and laying such paving (such amount to be determined by the surveyor for the time being of the vestry or board), and in case such estimated expenses exceed the actual expenses of such paving, then the difference between such estimated expenses and such actual expenses shall be repaid by the said vestry or board to the owners of houses by whom the said sum of money has been paid; and in case the said estimated expenses be less than the actual expenses of such paving, then the owners of the said houses shall on demand pay to the said vestry or board such further sum of money as together with the sum already paid amounts to such actual expenses.

The Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), s. 77, provides as follows:

Where any vestry or district board shall under the powers given by the one hundred and fifth section of the firstly recited Act (18 & 19 Vict. c. 120), have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein; provided, that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do, and any such costs and expenses, including the cost of paving at the points of intersection of streets, and all other incidental costs and charges, shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced, or during its progress, or after its completion; it shall be lawful for the vestry or district board at their discretion to accept payment of the amount apportioned or charged in respect of each house or premises by instalments spread over a period not exceeding twenty years, and any such amount shall be recoverable from the present or any future owner of the premises, either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board.

Lyon (with him *Gerard Laing*) for the appellant.—According to the true construction of the 77th section of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), owners of land may be rated in a less proportion than owners of houses, but all owners of land must be rated in the same proportion on some definite principle, and it is not open to a vestry to make an arbitrary distinction between one owner of land and another. The decision in *Nesbitt* v. *The Greenwich District Board of Works* (32 L. T. Rep. N. S. 762; L. Rep. 10 Q. B. 465), that the principle on which the expenses of paving a new street have been apportioned amongst the adjoining owners by a district board cannot be questioned before any tribunal is undoubtedly correct, but it shows that the apportionment must be made on some definite principle, whereas here the surveyor has not acted upon any principle at all, but upon mere arbitrary caprice. A vestry cannot in a street of 100 houses assess 99 at 1*d.* per foot and throw all the rest of the expense on the remaining one, and the case is the same with plots of land. This principle is really involved in the decision in *Whitchurch* v. *The Fulham District Board of Works* (13 L. T. Rep. N. S. 631; 7 B. & S. 212; L. Rep. 1 Q. B. 233), where the board divided a road into four sections and apportioned the cost of repairing each section amongst the owners of property in it, and it was held that there ought to have been but one apportionment, and that the separate apportionments were invalid. "Instead," says Cockburn, C.J., "of properly apportioning, you would be apportioning in a manner that would work a very great grievance." [WILLS, J.—What do you say was the principle in *The School Board for London* v. *The Vestry of St. Mary, Islington*, 33 L. T. Rep. N. S. 504; 1 Q. B. Div. 65?] The only point decided there was, whether, as the land belonging to the school board stood back upon the street, and only communicated with it by a passage twenty feet wide, it was assessable at all, and it was held that it was. No question of the amount or the principle of the apportionment was raised.

Austin for the respondents.—[WILLS, J.—The only distinction which the statute seems to me to authorise is a distinction between land on the one side and houses on the other. Where is your authority for making a distinction between land and land?] If a principle is necessary, it is a principle to separate into two divisions land valuable for building purposes and land which is not so but which is shortly to be turned into a road. But no principle is necessary. It was the intention of the Legislature to allow the board to make the apportionment as they think right, so long as they act fairly. In *The Vestry of Chelsea* v. *Evans* (34 J. P. 404) the magistrate found that the apportionment was unfair and unreasonable, but the court refused to go behind it.

Laing, in reply, cited

The Vestry of Mile End v. *The Guardians of the Whitechapel Union*, 34 L. T. Rep. N. S. 178; 1 Q. B. Div. 680; 46 L. J. 138, M.C.

WILLS, J.—I am of opinion that our decision must be in favour of the respondents. The construction of the Acts of Parliament on which the case turns is not easy. It appears to me that the provisions of the earlier Act (the Metropolis Management Act 1855, 18 & 19 Vict. c. 120, s. 105) were all but unworkable, and if that section had remained unaffected by subsequent legislation, it would, I think, have been possible for a dissatisfied person to have given a considerable amount of trouble. No power was given to the vestry to apportion the expenses or to recover from each individual his proportion of them, the only provision being that the whole amount of the expenses should be recoverable from the whole body of adjoining owners. But the matter was not left in this way, the 77th section of the Act of 1862 being passed to get rid of the difficulty. That section again is not very happily drawn. On consideration, however, it seems to me that one part of the section governs the whole and gets rid of the difficulty. I allude to the words "and any such costs and expenses, includ-

ing the cost of paving at the points of intersection of streets, and all other incidental costs and charges shall be apportioned by the vestry or district board, and shall be recoverable either before the work shall be commenced, or during its progress, or after its completion." What is the meaning of those words? To my mind they obviously mean that the vestry shall split up the whole of the costs and expenses into a number of separate amounts among all the owners of houses and owners of land on whom the liability to contribute is imposed by the earlier part of the section. It is quite true that the Act of Parliament contains no principle of apportionment, and says nothing as to how the apportionment is to be effected; but supposing that a number of persons interested in a common object, and never likely to agree as to the share each one ought to take in it, agreed that a third person should apportion their respective shares among them, that third person would not be bound to follow any principle, or do anything but attempt to do justice between the parties. Of course, he must not act arbitrarily or capriciously, but if he honestly endeavours to do what is right and just, there could be no ground for disputing his decision. Why, then, should not the Act of Parliament say that the vestry shall have power to do this? In my opinion it has done so, and that is the governing element of the enactment. There are, indeed, some cases which say that the principle on which the vestry have acted cannot be inquired into. But those cases do not, in my opinion, mean that a definite principle is necessary. It simply happened that in those cases a principle of some kind had been followed, and the language of the court adapted itself to the circumstances of the cases. I am of opinion that neither the principle nor the absence of principle can be inquired into; or, perhaps, in order that I may not be misunderstood, I should say the absence of uniform mode, since I think it is clear that the vestry have acted upon a principle, namely, the desire to make the apportionment as fair and just as possible between all the parties. The case of *The Vestry of Chelsea* v. *Evans* (34 J. P. 404) is very strong. There the magistrate found that the estimate of the surveyor was excessive, and that the apportionment thereof under the circumstances was unfair and unreasonable, but notwithstanding this the court, consisting of Cockburn, C.J. and Lush, J., seem to have adopted the argument of the vestry that all the magistrate had jurisdiction to do was to enforce payment of the sum apportioned without inquiring how it was apportioned, and held that the magistrate was bound to make the order. We cannot go behind the judgment in that case. I had some difficulty in comprehending it until I saw that the provision with respect to apportionment must be the dominant element in the enactment. The earlier words of the section, which provide that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, at first look as if that were the only case and the whole extent to which equality could be violated; but it seems to me that they are merely thrown in as a corollary, and to explain that land may be treated generally as entitling its owner to a less liberal proportion of the expenses than house property. The same thing might have been done if the words had not been inserted, and their presence is an inadequate ground for giving other than their plain meaning to the other words of the section.

GRANTHAM, J.—I am of the same opinion. The language of the section is open to controversy, because of the possibility of unfairness on the part of those to whom the section gives authority to make the apportionment. But the Legislature always acts, I think it will be found, on the principle that those in authority will act with perfect honesty and fairness. This is, in my opinion, the principle of both the Acts we are considering. Extensive power is given on the understanding that those to whom it is given will act honestly. Nothing shows the extent of the power given better than the case of *The School Board for London* v. *The Vestry of St. Mary, Islington* (33 L. T. Rep. N. S. 504; 1 Q. B. Div. 65). In that case the power of apportionment was used in a way which might have been most unfair. The School Board had a frontage of twenty feet, and yet the amount apportioned to it was thirty times as much as to the owner of eleven houses adjoining which must at least have had a frontage of over a hundred feet. It may or may not have been a fair apportionment, but the School Board were assessed upon the whole of a large area which lay back from the street, and it was held that they must pay it. I think the authorities show that we cannot inquire into the apportionment. In *Nesbitt* v. *The Greenwich Local Board* (32 L. T. Rep. N. S. 762; L. Rep. 10 Q. B. 465) Cockburn, C.J. says shortly: "Without expressing any opinion whether the principle is right or wrong upon which the board have proceeded, I think the magistrate had no jurisdiction to inquire into the principle on which the apportionment is made. The Legislature intended to leave the apportionment in the discretion of the board, and their discretion is absolute." I see no reason to doubt that the vestry have in this case acted fairly, and have followed a principle. Why should they not say that they think one piece of land is worth six times as much as another? We have no power to go behind the apportionment, and the appeal must therefore be dismissed.

Leave to appeal was refused.

Solicitor for the appellant, *J. F. Holmes Moss.*

Solicitors for the respondents, *Marsden* and *Son.*

June 11 *and* 12, 1888.

(Before MANISTY and STEPHEN, JJ.)

BOND (app.) *v.* EVANS (resp.). (*a*)

Licensing Act 1872—*Suffering gaming on licensed premises—Servant in charge permitting gaming—Ignorance on the part of innkeeper—Liability*—35 *&* 36 *Vict. c.* 94, *s.* 17.

The appellant was charged under 35 *&* 36 *Vict. c.* 94, *s.* 17, *as a licensed person for allowing gaming to be carried on on his premises, which was an ordinary inn and alehouse, to which was attached a skittle-alley communicating with the rest of the premises. The appellant employed a servant to manage the skittle-alley and attend upon the persons frequenting it, and had given him general directions not to permit gambling in*

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

the skittle-alley. On one occasion two constables went to the appellant's skittle-alley and found inside some men playing cards for money; and at this time the servant was in charge of the skittle-alley, and knew that the men were playing cards. It was admitted that the appellant was not present, and had had no actual knowledge of the card playing, and that his servant had never communicated with him on the subject. The appellant was convicted.

Held, that the conviction ought to be affirmed, and that, as the responsibility for not permitting or suffering gaming on licensed premises rested on the licensed person, the mere fact that he did not know of the existence of gaming on his premises did not relieve him of his responsibility; and that, as his servant who was in charge of the premises had knowledge of the gaming, the appellant had suffered gaming to be carried on within the meaning of the statute.

THIS was a case stated under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, by the stipendiary magistrate for the Staffordshire potteries district.

1. At a court of summary jurisdiction held at Longton, before the magistrate, on the 14th March 1888, Thomas Bond (hereinafter called the appellant) was charged on the information and complaint of Joseph Evans, the superintendent of police (hereinafter called the respondent) for that he, being a licensed person, did suffer gaming to be carried on, on his premises at Longton, known by the sign of the George and Dragon Inn, on the 23rd Feb. 1888.

2. From the evidence which was given before the magistrate at the hearing of the information and complaint be found the following facts. The appellant's premises consisted of an ordinary inn, alehouse, and victualling-house, to which there was a skittle-alley communicating by doors and passages with the rest of the premises.

3. The appellant had employed one George Owen to manage the skittle-alley, and to attend upon the persons frequenting the same, and he had received from the appellant general directions not to permit gambling on the skittle-alley.

4. On the 23rd Feb. 1888 two police constables visited the skittle-alley of the George and Dragon, and upon going inside found some men playing cards for money.

5. At this time George Owen was present in charge of the skittle-alley, and cognisant of the acts of the men who were playing cards. It is admitted that the appellant was not present and had no actual knowledge of the card-playing, and the said George Owen never communicated with him on the subject.

6. On the part of the appellant it was contended that, inasmuch as the appellant had no personal knowledge whatever of the gaming taking place, and had in no way connived at it, and his servant George Owen had suffered it to take place contrary to his duty and his express orders, the appellant could not be convicted, and in support of this contention the case was cited of *Somerset* (app.) v. *Hart* (resp.) (12 Q. B. Div. 360).

7. The magistrate, however, was of opinion that, notwithstanding the decision of the judge in *Somerset* v. *Hart*, the appellant Bond ought to be convicted, because he was satisfied that George Owen, who had been placed in charge of the skittle-alley, was present and well aware of what was going on, and permitted the gaming to take place, and that such holding was in conformity with the decisions of the judges in *Bosley* v. *Davies* (33 L. T. Rep. N. S. 528; 1 Q. B. Div. 84), and *Redgate* v. *Haynes* (33 L. T. Rep. N. S. 779; 1 Q. B. Div. 89), which he felt bound to follow.

The magistrate convicted the appellant.

If the court should be of opinion that the conviction was right, then it was to stand; but if wrong, then it was to be quashed.

By 35 & 36 Vict. c. 94, s. 17:

> If any licensed person (1) suffer any gaming or any unlawful game to be carried on on his premises . . . he shall be liable to a penalty not exceeding for the first offence ten pounds, and not exceeding for the second and any subsequent offence twenty pounds.
>
> Any conviction for an offence under this section shall, unless the convicting magistrates shall otherwise direct, be recorded on the licence of the person convicted.

J. P. Grain for the appellant.—The question here is, whether the innkeeper, the appellant, "suffered" this card-playing or gaming to be carried on on his premises within the meaning of sect. 17 of the Licensing Act 1872. Here the case finds that the appellant gave orders to his servant who looked after this skittle-alley to prevent gambling, and though the servant did know that on the occasion in question gambling was going on, it is found that the appellant was in perfect ignorance, and that his servant had not communicated to him any information as to gaming going on; the appellant neither connived at nor was wilfully blind to the fact of gaming, and was therefore innocent of the offence imputed to him, and ought not to have been convicted:

Somerset v. *Hart*, 12 Q. B. Div. 360.

That case is strongly in my favour, and if licensed persons are to be made liable for the acts of their servants, the licence of every publican who has a servant is in danger. There must be *mens rea* on the part of the innkeeper before he can be criminally convicted. In another case the trustees and members of the managing committee of a club gave orders to their steward not to sell intoxicating liquors to persons not members of the club. The steward did so contrary to their orders, but without their knowledge, and the court held that the managers were not responsible, on the ground that the master or principal is not liable when a servant or agent sells in direct contravention of the *bonâ fide* orders given, and without the knowledge or assent direct or indirect of the master or principal:

Newman and others v. *Jones*, 55 L. T. Rep. N. S. 327; 17 Q. B. Div. 132.

In the present case direct orders were given to the servant in charge of the alley not to allow gambling. The stipendiary magistrate was wrong in convicting on the authority of *Somerset* v. *Hart* (*ubi sup.*) and *Newman* v. *Jones* (*ubi sup.*).

Greene, Q.C. (*A. T. Lawrence* with him, in support of the conviction).—Actual knowledge of the gaming is not necessary on the part of the licensed person to render him liable to conviction; constructive knowledge is sufficient:

Bosley v. *Davies*, 33 L. T. Rep. N. S. 528; 1 Q. B. Div. 84.

And where a servant connives or permits gaming to be carried on, the master is liable for his acts:

Redgate v. *Haynes*, 33 L. T. Rep. N. S. 779; 1 Q. B. Div. 89.

In the latter case the master was made liable for

the acts of a general servant. The present case is an *d fortiori* one, for here the servant who permitted the gaming was put in special charge of the skittle-alley; here there was plenty of evidence of constructive knowledge on the part of the appellant. The cases cited followed the case of *Mullins* v. *Collins* (29 L. T. Rep. N. S. 338; L. Rep. 9 Q. B. 292), in which the appellant was convicted of supplying liquor to a police constable when on duty, though the appellant did not supply the liquor to the constable, nor did his servant know that the constable was on duty. In *Redgate* v. *Haynes* (*ubi sup.*) the hall porter was only a general servant, and not in charge of the room in which the gaming went on, which distinguishes that case from the present; and *Newman* v. *Jones* (*ubi sup.*) cannot alter the law, for there the house was not a licensed house at all, nor was the person whose acts were sought to make the appellants liable in any sense a servant who could render the master liable. Whereas in the present case there was an absolute delegation of the charge of the skittle-alley to the servant in question, whose connivance in the act of gaming was found by the magistrate. If the contrary were held, sect. 17 would be perfectly nugatory. Under sect. 13 of this Act, which makes it an offence to sell any intoxicating liquor to a drunken person, an innkeeper was convicted of selling drink to a drunken person though neither he nor his servants were aware of his condition, on the ground that the knowledge of the condition of the person served with liquor was not necessary to constitute the offence:

Cundy v. *Le Cocq*, 51 L. T. Rep. N. S. 265; 13 Q. B. Div. 207.

The onus of proving that the Act has not been contravened is thrown on the publican, and he cannot evade his responsibility by appointing a manager, and the acts of a manager are those of his principal or master. The test is the scope of the employment of the person appointed as manager or servant. The scope of the manager's service in this case was to manage the skittle-alley and prevent gaming in it, and by allowing gaming in it his offence against the law was within the scope of his authority. The Legislature intended the prohibition to be absolute against gaming on licensed premises; there is no penalty provided for the servant, but for the licensed person. The appellant was therefore rightly convicted for the acts of his servant.

Cur. adv. vult.

June 12.—MANISTY, J.—The appellant in this case was convicted under the Licensing Act 1872 (35 & 36 Vict. c. 94). s. 17, for suffering gaming to be carried on on his premises. The magistrate before whom he was charged has found the facts to be that gambling took place in the skittle-alley which was attached to the appellant's public-house, and that it took place with the knowledge of the appellant's servant, who was in charge of the skittle-alley, but without the knowledge of the appellant. In this state of circumstances it was contended before the magistrate, on the authority of *Somerset* v. *Hart* (*ubi sup.*), that there ought not to be a conviction, and on the argument before us the same decision, and that of *Newman* v. *Jones* (*ubi sup.*), were relied on for the appellant. The 17th section of the Licensing Act 1872, under which the appellant was convicted, is one of a group of sections headed "Offences against public order," and passed for the prevention of such offences. It is important to consider the language of these sections. By sect. 13: "If any licensed person permits drunkenness, or any violent, quarrelsome, or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person," he is made liable to a penalty. A question arose on that section in the year 1884, in the case of *Cundy* v. *Le Cocq* (*ubi sup.*) which I will consider before I deal with the other cases, because it is a decision on the earlier section. The judgment there has an important bearing on the present case because of the reasons given by Stephen, J. He said: "I am of opinion that the words of the section amount to an absolute prohibition of the sale of liquor to a drunken person, and that the existence of a *bonâ fide* mistake as to the condition of the person served is not an answer to the charge, but is a matter only for mitigation of the penalties that may be imposed. I am led to that conclusion both by the general scope of the Act, which is for the repression of drunkenness, and from a comparison of the various sections under the head, "Offences against public order." Some of these contain the word "knowingly," as for instance sect. 14, which deals with keeping a disorderly house; and sect. 16, which deals with the penalty for harbouring a constable. Knowledge in these and other cases is an element in the offence; but the clause we are considering says nothing about the knowledge of the state of the person served. I believe the reason for making this prohibition absolute was, that there must be a great temptation to a publican to sell liquor without regard to the sobriety of the customer, and it was thought right to put upon the publican the responsibility of determining whether his customer is sober" (*ubi sup.*). In my opinion the principle of that decision is applicable to the present case, for I think it was intended by sect. 17 absolutely to prohibit gaming on licensed premises, and that the substantial effect is that the responsibility is thrown upon any person who keeps a licensed house to take proper precautions to prevent all gaming on his premises. The only difference between the 13th and the 17th sections is, that in sect. 13 the word "permits" is used, while in sect. 17 the word is "suffers;" but the word "knowingly" is left out in both sections. In sect. 13 the expression used is simply "permits;" in sect. 14 it is "knowingly permits;" in sect, 15 it is "permitting" only; in sect. 16, sub-sect. 1, it is "knowingly harbours or knowingly suffers to remain;" and in sect. 17 it is merely "suffers," omitting the word "knowingly." It should also be observed that the word "knowingly" occurred in the repealed statute (9 Geo. 4, c. 61, sched. C.), but is omitted from the 17th section of the Act of 1872, which is substituted for that enactment. *Bosley* v. *Davies* (*ubi sup.*) was a decision upon sect. 17, and involved a consideration of the question whether proof of knowledge on the part of the innkeeper was necessary to support a conviction. It is very important to consider the language which was used in dealing with that question. In the course of the argument, Cockburn, C.J. made this observation: "A man may be said to "suffer a thing to be done if it is done through his negligence" (*ubi sup.* p. 87). The decision was that: "The case must be sent back to the justices, with

an intimation of the opinion of the court that actual knowledge in the sense of seeing or hearing by the party charged is not necessary, but that there must be some circumstances from which it may be inferred that he or his servants had connived at what was going on—constructive knowledge will supply the place of actual knowledge" (*ubi sup.* p. 88). That decision was followed by *Redgate* v. *Haynes* (*ubi sup.*), where the conviction was upheld although no knowledge on the part of the appellant that gaming took place was proved. The judgments there are directly in point with regard to the present case. Blackburn, J. said: "I agree that the mere fact that gaming was carried on on her premises would not render her liable to be convicted, because that is not 'suffering' the gaming to be carried on, and if the justices were of a different opinion they were wrong. But I think, if she purposely abstained from ascertaining whether gaming was going on or not, or, in other words, connived at it, that this would be enough to make her liable; and I think that where the landlady goes to bed she is still answerable for the conduct of those she leaves in charge of the house, and if those persons connive at the gaming she is responsible" (*ubi sup.* p. 94). Lush, J. also said: "I agree that it is not necessary that actual knowledge of the gaming should be proved. Sect. 17 says that the owner of licensed premises who 'suffers' gaming shall be liable to a penalty, and I think that connivance on the part of the landlady or the person in charge would be quite sufficient" (*ubi sup.* p. 96). It seems to me that those two cases, added to *Cundy* v. *Le Cocq* (*ubi sup.*), to which I have already referred, constitute a series of authorities against the appellant's contention on which we ought to act; and besides this, if there were no authority on the question, I should entertain no doubt as to the object of the statute. It remains to consider the cases which were relied on for the appellant. In *Somerset* v. *Hart* (*ubi sup.*) the justices refused to convict, and it was held that they were right, on the ground that there was no evidence to show any connivance or wilful blindness on the part of the landlord, and it did not appear that the servant was in charge of the premises. In the present case it is distinctly found as a fact that the appellant's servant was in charge of the skittle-alley where the gaming took place. In delivering judgment in *Somerset* v. *Hart* (*ubi sup.*) Lord Coleridge, C.J. said: "The only case cited for the appellant which raises any difficulty in my mind is that of *Mullins* v. *Collins* (*ubi sup.*), where, however, I observe the late Archibald, J. says that he does not intend in any way to interfere with the maxim that before a person can be criminally convicted he must be shown to have a *mens rea*. But the true effect of that case may, I think, be summed up by saying that there the judgment was in affirmance of a conviction" (*ubi sup.* pp. 362, 366). This last observation applies to the present case. Further on the Chief Justice says: "It may be observed further that the liquor was served by a woman, as to whom there was, it would appear, some doubt whether she was not the appellant's wife, and, if the magistrates thought she was his wife, and intrusted by him with the management of the house, the case would be brought within the principle of the other cases that have been cited" (*ubi sup.* p. 363). That is equivalent to saying that if the appellant's wife was engaged in the management of the business the case would come within the decisions in which convictions had been upheld. "No doubt," the Chief Justice goes on to say, "the other cases that were cited give me no difficulty, for, as it appears to me, in all of them the judges expressly say that there must be something from which connivance on the part of the licensed victualler may be inferred—at all events to necessitate a conviction. It is nowhere held in those cases that he can be said to suffer gaming where what takes place is not within his knowledge, but merely within that of one of his servants, and there is no connivance on his part" (*ubi sup.* p. 364). The Chief Justice certainly appears to have thought that the connivance of the landlord himself must be inferred in order to justify a conviction; but that is not so, for the other decisions to which I have referred show that the connivance of the servant in charge of the premises is sufficient. I cannot reconcile the statements contained in this passage with the other decisions. *Newman* v. *Jones* (*ubi sup.*) was a decision on other statutes. Moreover, it appears from the judgment in that case that the court quashed the conviction of the appellants, which had proceeded on the ground that "they were legal owners of the property of the club and members of the committee" (*ubi sup.*); but if the decision was that the appellants were not liable as members of the committee, that was not the question submitted to the court, for the only question submitted by the case was, whether "the appellants as trustees of the club were liable." In that case also neither *Bosley* v. *Davies* (*ubi sup.*) nor *Redgate* v. *Haynes* (*ubi sup.*) were adverted to. If *Somerset* v. *Hart* (*ubi sup.*) and *Newman* v. *Jones* (*ubi sup.*) militate against the other decisions to which I have referred, I prefer to adhere to the others. For these reasons I am of opinion that the conviction in the present case was right, and ought to be affirmed.

STEPHEN, J.—I am of the same opinion, and I only wish to add a few observations on the cases which have been referred to. The first case in point of time is *Mullins* v. *Collins* (*ubi sup.*), decided in 1874. That was a charge, under sect. 16 of the Licensing Act 1872, of supplying liquor to a constable on duty, and it was held that the publican was liable to be convicted, although the liquor was sold by his servant without his knowledge. There the servant sold the liquor in the ordinary course of business, taking his chance whether the constable was on duty or not, and did not ask, and the conviction was upheld on the ground that the wilful ignorance of the servant made his master responsible. In *Bosley* v. *Davies* (*ubi sup.*) there was very unsatisfactory proof that anyone knew that gaming was going on, and the case was accordingly remitted to the justices. I think this and all the other cases show that the prohibition is not quite absolute, but is subject to this limitation, that, in order to justify a conviction, someone must know of or connive at the gaming. In *Redgate* v. *Haynes* (*ubi sup.*) the justices thought that the landlady had been wilfully blind to what was happening, and that the hall porter had acted in the same way, but it was held by the court that the connivance of the hall porter, in whose charge the hotel was left, was sufficient to support the conviction. These two cases show

that the connivance of the servant in charge of the premises is sufficient. In *Somerset* v. *Hart* (*ubi sup.*) the facts were somewhat peculiar. That case, unlike the others which have been referred to, was a case where there had been an acquittal by the justices, and, moreover, the servant who knew of the gaming was only a potman, and was not in charge of the premises, and there had been no delegation of authority to him. This is how I understand *Somerset* v. *Hart* (*ubi sup.*), and, so understood, it does not seem to me to be in conflict with the other decisions. The Chief Justice there distinguishes the case of *Mullins* v. *Collins* (*ubi sup.*), where the servant either knew that the constable was on duty or was wilfully blind to that fact. In *Somerset* v. *Hart* (*ubi sup.*) the landlord knew nothing, and the potman only knew of the gaming as a fact, but did not come to know it as a part of his business. In *Cundy* v. *Le Cocq* (*ubi sup.*), decided on sect. 13, I said that the prohibition against serving a drunken person imposed by that section was absolute. That case, no doubt, has a bearing on the present case, but I do not attach so much importance to it as Manisty, J. does. In *Newman* v. *Jones* (*ubi sup.*) there is a mistake in the judgment, because *Cundy* v. *Le Cocq* (*ubi sup.*) is there spoken of as the case of a charge under sect. 16 of selling liquor to a constable on duty, whereas the charge was under sect. 13 for selling liquor to a drunken person. The error, however, is not one of any considerable importance. *Newman* v. *Jones* (*ubi sup.*) is the only decision which made me hesitate at all in the present case, because at first it seemed to me to have been held that there could not be a conviction because the steward had acted contrary to the orders of the appellants. But the trustees of a club are on a different footing from a licensed victualler, who is the proprietor of a house, and the holder of a licence. For these reasons, I think that *Newman* v. *Jones* (*ubi sup.*) stands on its own circumstances, and is distinguishable from the present case. In the present case I follow *Bosley* v. *Davies* (*ubi sup.*) and *Redgate* v. *Haynes* (*ubi sup.*), and, without differing from the decision in *Somerset* v. *Hart* (*ubi sup.*), I have come to the conclusion that the conviction was right, and ought to be affirmed. I can see no distinction between the word "permits," which is used in some of the other sections, and the word "suffers," which occurs in sect. 17. On general grounds, I should entertain no doubt as to the intention of the statute. I think the meaning is, that the landlord of licensed premises must prevent that which the Act prohibits from being done on his premises; and if he does not prevent it, so much the worse for him. I wish to repeat, with regard to sect. 17, what I said in *Cundy* v. *Le Cocq* (*ubi sup.*) with regard to sect. 13, that the statute imposes a prohibition.

Conviction affirmed.

Solicitors for the appellant, *H. Tyrrell*, for *Tennant, Paine*, and *Jones*, Hanley.

Solicitors for the respondent, *J. White* and *Sons*, for *Hand, Blackiston, Everett*, and *Hand*, Hanley.

Friday, May 11, 1888.

(Before FIELD and WILLS, JJ.)

CLARK *v.* THE SOMERSETSHIRE DRAINAGE COMMISSIONERS. (a)

Easement—Nuisance—Fouling stream by washings from manufactories—Change of nuisance—Right to change nuisance by pouring into stream liquids less foul than the former liquids—Land Drainage Act 1861 (24 & 25 *Vict. c.* 133), *s.* 58.

In 1832 *the appellants came into possession of a certain factory, and then commenced the business of fellmongers and manufacturers of sheepskin rugs, which they carried on down to* 1852, *and during this period the refuse of the fellmongery and sheepskin factory was discharged into a certain stream, which was an arterial drainage within the jurisdiction of the respondents. In* 1852 *the business of tanners was added, and the refuse from the tanyard was, in addition to the other refuse, discharged into the stream. In* 1878 *the appellants altered their premises, and began the manufacture of leather boards, and the washings from such new factory, which were different in character from those before discharged, were from and after* 1878 *poured into the stream; no refuse of tannery or fellmongery was then poured in, but only the washings of the dyes used to colour the leather boards. Such washings were not so foul in degree as the washings from the factory before* 1878. *The appellants were summoned by the respondents for causing or permitting these washings of the leather board manufactory to flow into the stream, and were convicted and fined. The respondents contended that the pouring into the stream the refuse of the fellmongery and sheepskin manufactory from* 1832, *and the refuse of the tannery from* 1852, *did not confer the right to pour into the stream the refuse and washings from the leather board manufactory opened in* 1878, *either under the Prescription Act, or at common law. The appellants contended that they had proved a legal prescriptive right to cause such washings to flow into the stream.*

Held, that the conviction was right, as the appellants had not, at the passing of the Land Drainage Act 1861, *the right to pour into the stream the refuse and washings of their leather board manufactory, and the fact that they had poured other refuse and washings into the stream since* 1832 *did not give them such right, although those washings were less foul than those formerly poured into the stream.*

APPEAL against an order made by the Somersetshire Drainage Commissioners, on the 9th March 1887, whereby it was adjudged that the appellants, being owners and occupiers of a certain factory called the Bowling Green Factory, otherwise the Avalon Leather Board Factory, situate in the county of Somerset, did, on certain days in the said order mentioned, to wit, on the 10th Feb., the 5th March, and the 24th Aug., all in the year 1886, cause or permit certain foul or unwholesome washings of manufactories to flow, from their said factory, into a certain statutory drain or watercourse, called the South Drain, being an arterial drainage work within the jurisdiction of the respondents, and whereby they, the appellants, were ordered to pay to the clerk

(a Reported by HENRY LEIGH, Esq., Barrister-at-Law.

of the respondents the sum of 1*s.* for each of their said offences.

The facts appear sufficiently from the head-note nd judgment.

Channell, Q.C. and *Austin* for the appellants.—It will be contended against us that, because there is a change in the mode of polluting the stream, therefore the right is lost altogether. But that right cannot be lost so long as no additional burden is thrown on the servient tenement. A mere variation in the materials discharged into the stream cannot destroy the right; if it were otherwise, any new mode of carrying on a manufacture would destroy the right already existing. Here there has been no more increase in the pollution than there was in *Baxendale* v. *McMurray* (L. Rep. 2 Ch. 790; 16 W. R. 32). As to the form of plea in such a case as the present, *Wright* v. *Williams* (1 M. & W. 77; 1 Gale, 410), and *Murgatroyd* v. *Robinson* (7 E. & B. 391; 26 L. J. 233, Q. B.; 3 Jur. N. S. 615) are in point. The true test is whether the change had made matters worse, had increased the burdens upon others, upon the servient tenement:

Harvey v. *Walters*, 28 L. T. Rep. N. S. 343; L. Rep. 8 C. P. 162; 42 L. J. 105, C. P.

[FIELD, J.—That was the extinguishment of an easement, but this is a grant.] The grant is to be measured by the damage. The chief point is, whether the easement, supposing it to exist in 1861, was altered by the change in the business. The easement cannot be altered, as no greater burden is here cast on the servient tenement. In *Baxendale* v. *McMurray* (*ubi sup.*) Lord Cairns says (at p. 795, L. Rep. 2 Ch.): "I am therefore of opinion that it is not sufficient for the plaintiff to show that the defendant uses in the manufacture of paper a raw material different from that formerly employed. He must show, further, a greater amount of pollution and injury arising from the new material; and the onus, of course, of showing this lies on the plaintiff." As to the Prescription Act applying, the following cases are in point:

Rolle v. *Whyte*, 17 L. T. Rep. N. S. 560; L. Rep. 3 Q. B. 286; 37 L. J. 105, Q. B.; 8 B. & S. 116; 16 W. R. 593;

Leconfield v. *Lonsdale*, 23 L. T. Rep. N. S. 155; L. Rep. 5 C. P. 657; 39 L. J. 305, C. P.; 18 W. R. 1165.

Odgers and *Leonard*, for the respondents, were not called upon.

FIELD, J.—It seems to me that the magistrates have arrived at a proper decision of law and of fact, and there is no reason for interfering with their determination. The question for our determination is, whether the appellants, as representing the leather board factory, had on the days mentioned a legal right to cause such washings or liquids to flow from their premises into this drain. Now, the facts found are, that on certain days mentioned in the case the appellants did cause or permit certain foul or unwholesome washings of manufactories to flow from their factory into the drain in question, and thereby did pollute the said drain within the meaning of the 58th section of the Land Drainage Act 1861 (*a*); but the appellants say that they come within the proviso at the end of the section, as they had at the passing of that Act in 1861 the legal right to cause such water, washings, and liquids to flow into the said drain. The question therefore is, whether or not in 1861 the appellants had the right to pour into the drain the foul liquid which they are now pouring in. Now what is the liquid which they are now pouring in? It is the refuse of the leather board manufactory, and the question is whether, under the Act of 1881, and at the time of the passing of that Act, the right to pour that liquid into the stream belonged to the appellants. I am not at all sure that the twenty years' and the forty years' limitation in the Prescription Act (2 & 3 Will. 4, c. 71) would apply to the case, and if the case had gone on that, Mr. Channell would have been in difficulties in showing that the Prescription Act applied to such a case. On the facts it appears that, from 1832 to 1852, the appellants carried on the business of fellmongers; after 1852 the business of tannery was added, and as to that business, clearly no right could have been acquired in 1861; at that time the only right that could by any possibility have been acquired was as to the business of the fellmongery. Then the magistrates have found that from 1872 to 1878 there was an abandonment of the premises by the appellants. Then in 1878 the present business was established, and it is contended now that they have a prescriptive right to discharge the liquid which they now discharge from that business into the stream. It seems to me that there is no such prescriptive right. I have never heard of any such form of plea. To suppose, because a person has carried on the business of fellmongery, he then acquires a right to carry on the business of, say, a butcher, or soap-boiler, because no more damage is done, is not a sound proposition. The appellants have relied on the case of *Baxendale* v. *McMurray* (*ubi sup.*), but there is a great difference between that case and the present. In that case, one and the same business of paper-making was carried on throughout, but here the appellants have changed their business, abandoning the fellmongery and taking to the manufacture of leather boards. It seems to me that this conviction was right.

WILLS, J.—I am of the same opinion. It seems to me to follow that the right must be shown to have existed in 1861, when the Land Drainage Act was passed. It is said that in 1861 the appellants had a right to pollute the stream. I share my brother's doubts whether the appellants could establish such a right, notwithstanding the cases of *Rolle* v. *Whyte* (*ubi sup.*) and *Leconfield* v. *Lonsdale* (*ubi sup.*). I take it as the basis of my judgment that the right to foul the stream did exist in 1861. It is said that because they carried on the fellmongery business so as to foul the stream, we ought to infer that the grant was to do something more than that, and foul it by

(*a*) Sect. 58 of the Land Drainage Act of 1861 provides: No person shall, without the consent of the commissioners, cause any filthy or unwholesome water or washings of manufactories or mines, or other foul or poisonous liquid, to flow into any watercourse within the jurisdiction of the commissioners of sewers; and any person offending against this enactment shall incur a penalty not exceeding five pounds, and a further penalty of forty shillings for every day during which the offence is continued; but this section shall not apply to any person having a legal right to cause such water, washings, or liquid, as aforesaid, to flow into any existing watercourse.

something different. I cannot assent to that. In *Baxendale* v. *McMurray* (*ubi sup.*) the court was dealing with a different state of facts, and then the court was a court of equity, which decided facts as well as law. There is no authority at all for the proposition, that so long as there was no increase of the burden upon the servient tenement the owner of the dominant tenement can change the user. It seems to me that, on conclusive authority, what the appellants are doing now is not within their right. I am therefore of the same opinion as my brother Field, and I think that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants, *Crowders* and *Vizard*, for *J. G. Bulleid*, Glastonbury.

Solicitors for the respondents, *Lambert, Petch, and Co.*, for *G. Lovibond*, Bridgwater.

BURY ST. EDMUNDS SUMMER ASSIZES.

Wednesday, July 11, 1888.

(Before POLLOCK, B.)

EDWARDS *v.* SALMON. (*a*)

Public Health Act 1875—*Officer or servant—Town clerk — Clerk to local sanitary authority — Acceptance by, of fee under colour of office— Allowance as clerk to local authority for extra legal work—Contentious business—Penalty—* 48 *&* 49 *Vict. c.* 55, *ss.* 189, 193.

The defendant, a solicitor, was town clerk of Bury St. Edmunds, and on the town council becoming the local sanitary authority was appointed clerk to the sanitary authority. By a resolution of the town council, dated the 6th May 1879, *his salary was fixed at* 365*l. per annum, including all legal charges, except for contentious matters, travelling expenses, and expenses out of pocket. About* 1883 *large sewage works were promoted, and subsequently carried out by the town council as the local sanitary authority, which works were carried on for three years and a quarter. During that time the defendant as such town clerk and officer of the sanitary authority, drew his annual salary of* 365*l.; but was engaged in conducting the extra legal work caused by the carrying through of the sewage scheme, which was opposed by some members of the town council and of the inhabitants. In Dec.* 1887, *on the recommendation of the sewage and irrigation committee, the town council resolved that the defendant be paid the sum of* 500 *guineas in addition to his salary of* 365*l. for his services in providing mortgages, contracts, attending and conducting inquiry before the Local Government Board inspector, and other work as a solicitor; and the defendant was paid the said sum. The plaintiff brought his action to recover the statutory penalty of* 50*l. against the defendant for having, under the colour of his office, or appointment as officer of the urban sanitary authority, accepted such fee of* 525*l. contrary to the provisions of sect.* 193 *of the Public Health Act* 1875.

Held, that, under the circumstances of the case, the acceptance by the defendant of the sum of 525*l. was not an acceptance under the colour of his office or employment of a fee or reward other than his proper salary, wages, or allowances, within the meaning of sect.* 193 *of the Public Health Act* 1875.

THIS was an action tried before Pollock, B. without a jury, at the Summer Assizes at Bury St. Edmunds, brought to recover the statutory penalty of 50*l.* against the defendant as the town clerk of the borough of Bury St. Edmunds for having, under colour of his office or appointment, as an officer of the urban sanitary authority, accepted a fee or reward other than his proper salary, wages, and allowances under sect. 193 of the Public Health Act 1875.

The facts of the case as opened for the plaintiff were as follows:—

The defendant had been for many years town clerk of the borough of Bury St. Edmunds. Upon the town council becoming urban sanitary authority under the Public Health Act 1875, the defendant, as town clerk, was appointed clerk to the local authority. The question of remunerating him for his extra services as such clerk was discussed, and on the 6th May 1879 a resolution was passed by the town council to the effect "That the future salary of the town clerk be 365*l.* per annum, to include all legal charges except for contentious business matters, travelling expenses, and payments out of pocket." The resolution went on to apportion the 365*l.* per annum, and make part payable out of the corporation funds and part out of the rates raised by the local authority. Such annual salary had been paid to the defendant.

About the year 1883 the town council, as the local sanitary authority, promoted and undertook certain sewage works obtaining, after an inquiry by the Local Government Board, compulsory powers for that purpose. The scheme was opposed by certain members of the town council and some of the inhabitants. The sewage works were proceeded with, and were not completed until after three years and a quarter. During that time the defendant conducted the legal business connected with the scheme; when the scheme was opposed he appeared for the borough at the inquiry conducted by the Local Government Board inspector, and on a favourable report obtained a loan of 25,000*l.*, and prepared the conveyances for the lands taken both by treaty and under compulsory powers. He attended the arbitration in the only case in which the compensation payable was not agreed on, and he prepared various mortgages and contracts. All this work had not in fact been contemplated, and had not been taken into account when his salary was fixed in 1879. No resolution appeared to have been passed when his work was commenced for any increase of salary to the defendant, or for any additional remuneration to be payable to him. The defendant did not send in any bill of costs for this extra work, but when the work was over the question of special remuneration for his extra work in connection with this sewage scheme was discussed by the sewage and irrigation committee of the town council who recommended in Oct. 1887 that the defendant be paid 500 guineas for his services, including mortgages, contracts, attending and conducting inquiry before the Local Government Board inspector, conducting as solicitor and counsel the arbitration upon Gifford's claim, and attendances, correspondence,

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

journeys, and all other claims in respect of the works except only payments out of pocket. The defendant was willing to accept this amount.

In Nov. 1887 the town council referred the matter back to the committee, but agreed that a sum of 200*l.* should be paid to the defendant on account. This sum the defendant received.

On the 6th Dec. 1887 the town council resolved, on the recommendation of the sewage and irrigation commitee, repeated after reconsideration, that the defendant be paid the said sum of 525*l.* in respect of the above services.

This sum was paid to the defendant, and on the 7th Dec. 1887 he gave a receipt in the following terms "Received of the urban sanitary authority for the borough the sum of 325*l.*, balance of the sum of 525*l.* agreed to be paid to me in full satisfaction and discharge of my professional work in connection with the new sewerage works extending over the past three years and a quarter."

The plaintiff brought his action to recover the statutory penalty on the ground of such acceptance by the defendant being an infringement of sect. 193 of the Public Health Act 1875.

By 38 & 39 Vict. c. 55, s. 189:

Every urban authority shall, from time to time, appoint fit and proper persons to be medical officer of health, surveyor, inspector of nuisances, clerk, and treasurer. Provided that if any such authority is empowered by any other Act in force within their district to appoint any such officer, this enactment shall be deemed to be satisfied by the employment under this Act of the officer so appointed, with such additional remuneration as they think fit, and no second appointment shall be made under this Act.

By sect. 193:

Officers or servants appointed or employed under this Act by the local authority shall not in anywise be concerned or interested in any bargain or contract made with such authority for any of the purposes of this Act.

If any such officer or servant is so concerned or interested, or under colour of his office or employment, exacts or accepts any fee or reward whatsoever other than his proper salary, wages, and allowances, he shall be incapable of afterwards holding or continuing in any office or employment under this Act, and shall forfeit and pay the sum of fifty pounds, which may be recovered by any person, with full costs of suit by action of debt.

Candy, Q.C. and *George Elliott* for the plaintiff.—The defendant has brought himself within the provisions of sect. 193 of the Public Health Act 1875 by accepting, as clerk to the local authority, the sum of 525*l.* as remuneration for his services connected with the local sewage works, over and above his proper and agreed annual salary as town clerk, of 365*l.* As town clerk he was under the resolution of the 6th May 1879 to receive that amount, which included his legal charges except for contentious business matters, and other legitimate expenses in respect of which he would be entitled to be recouped by producing vouchers. The town council became under the Public Health Act 1875 the local sanitary authority, and the defendant as town clerk became the clerk of that authority, as is provided for by sect. 189 of the Public Health Act 1875. He was bound to do all the legal business of the local authority for his stipulated salary, except as to contentious business. Now, in the sewage undertakings of the local authority there was no real contentious legal business in the well-understood technical sense; and, at any rate, not so much as would entitle the defendant to send in a bill of costs of 525*l.* The defendant, under the colour of his office as clerk to the local sanitary authority, has accepted under this remuneration for his so-called extra services a fee or reward over and above his proper salary and allowances. The plaintiff's claim is founded on the reasonable assumption that the resolution of the 6th May 1879 fixing the defendant's salary at 365*l.* per annum covered all work for the local authority in its dealings as such, and precluded the defendant from accepting any reward which was not within the scope or terms of that resolution. Now it cannot be fairly contended that such a large sum was an "allowance" within the meaning of that word in sect. 193. An allowance must mean an extra payment in respect of which an officer or servant would be entitled to be recouped by those who employed him; it cannot mean remuneration for extra work which is prospectively provided for and covered by his regular salary. Work of this character was or must be assumed to have been contemplated when the defendant's salary was fixed in 1879 at 365*l.* per annum. [POLLOCK, B.—That may be so; but do you mean to say that would last for ever? Do you mean to say that in a large and increasing town because a local authority once passed such a resolution their authority in the matter was exhausted?] It may well be that it was competent for a town council as a whole, or for an urban sanitary authority to revise the salary, wages, and allowances of its officers at any time if the growth of the town and the increase of the business rendered it advisable, and the officers of the corporation or other authority demanded it. It is admitted that it was competent for the sanitary authority to revise the defendant's salary, and the revision would take effect from the date of the resolution. But in the present case the corporation of Bury had not adopted that course. The defendant had not asked for any increase of salary, nor was any granted to him. The defendant did not even send in a bill of costs; but a lump sum as a kind of composition between him and the sanitary authority was accorded him in compensation for his services. That, it is submitted, it was not competent for the town council to do, nor for the defendant to accept. What has been done has been in violation of sect. 193, which was passed to prevent any attempts at jobbery or corruption. The defendant as clerk to the local authority, by accepting the sum in question, has brought himself within the mischief the section was passed to obviate.

Channell, Q.C. and *Poyser*, for the defendant, were not called on to argue.

POLLOCK, B.—There has been some confusion with regard to the words of the statute. The matter seems to stand in this way: The resolution of the 6th May 1879 is "That the future salary of the town clerk be 365*l.* per annum, to include all legal charges, except for contentious business matters, travelling expenses, and payments out of pocket." Of course we know that certain officers receive payment beyond their salaries for contentious business, and if by any resolution of the town council they sought to make that a contentious business matter which

was not so, and to pay more than the amount specified, then, by way of *certiorari* or in some other form (it is unnecessary to follow that out), the truth could be arrived at and the error of the council corrected. But that is not the question now. The question is whether the defendant, having been appointed at a salary of 365*l.* at the date mentioned, was entitled to receive a larger sum of 525*l.* beyond the 365*l.* he received by the resolution of the town council. Now, what did the town council do? On the 6th Dec. 1887 they resolved, upon the recommendation of the sewage and irrigation committee that a sum of 525*l.* in addition to the salary mentioned should be paid to the defendant as a remuneration for certain services rendered by him to the corporation in his official capacity of town clerk. I will not go through the wilderness of Acts of Parliament whereby the town council may be urban authorities, and whereby town clerks may be officers of the urban authorities. It must be taken for this purpose, taking the Acts more closely, that this town council was an urban authority. The Act which relates to this part of the matter is the Public Health Act of 1875, sect. 189, and that section says that "every urban authority shall from time to time appoint fit and proper persons to be (amongst others) clerk and treasurer." Then it says, "If any such authority is empowered by any other Act in force within the district to appoint any such officer" (which would be this town council) "this requirement shall be deemed to be satisfied by the employment under this Act of the officer so appointed, with such remuneration as they shall think fit." Therefore this town council, finding themselves *quâ* urban authority in the position of having employed a person who, within the words of this section, has been employed by them, but who is another officer, namely, the town clerk, then they are to give such additional remuneration as they think fit. In the section of the Act of Parliament there is no question about contentious or non-contentious business; and if the two votes of the council, one of the 6th May 1879, and the other of the 6th Dec. 1887, seem to be in some sense irreconcilable, then, of course, the first must give way to the latter. The second resolution follows the words of the Act of Parliament, and is not shown by parole evidence to be irregular in any way. It may be, for the purposes of this case, that some of the services rendered were services for non-contentious business. What then? The answers to that seem to be two. In the first place, in point of law, I do not think that it is essential that it should be contentious business in order to be within the scope of the section I have read; and, secondly, if it were, I think it may well be that the sum of 525*l.* was arrived at to prevent a claim for a larger sum being presented in the shape of a bill of costs (a part of which might be for non-contentious business); and then it would be competent for the town council to say, "We are cutting down his bill of costs which he has given us, say for 600*l.*; we are cutting that down to 525*l.*, and, if we are striking out 75*l.*, it cannot make any difference if that 75*l.* happens to be for non-contentious business." It seems to me it cannot be said that this defendant, within sect. 193, has "exacted or accepted any fee or reward whatsoever other than his proper salary, wages, or allowance." Whether it be salary strictly, or whether it be allowance, is immaterial to be considered; we need not look too closely and dissect each word, but I should say a fair way of dealing with it would be that his former salary was "salary," and that this might be called an "allowance." But, whatever it may be, it seems to me that he is not brought within this section. I do not know that any other remark is necessary on my part, except to say this: I should be sorry to suppose that any town council would pay away a penny of the ratepayers' money except according to strict legal rights; but if there has been any irregularity in the way of arriving at this sum, there is a well-known mode by which those who have made such a corrupt or careless arrangement can be made liable in respect to the moneys so improperly applied. But that is not the question here. The question is, did he or did he not exact or accept any fee or reward other than his proper salary, wages, or allowance? Therefore there must be judgment for the defendant.

Judgment for the defendant.

Solicitor for the plaintiff, *A. Pope.*
Solicitor for the defendant, *Gilbert Robins.*

CROWN CASES RESERVED.

June 16 *and Nov.* 10, 1888.

(Before Lord COLERIDGE, C.J., POLLOCK and HUDDLESTON, BB., FIELD, HAWKINS, MANISTY, STEPHEN, MATHEW, SMITH, WILLS, DAY, GRANTHAM, and CHARLES, JJ.)

REG. *v.* CLARENCE. (*a*)

*Criminal law—Inflicting bodily harm—Assault occasioning actual bodily harm—Husband communicating disease to wife—Consent—*24 *&* 25 *Vict. c.* 100, *ss.* 20, 47.

A man cannot be convicted, under 24 *&* 25 *Vict. c.* 100, *s.* 20, *of unlawfully and maliciously inflicting grievous bodily harm on his wife, or under sect.* 47 *of that Act of occasioning her actual bodily harm, by reason of his having communicated to her a venereal disease from which he was suffering, although at the time of his having connection with her he was aware, and she was unaware, of his condition.*

So held by a majority of the court (Field, Hawkins, Day, and Charles, JJ. dissentientibus).

CASE stated by the Recorder of the City of London, which was as follows:—

At the session of the Central Criminal Court, held on Monday, the 23rd April 1888, Charles James Clarence was tried on an indictment which, in the first count, charged him with unlawfully and maliciously inflicting grievous bodily harm upon Selina Clarence, and in the second count charged him with an assault upon the said Selina Clarence, occasioning her actual bodily harm.

Evidence was given in the case, which must be taken to have established the following facts:—

1. That Selina Clarence is the wife of the prisoner.

2. That on the 20th Dec. last the prisoner was suffering from gonorrhœa, and that he knew it.

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

3. That on that night he had sexual intercourse with his wife, she being ignorant that he was suffering from that disease, and that she would not have consented to such intercourse if she had known that the prisoner was so suffering.

4. That the result of such sexual intercourse was the communication of the disease to the prisoner's wife.

The prisoner was not represented by counsel.

I directed the jury that, if the evidence established the facts hereinbefore set out to their satisfaction, then, notwithstanding the fact that Selina Clarence is the prisoner's wife, they might find him guilty on both counts, or either count of the indictment.

The jury found the prisoner guilty, and I respited judgment and directed that he should remain in custody.

I desire the opinion of the court, whether such direction was correct in point of law, and whether upon such direction and facts the prisoner could properly be convicted on both counts, or either count of the indictment.

If the court shall be of opinion that the prisoner was properly convicted on both counts, or either count, the conviction is to stand; if otherwise, the conviction is to be quashed.

Forrest Fulton on behalf of the prisoner.—In order to support the first count of the indictment it was necessary under 24 & 25 Vict. c. 100, s. 20, to establish that the act of the prisoner was unlawful, and that grievous bodily harm ensued in consequence of such unlawful act. Here, though grievous bodily harm ensued, the act which occasioned it was not unlawful, and therefore the conviction on the first count cannot be sustained. *Reg.* v. *Martin* (8 Q. B. Div. 54) is an authority that both these elements are requisite to support a conviction under the section, for there the prisoner was held to have been rightly convicted of causing grievous bodily harm, because the act he did was unlawful. For the proposition that the prisoner's act here was lawful there is high authority, for, according to Lord Hale (Hale's P. C. 628), "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract." That was the law in Lord Hale's time and is still the law, the only doubt thrown upon it being that thrown upon it by Stephen, J. in his Digest of the Criminal Law (1st edit. 172), where he says: "Hale's reason is that a wife's consent at marriage is irrevocable. Surely, however, the consent is confined to the decent and proper use of marital rights. If a man used violence to his wife under circumstances in which decency, or her own health or safety, required or justified her in refusing her consent, I think he might be convicted of rape, notwithstanding Lord Hale's dictum. He gives no authority for it, but makes the remark only by way of introduction to the qualification contained in the latter part of clause (1), for which *Lord Castlehaven's case* (3 St. Tr. 402) is an authority." The result of departing from the principle that the wife's consent is irrevocable on the ground that fraud vitiates her consent would be that any kind of fraud would vitiate such consent; and any deceit practised by a person by means of which he obtained a woman's consent would render such person guilty of rape. In order to support a conviction upon the second count it is necessary to prove an assault, and an assault implies an absence of consent. If Lord Hale was right, and what he said is still law, the wife's consent being irrevocable there could be no absence of consent, and therefore no assault. In *Reg.* v. *Bennett* (4 F. & F. 1105) Willes, J. said: "It would have been impossible to have established rape in this case." There the prisoner was convicted of an indecent assault by giving a young person a foul disease. But here, if the offence of indecent assault was committed, it must follow that the prisoner committed the offence of rape. It would also follow, if the principle that fraud vitiates consent is applicable to such circumstances as these, that a woman of the town who communicated a disease to a man would be guilty of an indecent assault. The decision in *Reg.* v. *Bennett* (*ubi sup.*) is therefore not good law. In *Reg.* v. *Sinclair* (13 Cox C. C. 28) Shee, J. followed the decision in *Reg.* v. *Bennett*, but both those cases were commented upon unfavourably in *Hegarty* v. *Shine* (14 Cox C. C. 124, 145; 2 Ir. L. Rep. 273; 4 Ir. L. Rep. 288), where Fitzgerald, J. said that the ruling in *Reg.* v. *Bennett* was uncalled for, as there had been no consent, and he questions whether had there been consent an indictment could have been sustained had no result followed from the act of the prisoner. Here, supposing that the disease had not been communicated to the wife, could it be said that the indictment would lie? In *Reg.* v. *Flattery* (13 Cox C. C. 38; 2 Q. B. Div. 410) and *Reg.* v. *Lock* (2 C. C. R. 10) it was held that there was no consent, and therefore the convictions were upheld. With regard to *Reg.* v. *Sinclair* (*ubi sup.*), Barry, J., in commenting on it and on *Reg.* v. *Bennett* (*ubi sup.*), said it was more accurate to say that there was no consent at all in those two cases than to say that the consent had been vitiated. In *Reg.* v. *Barrow* (11 Cox C. C. 191; L. Rep. 1 C. C. R. 156; 28 L. J. 20, M. C.) the Court held that a man who had had connection with a woman who believed he was her husband could not be convicted of rape, and that was a stronger case than the present. In *Reg.* v. *Dee* (14 Ir. L. R. 468) the Court refused to follow *Reg.* v. *Barrow* (*ubi sup.*), but, if the decision in *Reg.* v. *Barrow* is good law, this conviction cannot be sustained. If it is not good law, still, *Reg.* v. *Dee* is not an authority upon which the conviction can be sustained, because there there was no consent at all. The offence committed here may be a good ground for dissolving the marriage, but that fact does not render the act an unlawful one; it is only the consequences of the act that were unlawful, between which and the act there is a clear distinction. The case of *Ciocci* v. *Ciocci* (1 Spring's Rep. 121) strengthens the view that the act was not unlawful, because there it was held that mere wilful risk was not sufficient to constitute legal cruelty where the disease was not in fact communicated. The conviction cannot therefore be supported on either count.

Poland for the prosecution.—The proposition that under no circumstances can a husband be guilty of rape on his wife, and the general statements made by Lord Hale, are not to be taken as law, for it is manifest that there may be circum-

stances under which a wife would have a right to resist her husband. It cannot be said that because a wife consents at her marriage she is bound to submit to have a foul disease communicated to her where she knows that by having connection with her husband such disease will be communicated. In *Popkin* v. *Popkin* (1 Haggs. Eccl. Rep. 765, n.) Lord Stowell, when Sir William Scott, said that a husband had no right to endanger the health of his wife by his act. The first proposition, that what was done does not fall under 24 & 25 Vict. c. 100, s. 20, because it was a lawful act, cannot be supported. The act of connection was lawful, no doubt, but the act of poisoning was unlawful, and there were therefore two acts, to one of which consent was given, but not to the other. With regard to the second count, that there was no assault, the answer is the same; there was no consent to the act of poisoning, and therefore there was an assault. If a surgeon proposed to inject morphia into a patient, and upon the patient consenting injected with the morphia an irritant poison, it could not be said that because the patient consented to the one he consented to the other. In *Reg.* v. *Bennett* (*ubi sup.*) it was held that there was no rape because the girl consented to sleep with the prisoner, but it was held that there was an indecent assault, and that case was followed in *Reg.* v. *Sinclair* (*ubi sup.*). So far as this country is concerned, the two cases have never been questioned; and though the majority of the court in Ireland in *Hegarty* v. *Shine* (*ubi sup.*) disagreed with them, they were approved of by May, L.C.J.; and it was not necessary for the court to decide upon the ground of the fraud vitiating the consent, because there was clearly no cause of action, as the contract was based on an illegal consideration. The fact that the disease might not have been communicated does not render the act any less unlawful than the fact that a man took up an unloaded gun in the belief it was loaded for the purpose of shooting at another, would prevent his act from being unlawful. He would have the benefit of the gun not having been loaded, but that would not have saved him had the gun been loaded. The moment the prisoner put his hand on his wife in order to have connection with her he committed an assault, and her subsequent consent did not alter the character of the assault. Under sect. 20 the crime is complete without there being an assault: (*Reg.* v. *Taylor*, 1 C. L. R. 194.) *Reg.* v. *Barrow* (*ubi sup.*) is not good law. He also cited

Reg. v. *Flattery* (*ubi sup.*);
Rex v. *Robinski*, 1 Mood. C. C. 19;
Reg. v. *Case*, 1 Den. C. C. 580;
Rex v. *Jackson*, Russ. & Ry. 487;
Reg. v. *Saunders*, 8 C. & P. 265;
Reg. v. *Williams*, 8 C. & P. 286;
Reg. v. *Clark*, 6 Cox C. C. 412; 24 L. J. 25, M. C.; Dears. C. C. 397;
Reg. v. *Young*, 14 Cox C. C. 114;
Reg. v. *Dee* (*ubi sup.*).

Fulton in reply.—There were not two acts. I do not say that the consequences of the prisoner's acts were lawful because his act was lawful. I say that there was only one act. In all the cases against me the consent was to a perfectly different act from that in respect of which the prisoner was convicted.

Cur. adv. vult.

Nov. 10.—The Court delivered the following judgments, of which the judgments of Wills, Smith, Stephen, Hawkins, Field, JJ. and Pollock, B. were written. Huddleston, B. and Smith and Grantham, JJ. agreed with the judgment of Stephen, J.; Day, J. agreed with the judgment of Hawkins, J.; and Charles, J. agreed with the judgment of Field, J. The result being that Lord Coleridge, C.J., Pollock and Huddleston, BB., Manisty, Stephen, Mathew, Smith, Wills, and Grantham, JJ. were against the conviction, while Field, Hawkins, Day, and Charles, JJ. supported it.

WILLS, J. read the following judgment:—The prisoner in this case has been convicted (1) of "an assault" upon his wife, "occasioning actual bodily harm," under sect. 24 & 25 Vict. c. 100, s. 47; and (2) of "unlawfully and maliciously inflicting" upon her "grievous bodily harm" under sect. 20 of the same statute. The facts are that he was, to his knowledge, suffering from gonorrhœa; that he had marital intercourse with his wife without informing her of the fact; that he infected her, and that from such infection she suffered grievous bodily harm. The question is, whether he was rightly convicted upon either count. First, was he guilty of an assault? In support of a conviction it is urged that even a married woman is under no obligation to consent to intercourse with a diseased husband; that had the wife known that her husband was diseased she would not have consented; that the husband was guilty of a fraud in concealing the fact of his illness; that her consent was therefore obtained by fraud and was therefore no consent at all, and, as the act of coition would imply an assault if done without consent, he can be convicted. This reasoning seems to me eminently unsatisfactory. That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent. In respect of a contract fraud does not destroy the consent; it only makes it revocable. Money or goods obtained by false pretences still become the property of the fraudulent obtainer unless and until the contract is revoked by the person defrauded, and it has never been held that, as far as regards the application of the criminal law, the repudiation of the contract had a retrospective effect, or there would have been no distinction between obtaining money under false pretences and theft. A second and far more effective way of stating the argument, however, is that connection with a diseased man and connection with a sound man are things so essentially different that the wife's submission without knowledge of the facts is no consent at all. It is said that such a case rests upon the same footing with the consent to a supposed surgical operation or to connection with a man erroneously supposed to be the woman's husband. In the latter case there has been great difference of judicial opinion as to whether it did or did not amount to the crime of rape; but as it certainly would now be rape by virtue of the Criminal Law Amendment Act 1885 (48 & 49 Vict. c. 69), s. 4, I treat it as so settled. A third way of putting the case is, that inasmuch as the act done

amounts to legal cruelty according to the doctrines formerly of the Ecclesiastical Courts, and now of the Divorce Court, it cannot be said to be within the consent implied by the marital relation. These different ways of putting the argument in favour of a conviction have some important differences. According to each the consent of the marital relation does not apply to the thing done—a fact as to which there does not seem to be room for doubt, and according to each the want of it makes the transaction an assault. According to the first it is the fraudulent suppression of the truth which destroys the consent *de facto* given, a proposition involving as a necessary element in the offence the knowledge of his condition on the part of the offender. According to the second, it is the difference between the thing supposed to be done and the thing actually done that negatives the idea of consent at all, and in that view it must be immaterial whether the offender knew that he was ill or not. According to the third, his knowledge is material not on the ground of fraudulent misrepresentation, but because it is an element in legal cruelty as that term is understood in the Divorce Court. It makes a great difference upon which of these grounds a conviction is supported. Each of them covers an area vastly greater than the ground occupied by the circumstances of the present case. If the first view be correct, every man, as has been pointed out, who knowingly gives a piece of bad money to a prostitute to procure her consent to intercourse, or who seduces a woman by representing himself to be what he is not, is guilty of assault, and, as it seems to me, therefore, of rape. If the second view be correct, it applies in similar events just as much to unmarried as to married people, unless the circumstances should establish that the parties were content to take their chances as to their respective states of health; and the allegation that a man had given an assurance to a prostitute before having intercourse with her that he was sound when he was not so in fact, might be a ground for putting him upon a trial for rape. If the third view be correct, it places the married man, in the eye of the criminal law, in a much worse position than the unmarried, and makes him guilty of an assault, and possibly of rape, when an unmarried man would not be liable to the same consequences. It may be said that, from the moral point of view, his case is the worse; but there are two sides to this as to most other questions. The man who goes out of his way to seek intercourse under such circumstances—and, be it remembered that the hypothesis I am now dealing with assumes knowledge of his condition on the part of the man—is without excuse. There may be many excuses for the married man suggested by the modes of life with which poverty and overcrowding have to do. We are thus introduced, as it seems to me, to a set of very subtle metaphysical questions. If we are invited to apply the analogy of the cases in which a man has procured intercourse by personating a husband, or by representing that he was performing a surgical operation, we have to ask ourselves whether the procurement of intercourse, by suppressing the fact that the man is diseased, is more nearly allied to the procurement of intercourse by misrepresentation as to who the man is, or as to what is being done, or to misrepresentations of a thousand kinds in respect of which it has never yet occurred to anyone to suggest that intercourse so procured was an assault or a rape. There are plenty of such instances in which the knowledge of the truth would have made the victim as ready to accept the embraces of a man stricken with small-pox or leprosy. Take, for example, the case of a man without a single good quality, a gaol bird, heartless, mean, and cruel, without the smallest intention of doing anything but possessing himself of the person of his victim, but successfully representing himself as a man of good family and connections prevented by some temporary obstacle from contracting an immediate marriage, and with conscious hypocrisy acting the part of a devoted lover, and in this fashion, or perhaps under the guise of affected religious fervour, effecting the ruin of his victim. In all that induces consent there is not less difference between the man to whom the woman supposes she is yielding herself and the man by whom she is really betrayed, than there is between the man bodily sound and the man afflicted with a contagious disease. Is there to be a distinction in this respect between an act of intercourse with a wife who on this special occasion would have had a right to refuse her consent, and certainly would have refused it had she known the truth, and the intercourse taking place under the general consent inferred from a bigamous marriage obtained by the false representation that the man was capable of contracting a legal marriage? In such a case the man can give no title of wife to the woman whose person he obtains by the false representation that he is unmarried, and by a ceremony which, under the circumstances, is absolutely void. Where is the difference between consent obtained by the suppression of the fact that the act of intercourse may produce a foul disease, and consent obtained by the suppression of the fact that it will certainly make the woman a concubine, and while destroying her status as a virgin withhold from her the title and rights of a wife? Where is the distinction between the mistake of fact which induces the woman to consent to intercourse with a man supposed to be sound in body, but not really so, and the mistake of fact which induces her to consent to intercourse with a man whom she believes to be her lawful husband but who is none? Many women would think that, of two cruel wrongs, the bigamist had committed the worse. These are but specimens of the questions which must be faced before the circumstances of the present case can be pronounced to constitute an assault; and such considerations lead one to pause on the threshold and inquire whether the enactment under consideration could really have been intended to apply to circumstances so completely removed from those which are usually understood when an assault is spoken of, or to deal with matters of any kind involving the sexual relation or act. The description of the offence constituted by sect. 47 is as follows: "Whoever shall be convicted of an assault occasioning actual bodily harm." The section is the last of a group of twelve headed "Assaults." None of them except sect. 43 implies that any distinction between males and females is thought of, and that section points to nothing of a sexual character. It merely provides that in cases of assaults upon males under fourteen and

upon females generally, if the assault or battery is of such an aggravated character that it cannot in the opinion of the justices be sufficiently punished as a common assault or battery, it shall be lawful for them to inflict a heavier punishment. Indecent assaults, as such, upon females are dealt with by sect. 52, and upon males by sect. 62, and there is therefore no ground for supposing that anything specially between the sexes is pointed at either by this section, or by any of those in the group to which it belongs. The next group of eight sections (48-55) is headed "Rape, abduction, or defilement of women," and deals specially with sexual crimes. Surely this was the place in which to find an enactment dealing with the very peculiar circumstances now before us, and it cannot really have been intended that they should be embraced by a section whose terms are applicable to, and as it seems to me satisfied by, the class of cases which would naturally occur to one's mind, those of direct violence. The worst of the contagious diseases of this class has, I believe, been known in this country for close upon four centuries. The circumstances which have happened in this case cannot have been of infrequent occurrence during that interval, and cannot have failed justly to give rise to the bitterest resentment. It seems to my mind a very cogent argument against the conviction that, if the view of the law upon which it is founded be correct, thousands of offending husbands, and as I think also of offending wives, must have rendered themselves amenable to the criminal law; and yet it was reserved for the year 1866, when *Reg.* v. *Bennett* (4 F. & F. 1105) was decided, to discover that such transgressors might have been indicted and criminally dealt with during all that long period. It is true that women take a different place in social position, and have by Act of Parliament many rights and by common usage much social liberty which no one would have claimed for them centuries ago. This fact, however, seems to me a strangely insufficient reason for a new reading of the criminal law fraught with consequences which no one can deny to be of a very serious and widespread character. The principle upon which a conviction in this case must be upheld will or will not apply to the intercourse of unmarried, as well as of married, men and women, according to the ground or grounds selected upon which to justify it. If it is based upon the notion of cruelty as understood in the Divorce Court, the case of the unmarried man and woman falls without its purview. If suppression of the truth be a material element in the inquiry, actual misrepresentation on the subject of health would put an unmarried man or woman in the same position as the married man or woman who conceals that fact against which the married state ought to be a sufficient guarantee. I intentionally refer to women as well as men, for it is a great mistake to look at questions of this kind as if sexual faults and transgressions were all on the side of one sex. The unmarried woman who solicits and tempts a perhaps reluctant man to intercourse which he would avoid like death itself if he knew the truth as to her health, must surely, under some circumstances at least, come under the same criminal liability as the man. If, again, the conviction be upheld on the ground of the difference between the thing consented to and the thing done, the principle will extend to many, perhaps most, cases of seduction and to other forms of illicit intercourse, including at least theoretically the case of prostitution, and if such difference be the true ground upon which to base a confirmation of the conviction, knowledge of his or her condition on the part of the person affected is immaterial. It is the knowledge or want of knowledge on the part of the person who suffers from contagion alone that is the material element. Surely these considerations point to the conclusion that a wide door will be opened to inquiries not of a wholesome kind, in which the difficulties in the way of arriving at truth are often enormous, and in which the danger of going wrong is as great as it is by people in general inadequately appreciated. A new field of extortion may be developed, and very possibly a fresh illustration afforded of the futility of trying to teach morals by the application of the criminal law to cases occupying the doubtful ground between immorality and crime, and of the dangers which always beset such attempts. Of course, if by legislation such cases should be brought within the criminal law, all we shall have to do will be to face the difficulties and do our best to administer the law. It seems to me, however, that such an extension of the criminal law to a vast class of cases with which it has never yet professed to deal is a matter for the Legislature and the Legislature only. I understand the process of expansion by which the doctrines of the common law are properly made by judicial construction to apply to altered modes of life and to new circumstances and results thus brought about which would have startled our ancestors could they have foreseen them. I do not understand such a process and I do not think it legitimate, when every fact and every circumstance which goes to constitute the alleged offence is identical with what it has been for many hundreds of years past. Whether further legislation in this direction is desirable is a question for legislators rather than lawyers, and the only remark that I desire to make upon this subject is that, apart from cases of actual violence, and of children so young that the very fact of touching them in the way of sexual relation may fairly be treated as a crime, the mysteries of sexual impulses and intercourse are well nigh insoluble, and the difficulty of arriving at the truth in the case of imputed misconduct enormous; and I doubt whether they can be thoroughly appreciated without the experience gained by trying cases of intercourse with girls near the age of sixteen, and they certainly suggest the necessity of the utmost care in dealing by way of legislation with the subject under discussion. If intercourse under the circumstances now in question constitute an assault on the part of the man, it must constitute rape, unless, indeed, as between married persons rape is impossible—a proposition to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority. As between unmarried people this qualification will not apply. I cannot understand why, as a general rule, if intercourse be an assault, it should not be a rape. To separate the act into two portions, as was suggested in one of the Irish cases, and to say that there was consent to so much of it as did not consist in the administration of an animal poison, seems to me a subtlety of an extreme kind. There is, under

the circumstances, just as much and just as little consent to one part of the transaction as to the rest of it. No one can doubt that in this case, had the truth been known, there would have been no consent to even a distant approach to it. I greatly prefer the reasoning of those who say that, because the consent was not to the act done, the thing done is an assault. If an assault, a rape also, as it appears to me. I am well aware of the respect due to the opinion of the very learned judges from whom I differ; but I cannot help saying that to me it seems a strange misapplication of language to call such a deed as that under consideration either a rape or an assault. In other words, it is, roughly speaking, where the woman does not intend that the sexual act shall be done upon her either at all, or, what is pretty much the same thing, by the particular individual doing it, and an assault which includes penetration does not seem to me, under such circumstances, to be anything but rape. Of course, the thing done in the present case is wicked and cruel enough. No one wishes to say a word in palliation of it. But that seems to me to be no reason for describing it as something else than it is, in order to bring within the criminal law an act which, up to a very recent time, no one ever thought was within it. If coition, under the circumstances in question, be an assault, and if the reason why it is an assault depends in any degree upon the fact that consent would have been withheld if the truth had been known, it cannot the less be an assault because no mischief ensues to the woman, nor, indeed, where it is merely uncertain whether the man be infected or not. For had he disclosed to the woman that there might be the peril in question, she would, in most cases other than that of mere prostitution, have refused her consent, and it is, I should hope, equally true that a married woman, no less than an unmarried woman, would be justified in such a refusal. In all such cases, therefore, apart from the suggested impossibility of rape upon a wife, rape must be committed, and a great many rapes must be constantly taking place without either of the parties having the least idea of the fact. The question raised is of very wide application. It does not end with the particular contagion under consideration, but embraces contagion communicated by persons having small-pox or scarlet fever, or other like diseases quite free from the sexual element, and whilst so afflicted coming into a personal contact with others which would certainly have been against the will of those touched had they known the truth. This species of assault, if assault it be, must have been of much longer standing than the four centuries I have alluded to, and it involves no considerations depending upon the social status of women, yet no one has ever been prosecuted for an assault so constituted. But upon this point I desire only to express my concurrence in the observations of my brother Stephen, which I have had the opportunity of reading. I wish to observe that, if an assault can be committed by coition to which consent has been procured by suppression of the truth or misrepresentation as to the state of health of one of the parties, questions of the kind I have indicated will be triable, may be tried now at petty sessions. The observation is not, of course, conclusive; but it is well to appreciate whither a conviction in the present case must lead us, not only as regards the subject-matter of the criminal law, but as to the tribunals which will have to administer it. When the Act of 1861 (24 & 25 Vict. c. 100) was passed, it had never occurred to any human being, so far as our legal history affords any clue, that the circumstances now under consideration constituted an assault. The term is as old as any in our law, but it had never been so applied. The doctrine owes its origin to the remarks of Willes, J., at the Taunton Assizes, held in 1866, and reported in *Reg.* v. *Bennett* (4 F. & F. 1105). It was pointed out in the Irish case of *Hegarty* v. *Shine* (Ir. L. Rep. 2 C. L. 273, C. A.; Ir. L. Rep. 4 C. L. 288), that the conviction might be upheld, on the ground that the girl was, as she alleged, asleep when intercourse took place, and therefore gave no consent. In spite of all my respect for everything that fell from the lips of that very great lawyer, I am compelled to think that it was a case in which he strained the law for the purpose of punishing a great wrong, and I confess myself unable to follow his view, that the thing done in that case might be an assault and yet not a rape. Were it, however, possible that the mere words of the section would apply to the transaction in question, and that it were capable of being described as an assault, I am still of opinion that the context shows that sexual crimes were intended to be dealt with as a class by themselves, the only rational way of legislating upon such a subject, and if the letter of the section could be satisfied by the present circumstances, there never was a case to which the maxim *Qui hæret in literâ hæret in cortice* more emphatically applied. I proceed to inquire whether the conviction under sect. 20 can be supported. That section says, "Whoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, with or without any weapon or instrument, shall be guilty of a misdemeanour, &c." Whilst of opinion that it is not every breach of moral duty that will satisfy the term "unlawfully," I am clearly of opinion that an act which would give a right to a judicial separation is abundantly sufficient to answer to it. I am also of opinion that an unlawful act done wilfully and intentionally, and without any circumstances to justify it and take away its *primâ facie* character of unlawfulness, is malicious within the meaning of the section. But I think the section clearly points to the infliction of direct and intentional violence, whether with a weapon, or the fist, or the foot, or any other part of the person, or in any other way not involving the use of a weapon, as, for instance, by creating a panic at a theatre whereby people trampled upon one another: (*Reg.* v. *Martin*, 8 Q. B. Div. 54.) The prisoner in that case did what was certain to make people crush one another, perhaps to death, and the grievous bodily harm was as truly inflicted by him as if he had hurled a stone at somebody's head. Take also the illustration of my brother Stephen, of a man who digs a pit for another to fall into, whereby that other is injured. I do not think this section was ever intended to apply to the administration of poison, and most of the arguments I have used to show that sexual offences were not intended to be dealt with in sect. 47 apply with equal force to sect. 20. The Court for the Consideration of Crown Cases Reserved, in

Reg. v. *Taylor* (L. Rep. 1 C. C. R. 194), decided that n the offence of "unlawfully and maliciously nflicting grievous bodily harm" an assault is necessarily included. So far as that decision is concerned the same question may be said to arise under sect. 20 as under sect. 47. But I think the argument is even stronger here, for the context seems to me to show that direct personal violence of some kind was intended; so that, even if the constructive assault contended for by those who support a conviction under sect. 47 were established, a conviction under this section would still be wrong. I am of opinion therefore that the conviction should be quashed.

SMITH, J. read the following judgment:—In my judgment this conviction cannot be supported. I have had the opportunity of reading the judgment of my brother Stephen, and I agree in it and in his reasons. There is one point I wish to add, which also appears to me to show that this conviction is erroneous. At marriage the wife consents to the husband's exercising the marital right. The consent then given is not confined to a husband when sane in body, for I suppose no one would assert that a husband was guilty of an offence because he exercised such right when afflicted with some complaint of which he was then ignorant. Until the consent given at marriage be revoked, how can it be said that the husband in exercising his marital right has assaulted his wife? In the present case, at the time the incriminatory act was committed, the consent given at marriage stood unrevoked. Then how is it an assault? The utmost the Crown can say is, that the wife would have withdrawn her consent if she had known what her husband knew; or, in other words, that the husband is guilty of a crime, viz., an assault, because he did not inform the wife of what he then knew. In my judgment, in this case the consent given at marriage still existing and unrevoked, the prisoner has not assaulted his wife. As to the unlawfully and maliciously inflicting grievous bodily harm, it appears to me that this offence cannot be committed unless an assault has in fact been committed, and indeed this has been so held; and, inasmuch as in my judgment in this case no assault has been committed, the graver offence equally has not been committed.

MATHEW, J.—I am of opinion that this conviction must be quashed, and agree with the judgment of my brother Stephen.

STEPHEN, J. read the following judgment:—The question in this case is, whether a man who knows that he has gonorrhœa, and who by having connection with his wife who does not know it infects her, is or is not guilty of an offence either under sect. 20 of 24 & 25 Vict. c. 100, or under sect. 47 of the same Act. Sect. 20 punishes everyone who "unlawfully and maliciously inflicts any grievous bodily harm upon any other person." Sect. 47 punishes everyone who is convicted of "an assault occasioning actual bodily harm to any person." Before discussing in detail the meaning of these words I will make one general observation. The present case is the first, so far as appears, in which any person has ever been indicted, or, at all events convicted, of any offence whatever for infecting another with a disease of any kind, although diseases of this kind are unhappily common, and legislation in reference to them has taken place. The legislation in question is contained in 29 Vict. c. 35, and some other Acts which amend it. These Acts were repealed in 1886. They authorised the detention in hospitals of diseased women under certain circumstances, but they contained nothing to suggest that the communication of the disease was in itself a crime. If such had been the case the Acts in question would probably have been made supplementary to the ordinary administration of criminal justice. If the present conviction is right it must be so on some principle which would apply to women as well as to men, and to unmarried women as well as to wives. Sect. 47 indeed could hardly apply to women, but sect. 20 would make no distinction between the sexes. It is also, I think, clear that, unless some distinction can be pointed out which does not occur to me, the sections must be held to apply, not only to venereal diseases, but to infection of every kind which is in fact communicated by one person to another by any act likely to produce it. A man who, knowing that he has scarlet fever or small-pox, shakes hands with a friend may be said to fall under sect. 20 or sect. 47 as much as the prisoner in this case. To seize a man's hand without his consent is an assault; but no one would consent to such a grasp if he knew that he risked small-pox by it, and if consent in all cases is rendered void by fraud, including suppression of the truth, such a gesture would be an assault occasioning actual bodily harm as much as the conduct of the prisoner in this case. Not only is there no general principle which makes the communication of infection criminal, but such authority as exists is opposed to such a doctrine in relation to any disease. The following are the authorities on this subject. By 1 Jac. 1, c. 31, s. 7, it was made felony for any person who had, under other provisions of the Act, been commanded to keep his house "to go abroad and converse in company having any infectious sore upon him uncured." Upon this Hale (1 P. C. 432) remarks that the statute is now discontinued, and he adds: "But what if such person goes abroad to the intent to infect another, and another is thereby infected and dies? Whether this be not murder by the common law might be a question; but if no such intention evidently appears, though *de facto* by his conversation another is infected, it is no felony by the common law, though it be a great misdemeanour, and the reasons are: (1) Because it is hard to discern whether the infection arises from the party or from the contagion of the air. It is God's arrow, &c. (2) Nature prompts every man in what condition soever to preserve himself, which cannot be well without mutual conversation. (3) Contagious diseases, as plague, pestilential fevers, small-pox, &c., are common among mankind by the visitation of God, and the extension of capital punishments in cases of this nature would multiply severe punishments too far and give too great latitude and loose to severe punishments." Some of the expressions in this passage would scarcely be employed now, but it may be taken as a caution against wide and uncertain extensions of the criminal law, and as a distinct proof that Hale did not regard the transmission of disease as an ordinary case of the infliction of bodily harm. His

statement that, though not a felony, it would be a great misdemeanour at common law to infect another unintentionally by going about with a plague sore may at first sight appear to favour the maintenance of the conviction in this place, but it is I think explained, and its generality is limited, by *Reg.* v. *Vantandillo* (4 M. & S. 73). It was held in that case to be an indictable misdemeanour to carry a child which had the small-pox along a street, and the passage from Lord Hale was the principal authority relied upon. The offence referred to by Lord Hale is therefore the offence of committing a public nuisance, and his authority is opposed rather than favourable to the notion that to infect another with a contagious disease is in the nature of an offence against the person. The provisions of the Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 120, 130, and in particular sect. 126, treat offences by spreading infection in the same way. By that section an infected person who without proper precaution exposes himself in any street, &c. is liable to a penalty of 5*l*. These considerations make it antecedently improbable that the abominable conduct of which the prisoner has been convicted should be in the strict legal sense of the word a crime. I now come to the construction of the precise words of the statute. Sect. 20 punishes "every one who unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument." It is said upon sect. 20 that the prisoner did not act "unlawfully," because he had by law a right to have intercourse with his wife. It is said in answer to this that he did act unlawfully because his right ceased when he knew himself to be suffering under the disease which he communicated, and because the word "unlawfully" must here be construed to mean "unlawfully" in the wide general sense in which the word is used with reference to acts which if done by conspirators are indictable, though not if they are done by individuals. This general sense may, I think, be said to be "immoral and mischievous to the public." I do not agree with the doctrine that the word "unlawfully" is used here in this wide sense. The use of the word in relation to conspiracy appears to me to be exceptional. I think that no act can for this purpose be regarded as unlawful merely because it is immoral. It must I think be forbidden by some definite law; but I pass this over, for I think that in this case the word "unlawfully" applies because the act done is forbidden by the law relating to marriage according to which it constitutes cruelty, and is as such a cause for a judicial separation, whilst it is strong evidence of adultery which coupled with cruelty would be a ground for a complete divorce. The word "maliciously" obviously applies. But is there an "infliction of bodily harm, either with or without any weapon or instrument?" I think there is not, for the following reasons: The words appear to me to mean the direct causing of some grievous injury to the body itself with a weapon, as by a cut with a knife, or without a weapon as by a blow with the fist or by pushing a person down. Indeed, though the word "assault" is not used in the section, I think the words imply an assault and battery of which a wound or grievous bodily harm is the manifest immediate and obvious result. This is supported by *Reg.* v. *Taylor* (L. Rep. 1 C. C. R. 194), in 1869, in which it was held that a prisoner could upon an indictment under that section be convicted of a common assault because each offence, "wounding" and "inflicting grievous bodily harm," "necessarily includes an assault," though the word does not occur in the section. It is further illustrated by reference to the 14 & 15 Vict. c. 19, s. 4, of which the present section is a re-enactment. It begins with the preamble: "And whereas it is expedient to make further provision for the punishment of aggravated assaults," and then proceeds in the words of the present section with a trifling and unimportant difference in their arrangement. Infection by the application of an animal poison appears to me to be of a different character from an assault. The administration of poison is dealt with by sect. 24, which would be superfluous if poisoning were an "infliction of grievous bodily harm either with or without a weapon or instrument." The one act differs from the other in the immediate and necessary connection between a cut or a blow and the wound or harm inflicted, and the uncertain and delayed operation of the act by which infection is communicated. If a man by a grasp of the hand infects another with small-pox it is impossible to trace out in detail the connection between the act and the disease, and it would, I think, be an unnatural use of language to say that a man by such an act "inflicted" small-pox on another. It would be wrong in interpreting an Act of Parliament to lay much stress on etymology, but I may just observe that "inflict" is derived from "infligo," to which in Facciolati's Lexicon three Italian and three Latin equivalents are given, all meaning "to strike," viz., *dare*, *ferire*, and *percustere* in Italian, and *infergo*, *impingo*, and *percutio* in Latin. There is authority for the proposition that poisoning is not an assault, though in the case of *Reg.* v. *Button* (8 C. & P. 660), in 1838, Serjeant Arabin, after consulting the Recorder of London, Mr. Law, held that it was. In *Reg.* v. *Dilworth* (2 Mo. & Ro. 531), in 1843, a man was indicted for administering poison with intent to murder, and it was suggested that if the intent was not made out the prisoner might be convicted under 1 Vict. c. 85 of a common assault, as it was involved in the charge, and *Reg.* v. *Button* (8 C. & P. 660) was cited, but Coltman, J. said that he disagreed with *Reg.* v. *Button* (*ubi sup.*), and that the prisoner must either be convicted or acquitted of the whole charge. In *Reg.* v. *Hanson* (2 C. & K. 912), in 1849, Vaughan Williams, J., after consulting Cresswell, J., held that the administration of cantharides was neither a common assault nor a common law misdemeanour; and *Reg.* v. *Walkden* (1 Cox C. C. 282) was a decision to the same effect by Parke, B. Upon these grounds I am of opinion that sect. 20 does not apply to the case. Is the case, then, within sect. 47 as "an assault occasioning actual bodily harm?" The question here is whether there is an assault. It is said there is none because the woman consented, and to this it is replied that fraud vitiates consent, and that the prisoner's silence was a fraud. Apart altogether from this question I think that the act of infection is not an assault at all, for the reasons already given. Infection is a kind of poisoning. It is the application of an animal poison, and poisoning, as already shown, is not an assault.

Apart, however, from this, is the man's concealment of the fact that he was infected such a fraud as vitiated his wife's consent to his marital rights, and converted the act of connection into an assault? It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the words, and without qualification. It is too short to be true as a mathematical formula is true. If we apply it in that sense to the present case it is difficult to say that Clarence was not guilty of rape, for the definition of rape is having connection with a woman without her consent, and if fraud vitiates consent, every case in which a man infects a woman or commits bigamy, the second wife being ignorant of the first marriage, is also a case of rape. Many seductions would be rapes, and so might acts of prostitution procured by fraud, as for instance by promises not intended to be fulfilled. These illustrations appear to show clearly that the maxim that fraud vitiates consent is too general to be applied to these matters as if it were absolutely true. I do not at all deny that in some cases it applies, though it is often used with reference to cases which do not fall within it. For instance, it has nothing to do with such cases as assaults on young children. A young child who submits to an indecent act no more consents to it than a sleeping or unconscious woman. The child merely submits without consenting. The only cases in which fraud indisputably vitiates consent in these matters are cases of fraud as to the nature of the act done. As to fraud, as to the identity of the person by whom it is done, the law is not quite clear. In *Reg.* v. *Flattery* (2 Q. B. Div. 410) in which consent was obtained by representing the act as a surgical operation, the prisoner was held to be guilty of rape. In the case where consent was obtained by the personation of a husband, there was before the passing of the Criminal Law Amendment Act of 1885 a conflict of authority. The last decision in England (*Reg.* v. *Barrow*, L. Rep. 1 C. C. R. 158) decided that the act was not rape, and *Reg.* v. *Dee* (14 Ir. L. R. C. L. 468), decided in Ireland in 1884, decided that it was. The Criminal Law Amendment Act of 1885 "declared and enacted" that thenceforth it should be deemed to be rape, thus favouring the view taken in *Reg.* v. *Dee* (*ubi sup.*). I do not propose to examine in detail the controversies connected with these cases. The judgments in the case of *Reg.* v. *Dee* (*ubi sup.*) examine all of them minutely, and I think they justify, the observation that the only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape, are frauds as to the nature of the act itself, or as to the identity of the person who does the act. There is abundant authority to show that such frauds as these vitiate consent both in the case of rape and in the case of indecent assault. I should myself prefer to say that consent in such cases does not exist at all, because the act consented to is not the act done. Consent to a surgical operation or examination is not a consent to sexual connection or indecent behaviour. Consent to connection with a husband is not consent to adultery. I do not think that the maxim that fraud vitiates consent can be carried further than this in criminal matters. It is commonly applied to cases of contract, because in all cases of contract the evidence of a consent not procured by force or fraud is essential, but even in these cases care in the application of the maxim is required, because in some instances suppression of the truth operates as fraud, whereas in others at least a suggestion of falsehood is required. The act of intercourse between a man and a woman cannot in any case be regarded as the performance of a contract. In the case of married people that act is part of a great relation based upon the greatest of all contracts, but standing on a footing peculiar to itself. In all other cases the immorality of the act is inconsistent with any contract relating to it. Thus in no case can considerations relating to contract apply to it. The effect of fraud upon a contract is to render it voidable at the option of the party defrauded. This clearly cannot apply to sexual intercourse. It is either criminal if the woman does not consent, or if her consent is obtained by certain kinds of fraud, or it is, as this was, a breach of matrimonial duty, or it is not criminal at all. The woman's consent here was as full and conscious as consent could be. It was not obtained by any fraud, either as to the nature of the act or as to the identity of the agent. The injury done was done by a suppression of the truth. It appears to me to be an abuse of language to describe such an act as an assault. It is not stated at what interval after the 20th Dec. the disease showed itself, but there must have been some interval during which it was uncertain whether infection had been communicated or not. During this interval was the man guilty or not? If he was, it seems extraordinary to say that he had committed an assault from which an event which was not in his power could set him free. If he was not, it seems to me equally strange to say that he could be deprived of his innocence by such an event. In some instances no doubt such an interval might elapse. If a man laid a trap for another, into which he fell after an interval, the man who laid it would, during the interval, be guilty of an attempt to assault, and of an actual assault as soon as the man fell in. In the case of death inflicted by violence, the criminal might at first be guilty of an assault or an unlawful wounding, and his crime would become murder or manslaughter on the death of the person wounded; but in the case of an attempt the intention to consummate the crime exists from the first, and in the case of murder the act which ultimately becomes murder is in itself a crime whether death ensues or not. In this case there was no intention, and therefore no attempt, to infect, and it seems anomalous to make a consequence, which, though highly probable, was neither intended nor necessary, relate back on its occurrence in such a way as to make an act not punishable itself into a crime. Two authorities were quoted to show that such an act as this is a crime. They are *Reg.* v. *Bennett* (4 F. & F. 1105), in which Willes, J. decided, in 1860, that a man who infected his niece, a girl of thirteen, might be convicted of an indecent assault, though she consented to sleep with him; and *Reg.* v. *Sinclair* (13 Cox C. C. 28), in which this decision was followed, in 1867, by Shee, J. The case of *Reg.* v. *Bennett* (*ubi sup.*) was disapproved of in *Hegarty* v. *Shine* (Ir. L. Rep. 2 C. L. 273; C. A. 4 C. L. 228), though, as the Irish courts point out, the

verdict may possibly have been justified by the facts as proved, the girl having sworn that she was asleep and could not say what happened to her. If this was believed there was evidence of indecent assault at least, if not of rape. *Reg.* v. *Sinclair* (*ubi sup.*) was decided, on the authority of *Reg.* v. *Bennett* (*ubi sup.*). For these reasons I think there was no assault in the present case, and that therefore it does not fall within sect. 20. I wish to observe, on a matter personal to myself, that I was quoted as having said in my Digest of the Criminal Law that I thought a husband might, under certain circumstances, be indicted for rape on his wife. I did say so in the first edition of that work, but on referring to the last edition (p. 124, note) it will be found that that statement was withdrawn. I think that this conviction should be quashed. No one can doubt the abominable nature of the prisoner's conduct, but, if it is to be treated as a crime, it must, I think, be done upon express statutory authority. The whole matter is surrounded with difficulties with which the Legislature alone is competent to deal, and to which it would be out of place to refer. I am informed that my brother Grantham agrees with this judgment.

HAWKINS, J. read the following judgment:—I am of opinion that the prisoner was rightly convicted upon both counts of the indictment. The first count was framed under sect. 20 of 24 & 25 Vict. c. 100, and charged the prisoner with "unlawfully and maliciously inflicting grievous bodily harm" upon Selina Clarence. The second count was framed under sect. 47 of the same Act, and charged him with an "assault" upon the said Selina Clarence, "occasioning" her "actual bodily harm." At the time of the committing of the offences charged Selina Clarence was and still is the wife of the prisoner. At that time the prisoner was suffering from gonorrhœa, as he knew, but his wife was ignorant of the fact. In this condition of things the prisoner had sexual intercourse with his wife, and in so doing communicated to her his disease, and thereby caused her grievous bodily harm. It must also be taken as a fact that, had the prisoner's wife known that he was so suffering, she would have refused to submit to such intercourse. On the prisoner's behalf it was contended that the conviction was wrong upon several grounds: first, that the injury caused to the wife was the result of a lawful act—viz., the sexual communion of a husband with his wife; secondly, that the charge in the first count involved, and that in the second count was based on, an assault, and that no assault could be committed by a husband in merely exercising his marital right upon the person of his wife; and, thirdly, that the sections of the statute under which the indictment was framed had no application to such circumstances as those above mentioned. About the unlawfulness and maliciousness of the prisoner's conduct it seems to me impossible to raise a doubt. It has long been established by authority that, if a husband knowingly communicates to his wife a venereal disease, such misconduct amounts to legal cruelty, and is ground for judicial separation; and, in the absence of evidence to the contrary, it may be presumed that a man suffering under venereal disease knows it, and knows also that, if he has communion with his wife, he will in all human probability communicate his malady to her: (see *Brown* v. *Brown*, L. Rep. 1 P. & D. 46.) It is equally clear that wilfully to do an unlawful act to the prejudice of another is to do it maliciously. We have, then, these elements established, grievous bodily harm unlawfully and maliciously caused. To complete the offence, according to the language of sect. 20, it is only necessary to prove that such injury was "inflicted" by the prisoner within the meaning of that word as used in sect. 20. For the prisoner it was contended that bodily harm cannot legally be said to be "inflicted," unless it has been brought about by some act amounting to an assault, and that there was no evidence of any assault in the present case. I think both these contentions untenable, and that the first count may be supported, even assuming no assault to have been proved. I think moreover that an assault was proved. I will, however, defer what I have to say upon that point until I come to deal with the second count. With reference to the question, whether it was necessary to prove an assault in order to establish the first count, it may be, though I do not say it is so, that some support is afforded to the argument of the prisoner's counsel if the word "inflict" is read only according to its strict etymological interpretation. I am aware also that the argument has the support of the dictum of Kelly, C.B., in delivering the judgment of the court in *Reg.* v. *Taylor* (L. Rep. 1 C. C. R. 195). In that case the prisoner was indicted in one count for unlawfully wounding, and another for "unlawfully and maliciously inflicting grievous bodily harm." The jury found him guilty of "an assault," and the conviction was affirmed, the Lord Chief Baron saying, "each of the counts is for an offence which necessarily includes an assault." With reference to this dictum it will be seen at a glance that it was not at all essential for the judgment, inasmuch as the conviction for an assault might be supported if either count involved an assault, which the count for wounding most unquestionably did. I feel, therefore, at liberty respectfully to dissent from that dictum so far as it applies to the count for "inflicting grievous bodily injury," and I do so with the more confidence because I do not find it supported by any later authority. In my opinion the Legislature, in framing the various sections of the statute already and hereafter referred to, used the words "inflict," "cause," and "occasion" as synonymous terms for the following among other reasons. Let me begin by calling attention to the language of the 18th section, which runs thus: "Whosoever shall unlawfully and maliciously by any means whatsoever wound or 'cause' any grievous bodily harm to any person,' &c., with intent, &c., shall be guilty of felony." If the prisoner had been indicted under this section, could anybody doubt that, upon proof of his intention to cause the grievous bodily harm he in fact occasioned, he would have fallen within not only the spirit but the precise anguage of the section according to the strictest interpretation which could be applied to it? I next ask myself, what was the object of the 20th section? Clearly it was to provide for cases in which the grievous bodily harm mentioned in sect. 18, though unlawfully and maliciously caused, was unaccompanied by the felonious intent, which is the aggravating feature of the felony created by that section, and accord-

ingly sect. 30 made such last-mentioned offence a misdemeanour only, by enacting as follows: "Whosoever shall unlawfully or maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour." Surely the object of these two sections could only have been to make the doing of grievous bodily harm with intent a felony, without intent a mere misdemeanour;" and to hold that no man could be convicted under sect. 20 without proof of an assault would practically amount to holding that maliciously to do grievous bodily harm to another without felonious intent is unpunishable unless such harm is done through the medium of an assault. It is impossible that the Legislature could have intended this. I must refer now to sect. 47, which enacts that "whosoever shall be convicted upon an indictment of an assault 'occasioning' actual bodily harm shall be liable, &c." Here it will be observed that where the Legislature intends that an assault shall be the foundation of the offence it says so in express terms. If, in using the word "inflict" in sect. 20, it had intended that it should be interpreted as "cause by means of an assault," sect. 47 would have been superfluous; for by merely substituting the word "actual" for "grievous" in sect. 20, the whole object of both sections would have been attained; for the punishment awarded in each is the same, and "actual" harm of necessity includes "grievous" harm, and if for any reason, which I am unable to discover, the Legislature had thought fit to separate the two sections, applying one to an assault causing "grievous," the other to an assault causing "actual," bodily harm, I should at least have expected it to use the same phraseology in each. If, on the other hand, it intended the 20th section to bear the construction I put upon it, I should expect to find that which I do, viz., difference in the language. As the sections now stand, construing them as I do, it looks as if the framers of the Act intended, as I think they did, that when grievous bodily harm was maliciously caused by any means, the offender should be liable to a punishment of five years' penal servitude, and that the same punishment might follow upon a conviction for occasioning any actual injury, though short of that which could be termed "grievous" if such injury was caused by an assault. I am not without authority for the view I have expressed upon this part of the case. By sect. 23 of the same Act it is enacted that "whosoever shall unlawfully, &c., administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to inflict upon any such person any grievous bodily harm, shall be guilty of felony." Now, clearly, there may be an administering or a causing of poison, &c., to be taken so as to inflict harm under that section without even the semblance of an assault. See *Reg.* v. *Dilworth and Smith* (2 M. & R. 534, per Coltman, J., and note *b* to the case.) See also *Reg.* v. *Wilson* (7 Cox C. C. 190; D. & B. C. C. 127), where, upon the trial of an indictment under 7 Will 4 & 1 Vict. c. 85, s. 6, the prisoner was charged with administering or causing to be taken by a woman a noxious drug with intent to procure her miscarriage; it was proved that the prisoner had procured the drug and given it to the woman at her own request, and she had taken it in his absence: it was held that he might be convicted of causing it to be taken. Under such circumstances, no one could say the prisoner had committed an assault in procuring and handing the drug to the woman in compliance with her request. These considerations lead me to the conclusion that the word "inflict," when used in the statute, was not intended to be construed as involving an assault, whatever may be its strict etymological interpretation, as to which I do not think it necessary to enter upon a discussion. See also *Reg.* v. *Martin* (8 Q. B. Div. 54), where the prisoner was convicted upon an indictment under sect. 20 of "inflicting grievous bodily harm" under circumstances which it would be difficult to say amounted to an assault. It is right, however, to say that the point under consideration was not raised in that case, although it is unlikely to have escaped the attention of the four astute judges by whom, with myself, that case was decided. I proceed now to consider the question whether there was in fact an assault by the prisoner on his wife occasioning her either grievous or actual bodily harm. I answer this question also in the affirmative. By the marriage contract a wife no doubt confers upon her husband an irrevocable privilege to have sexual intercourse with her during such time as the ordinary relations created by such contract subsist between them. For this reason it is that a husband cannot be convicted of a rape committed by him upon the person of his wife. But this marital privilege does not justify a husband in endangering his wife's health and causing her grievous bodily harm by exercising his marital privilege when he is suffering from venereal disorder of such a character that the natural consequence of such communion will be to communicate the disease to her. Lord Stowell, in *Popkin* v. *Popkin*, cited in *Durant* v. *Durant* (1 Hagg. Eccl. Rep. 767), said: "The husband has a right to the person of his wife, but not if her health is endangered." So, to endanger her health, and cause her to suffer from loathsome disease contracted through his own infidelity cannot, by the most liberal construction of his matrimonial privilege, be said to fall within it; and, although I can cite no direct authority upon the subject, I cannot conceive it possible seriously to doubt that a wife would be justified in resisting by all means in her power—nay, even to the death, if necessary—the sexual embraces of a husband suffering from such contagious disorder. In my judgment, wilfully to place his diseased person in contact with hers without her express consent amounts to an assault. It has been argued that, to hold this, would be to hold that a man who, suffering from gonorrhœa, has communion with his wife might be guilty of the crime of rape. I do not think this would be so. Rape consists in a man having sexual intercourse with a woman without her consent, and the marital privilege being equivalent to consent given once for all at the time of marriage, it follows that the mere act of sexual communion is lawful; but there is a wide difference between a simple act of communion which is lawful and an act of communion combined with infectious contagion endangering health and causing harm which is unlawful. It may be said that, assuming a man to be diseased, still, as he cannot have com-

munion with his wife without contact, the communication of the disease is the result of a lawful act, and therefore cannot be criminal. My reply to this argument is that, if a person, having a privilege of which he may avail himself or not at his will and pleasure, cannot exercise it without at the same time doing something not included in this privilege, and which is unlawful and dangerous to another, he must either forego his privilege or take the consequences of his unlawful conduct. I may further illustrate my view upon this part of the case by applying, by way of test, to an indictment for assault the old form of civil pleadings. Thus: Indictment for an assault; plea of justification, that the alleged assault was the having sexual communion with the prosecutrix, she being the prisoner's wife; new assignment, that the assault charged was not that charged in the plea, but the unlawful and malicious contact of her person with dangerous and contagious disease. What possible justification could be pleaded or answer given to such new assignment? I ought perhaps to state that, even if to hold a husband liable for an assault under such circumstances would be to subject him also to a charge of rape, the opinion I have above expressed would not be changed. No jury would be found to convict a husband of rape on his wife except under very exceptional circumstances, any more than they would convict of larceny a servant who stealthily appropriated to her own use a pin from her mistress's pincushion. I can, however, readily imagine a state of circumstances under which a husband might deservedly be punished with the penalty attached to rape, and a person committing a theft even of a pin to the penalty attached to larceny. The cases put of a person suffering from small-pox, diphtheria, or any other infectious disorder, thoughtlessly giving a wife or child a mere affectionate kiss or shake of the hand from which serious consequences never contemplated ensued, seem to me cases in which it is impossible to suppose any criminal prosecution would be tolerated, or could, if tolerated, result in a conviction; but I can picture to myself a state of things in which a kiss or shake of the hand given by a diseased person, maliciously with a view to communicate his disorder, might well form the subject of criminal proceedings. I will not, however, stop to discuss such imaginary cases further. The case of *Reg.* v. *Bennett* (4 F. & F. 1105), decided in 1866, is an authority directly in support of the view I have taken. The indictment was for an indecent assault on a girl who had consented to sleep with the prisoner, who had connection with her, and communicated to her a foul disease. Willes, J., before whom the case was tried, in summing-up, told the jury that, though it would have been impossible to have established rape, yet, if the girl did not consent to the aggravated circumstances—*i.e.*, to connection with a diseased man — his act would be an assault. Willes, J. no doubt, according to the report, based his observations upon the rule that fraud vitiates consent; but it is clear his mind was alive to the point I have been considering, viz., that, though there might be such consent to sexual intercourse as to make the connection no rape, nevertheless the infectious contact might amount to an assault: (see also *Hegarty* v. *Shine*, 14 Cox C. C. 124; s.c. C. A. Ib. 145; and *Reg.* v. *Sinclair*, 13 Cox C. C. 28.) In dealing with this case my judgment is not based upon the doctrine that fraud vitiates consent, because I do not think that doctrine applies in the case of sexual communion between husband and wife. The sexual communion between them is, by virtue of the irrevocable privilege conferred once for all on the husband at the time of the marriage, and not at all by virtue of a consent given upon each act of communion, as is the case between unmarried persons. My judgment is based on the fact that the wrongful act charged against the prisoner was not involved in or sanctioned by his marital privilege, and was one for which no consent was ever given at all. For this reason it is unnecessary to discuss or express any opinion upon the various cases cited during the argument relating to connection obtained by fraud, and I accordingly abstain from doing so. Another argument used for the prisoner was, that such cases as the present were not contemplated by the statute under which he was indicted, and it was also said that, if it had been intended that the communication of a venereal disease to a woman during an act of sexual intercourse, consented to by her, should be punishable as a crime, some special enactment to that effect would have been introduced into one or other of the Acts of Parliament relating to women and offences against them. This is an argument to which I attach no weight, assuming the facts bring the case within the fair interpretation of the sections to which I have referred. Moreover, I may point out that *Reg.* v. *Bennett* (14 Cox C. C. 124; s.c. C. A. Ib. 145), to which I have referred, was tried in the year 1866, and it is strange, if the law as there laid down was thought to be contrary to the law of the land or to the intention of the Legislature, that in no subsequent legislation during the twenty-two years which have since elapsed has any enactment been introduced in which any expression is to be found indicative of a disapproval of that decision or that the intention of the statute was at variance with it. I think the Legislature contemplated the punishment of all grievous bodily harm, however caused, if caused unlawfully and maliciously; and I cannot bring my mind for an instant to believe that, even had the circumstances before us been present to the minds of the framers of the Act, they would have excluded from its operation an offence as cruel and as contrary to the obligation a man owes to his wife to protect her from harm, as can well be conceived. It has been urged that the case of husband and wife does not differ from that of unmarried persons, and that to affirm this conviction would tend to encourage undesirable prosecutions where disease has been communicated during illicit communion. I do not by any means assent to these propositions. I think the two cases are substantially different. The wife submits to her husband's embraces, because at the time of marriage she gave him an irrevocable right to her person. The intercourse which takes place between husband and wife after marriage is not by virtue of any special consent on her part, but in mere submission to an obligation imposed upon her by law. Consent is immaterial. In the case of unmarried persons, however, consent is necessary previous to every act of communion, and if a common prostitute were to charge with a criminal offence a man who,

in having had connection with her, had infected her with disease, few juries would under ordinary circumstances hesitate to find that each party entered into the immoral communion tacitly consenting to take all risks. In the case of women other than prostitutes, the circumstances of each particular case would have to be considered, and the question how far fraud vitiates consent to such communion would also have to be dealt with. In such cases, too, shame would deter most decent women from appealing to the law; and, if a man were the sufferer, seldom would he incur the ridicule and exposure which would be brought upon him. Considering how few prosecutions have been instituted for such causes since the decision in *Reg.* v. *Bennett* (14 Cox C. C. 124; s.c. C. A. Ib. 145), and entertaining moreover, as I do, a doubt whether any person, man or woman, could, as against the public interests, consent to the infliction of grievous bodily harm, so as to give a legal defence to a criminal prosecution, although such consent might afford a good defence to a civil action, I do not see any reason for such fears on the subject as have been entertained. Anyhow they cannot affect the law. Fortified in my opinion, as I believe myself to be, by the plain words of the statute, and by the authority of Willes, J., one of the greatest and most accurate lawyers of modern times, I have arrived at the conclusion that this conviction is right and in accordance with the law, and I cannot therefore be a party to a judgment which in effect would proclaim to the world that by the law of England in this year 1888 a man may deliberately, knowingly, and maliciously perpetrate upon the body of his wife the abominable outrage charged against the prisoner, and yet not be punishable criminally for such atrocious barbarity. I may state that this judgment has been read by my brother Day, who requests me to say that he thoroughly concurs in it.

MANISTY, J.—I am of opinion that this conviction should be quashed. I abstain from giving the reasons stated by my learned brothers who take the same view that I take, and propose only to add a few words. This is a statute which relates to circumstances of violence to the person. It is so stated in the title of the Act, which is "An Act to consolidate and amend the statute law of England and Ireland relating to offences against the person," and all the crimes of violence include an assault. Now what is an assault? It is either an act of infliction of violence on a person, or it is an attempt with force or violence to do or inflict, whether by force or by holding up the fist with threatening words, coupled with the capability of doing actual violence to the person of another. That being the principle of the Act it seems to me that what the prisoner here has done is not within the purview of the Act. I question whether it was ever intended or thought of, and I am of opinion that no assault was committed. An assault is a crime of violence, and the opinion of my learned brothers, who are of opinion that this conviction should be supported, is founded chiefly on this being a case of an assault. If it be a crime punishable by statute to act as the prisoner did, I should have expected to find it provided for amongst the statutes relating to the communication of contagious diseases, some of which have lately been repealed. That is the real nature of the crime alleged here; but I believe you will not find anything in those statutes as to this case. I need say no more, therefore, than that it is not, in my opinion, within the purview of this Act. If it had been it would have been mentioned.

HUDDLESTON, B.—I am of opinion that this conviction must be affirmed. I have had the advantage of reading the judgment of my brother Stephen, and entirely concur with it. I also concur with the judgments of my brother Wills and my brother Smith.

FIELD, J. read the following judgment:—This indictment contained two counts expressed respectively in the actual words of sects. 20 and 47 of 24 & 25 Vict. c. 100, and charging the prisoner under sect. 20 with "unlawfully and maliciously inflicting" upon his wife "grievous bodily harm;" under sect. 47, with "an assault" upon his wife "occasioning actual bodily harm." The facts proved were, that the prisoner had sexual intercourse with his wife at a time when to his knowledge he was suffering from gonorrhœa, his wife being ignorant of this fact; that had she known of it she would not have consented to the intercourse, and that the result of the connection was to communicate to her the disease. The learned Recorder of London directed the jury that if those facts were established they might find the prisoner guilty on both or either of the counts. The jury found the prisoner guilty, and the learned Recorder has stated the case now before us, in which he asks the opinion of this court whether his direction was right in point of law, and whether upon these facts the prisoner could be properly convicted on both or either of the counts. The answer to this question depends on the true construction of the Act under which the indictment was preferred, and on a consideration of the authorities, and I have come to the conclusion that the direction of the learned Recorder was right, and that the prisoner was properly convicted on both counts. The questions then are: First, Did the prisoner "unlawfully and maliciously inflict grievous bodily harm" on his wife; secondly, Did the prisoner "occasion bodily harm" to his wife by an "assault?" Now, it has long been established that a man who takes indecent liberties with a woman or has or attempts to have connection with her, may be properly convicted either of indecent assault or rape, which includes an assault, according to the circumstances of the case, if the acts were done without her consent, express or implied, or against her will. It is, I think, also clear that if the condition of the man is such that it is an ordinary and natural consequence of the contact to communicate an infectious disease to the woman, and he does so, he does in fact inflict upon her both "actual" and "grievous bodily harm." Such an act produces what a great authority, Lord Stowell, describes as "an injury of a most malignant kind:" see the note to *Durant* v. *Durant* (1 Hagg. 768). It is also well settled that every sane man must be taken to intend the natural and reasonable consequences of his acts, and the intentional infliction of grievous bodily harm, unless justified or excused by law, is to my mind "malicious and unlawful." Thus far the case rests upon what seem to me to be known and generally adopted principles.

But it is argued that here there is no offence because the wife of the prisoner consented to the act, and I entertain no doubt that, if that was so, there was neither assault nor unlawful infliction of harm. Then did the wife of the prisoner consent? The ground for holding that she did so, put forward in argument, was the consent to marital intercourse which is imposed upon every wife by the marriage contract, and a passage from Hale's Pleas of the Crown, vol. 1, p. 629, was cited, in which it is said that a husband cannot be guilty of rape upon his wife, "for by their mutual matrimonial consent and contract the wife hath given up herself in this kind to her husband which she cannot retract." The authority of Hale, C.J. on such a matter is undoubtedly as high as any can be, but no other authority is cited by him for this proposition, and I should hesitate before I adopted it. There may, I think, be many cases in which a wife may lawfully refuse intercourse, and in which, if the husband imposed it by violence, he might be held guilty of a crime. Suppose a wife for reasons of health refused to consent to intercourse, and the husband induced a third person to assist him while he forcibly perpetrated the act, would anyone say that the matrimonial consent would render this no crime? And there is the great authority of Lord Stowell for saying that the husband has no right to the person of his wife if her health is endangered: (*Poplin* v. *Poplin*, 1 Hagg. 765.) It seems to me, however, unnecessary to decide that question in the present case, because the prisoner's wife undoubtedly did consent in fact to the act of intercourse, and therefore consented to all natural and ordinary attendant circumstances or consequences of the act, and also to such as were reasonably within her knowledge and contemplation. Had then the harm inflicted upon or occasioned to the prisoner's wife been one of the consequences of an ordinary natural and healthy connection, or had she known, or had reasonable grounds for thinking, that her husband was in a diseased condition, her consent to the consequences would, I think, be implied, and so no offence would have been committed. In the same way I think that, if a man knowingly consorts with a prostitute who gains her livelihood by promiscuous intercourse, it may well be implied that he accepts all the consequences. Also, had the prisoner in this case not been aware of his condition, his act would not have been malicious or an assault, for, as he would have had no reason to suppose that his wife would do other than consent, he would have a right to act upon the implication, and I think therefore that, upon the construction which I am putting upon the Act, there will be no danger of bringing within its definitions an injury caused by an innocent or merely thoughtless act of affection between husband and wife. But I have said that here there undoubtedly was consent on the part of the prisoner's wife to the act of intercourse, and it is now necessary to consider what were the actual circumstances attending this act of intercourse, and what was the nature and condition of the intercourse to which the consent was given. The actual circumstances were, that the prisoner, knowing he had a foul and infectious disease upon him, and that the infection of his wife would be the natural and reasonable consequence of intercourse, solicited it. He also knew that his wife consented to it in ignorance of his condition. Under these circumstances I think that her consent to the intercourse in fact was given upon the implied condition that to the knowledge of the prisoner the nature of the intercourse was that to which she had bound herself to consent and had been accustomed to consent, *i.e.*, a natural and healthy connection. But the intercourse which the prisoner imposed upon his wife was of a different nature, one which in all probability would communicate to her a foul disease, and to which the jury had found that she would not have consented had she known the state of his health. It seems to me therefore to follow that the mere consent of the prisoner's wife to an act innocent in itself, and in no way injurious to her, was no consent at all to what the prisoner did; and, moreover, that he obtained such consent as she gave by wilfully suppressing the fact that he was suffering from disease. Such an act between husband and wife is, I cannot doubt, unlawful. In the Divorce Court it has been held that the wilful or reckless communication of disease by the one to the other amounts to legal cruelty, involving the liability to rescission of the marriage contract so far as regards cohabitation and intercourse: (*Boardman* v. *Boardman*, L. Rep. 1 P. & M. 233.) There was, I think, a clear duty cast upon the prisoner before he solicited the intercourse to communicate his condition to his wife, and the imposition of intercourse without such communication amounted to a false representation by act and conduct that he was in the same healthy and natural condition as he had been upon previous occasions of lawful intercourse. The result therefore at which I have arrived is, that there was no consent in fact by the prisoner's wife to the prisoner's act of intercourse, because, although he knew, yet his wife did not know, and he wilfully left her in ignorance as to the real nature and character of that act. This being so, it follows that there was both an assault and a criminal infliction of harm. I have arrived at this result by my own unaided construction of the statute and consideration of the law. I now proceed to consider the authorities. They may be divided, according to the facts which they present, into three classes of cases. The first class consists of cases in which a wife's consent has been obtained by the fraud of the prisoner inducing her to believe that he was her husband: (*Reg.* v. *Saunders*, 8 C. & P. 265; *Reg.* v. *Williams*, 8 C. & P. 266.) The second class consists of cases in which the woman's consent was obtained by fraudulent conduct, inducing her to believe that she was undergoing medical treatment or examination: (*Reg.* v. *Rosinski*, 1 Moo. C. C. 19; *Reg.* v. *Case*, 4 Cox C. C. 220; *Reg.* v. *Flattery*, 2 Q. B. Div. 410.) The third class consists of cases in which, as in the present case, the consent of the woman was given in consequence of the wilful and unlawful suppression of an injurious change of natural and previously known condition: (*Reg.* v. *Bennett*, 4 F. & F. 1105; *Reg.* v. *Sinclair*, 13 Cox C. C. 28; *Hegarty* v. *Shine*, 14 Cox C. C. 128; C. A. 145.) Although these cases differ in themselves as to the facts and as to the language used by the court, all of them, except *Hegarty* v. *Shine* (*ubi sup.*), are, as it seems to me, governed by the same principle, which is that, though the woman consented to the act of intercourse, she

did not consent to it in its actual nature and conditions. In *Reg.* v. *Case* (4 Cox C. C. 220) the girl did not resist from a *bonâ fide* belief wilfully induced by the prisoner that she was being treated medically, and the learned Recorder of London, a judge of wide experience in criminal cases, directed the jury that, if they were satisfied that the act was committed under such circumstances, the prisoner's conduct amounted to an assault. This direction was approved on appeal. Wilde, C.J. says in his judgment: "She made no resistance to an act which she supposed to be quite different from what was done, and therefore that which was done was done without her consent." Coleridge, J., whose knowledge and experience in those matters could not be surpassed, said: "She makes no resistance only in consequence of the confidence which she reposed in the defendant as her medical adviser. If there had been no consent the defendant's act would have been indisputably an assault." Platt, B. said: "The girl consents to one thing, and the defendant does another, that other involving an assault." This was a decision of the Court for the Consideration of Crown Cases Reserved. In the case of *Reg.* v. *Flattery* (2 Q. B. Div. 410), in the same court, a case of the second class, the same doctrine was held, Kelly, C.B. saying: "The girl only submitted to the plaintiff touching her person in consequence of the fraud and false pretences of the prisoner, and the only thing she consented to was the surgical operation." In these cases the fraud by which the consent was obtained was a fraud as to person and circumstances, and did not, as in this case, relate to the very act of connection, its physical nature and conditions, and it seems to me to follow that a consent induced by a fraud relating to the physical nature and conditions of the act itself falls still more clearly within this principle. Accordingly so it was held in *Reg* v. *Bennett* (4 F. & F. 1105). There that very eminent judge, Willes, J., applied this doctrine and held that the consent to one act obtained by fraud as to its physical nature was no consent to a different act injurious in its nature and to which the consent was never intended to be applied. In this respect he was followed by Shee, J. in *Reg.* v. *Sinclair* (13 Cox C. C. 28). It is true that in *Hegarty* v. *Shine* (14 Cox C. C. 124; s. c. C. A. 145) some of the judges in the Irish courts expressed disapproval of the ruling of Willes, J. in *Reg.* v. *Bennett* (*ubi sup.*), as tending to show that any fraud is sufficient to convert a civil act of breach of duty into a criminal one, and reliance was placed on this in the argument against the conviction. But I think this disapproval rests upon a misunderstanding of the direction, as I understand that very learned judge never meant to say that any fraud must vitiate the consent, but that a consent obtained to one act is not a consent to an act of a different nature, and if obtained by a fraud as to its nature would not render the act lawful. In *Hegarty* v. *Shine* (14 Cox C. C. 124; s. c. C. A. 145) in the Court of Appeal *Reg.* v. *Bennett* (*ubi sup.*) was distinguished and in no way departed from, and the actual decision in *Hegarty* v. *Shine* (*ubi sup.*) does not seem to me in any way to touch the present case. I think therefore that the conviction should be affirmed. I am desired to add that my brother Charles concurs in this judgment.

POLLOCK, B. read the following judgment:—I agree with the judgment delivered by my learned brothers who are against the conviction, and had I seen these judgments before I prepared my own I might have been content to say simply that I assent to them; but, as I have set out my own reasons, I think it is only respectful to those from whom I differ that I should read them. The first count of the indictment is based upon sect. 20 of 24 & 25 Vict. c. 100 (1861), which provides that "Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person either with or without any weapon or instrument, shall be guilty of a misdemeanour." This provision is founded upon and in continuation of the earlier legislation upon the same subject contained in 14 & 15 Vict. c. 19, s. 4 (1831), which is as follows: "And whereas it is expedient to make further provision for the punishment of aggravated assaults; be it enacted that, if any person shall unlawfully and maliciously inflict upon any other person either with or without any weapon or instrument any grievous bodily harm, or unlawfully and maliciously cut, stab, or wound any other person, every such offender shall be guilty of a misdemeanour." Looking at the language of these two Acts, it appears to me that the "grievous bodily harm" which is "unlawfully" inflicted must be the natural consequence of some act in the nature of a blow, wound, or other violence, which is in itself illegal and not merely the result of conduct which is immoral and injurious by reason only of a fraud or breach of good faith; or, to put the proposition in another form, "grievous bodily harm which is the ultimate effect of treachery in the doing of that which is not a "wounding or inflicting, &c., with or without any weapon or instrument," but is the doing of an act of an entirely different character, is not within the terms of the statute. It is also to be observed that, although a man is by law held to be responsible for the necessary consequences of his acts, in the case before us it cannot be suggested that the real intent of the prisoner was to inflict grievous bodily harm, or indeed any harm, upon his wife. The second count charges an assault, and upon this more difficulty arises. Some of the observations which I have already made are equally applicable to this question. Apart from authority I should be inclined to hold that, in this case also, an assault must in all cases be an act which in itself is illegal, and it is not unimportant to notice that the case is one of first impression, as no trace can be found of any previous attempt to bring such conduct, foul and cruel though it be, within the scope of the criminal law. As to this count, however, there is some authority. In *Reg.* v. *Bennett* (4 F. & F. 1105) an uncle was indicted for an indecent assault upon his niece, he being diseased and she ignorant of the fact. It was held by Willes, J. that the prisoner could be properly convicted, and in his summing-up that learned judge said: "An assault is within the rule that fraud vitiates consent, and therefore if the prisoner, knowing that he had a foul disease, induced his niece to sleep with him, intending to possess her, and infected her, she being ignorant of his condition, any consent which she may have given would be vitiated, and the prisoner would be guilty of an indecent assault." This case was

followed by *Reg.* v. *Sinclair* (13 Cox C. C. 28), in which the prisoner being diseased had connection with a girl who, being ignorant of the fact, consented. As far as I can discover, these are the only decisions which have any material bearing upon the case now before us. They are not binding upon this court, and they have been much questioned in the civil case in Ireland of *Hegarty* v. *Shine*. As at present advised I see great difficulty in adopting them in their entirety. If the reasoning upon which they are founded be sound, I should have thought that the offence of which the prisoners were guilty was not an assault but rape. Without, however, further argument and consideration, I am not prepared to say that they should be overruled, especially as in cases of a similar kind, which may well arise, they are undoubtedly important and useful in the administration of the criminal law; but I cannot assent to the proposition that there is any true analogy between the case of a man who does an act which in the absence of consent amounts to an indecent assault upon his niece, or any woman other than his wife, and the case of a man having connection with his wife. In the one case the act is, taken by itself, in its inception an unlawful act, and it would continue to be unlawful but for the consent. The husband's connection with his wife is not only lawful, but it is in accordance with the ordinary condition of married life. It is done in pursuance of the marital contract, and of the status which was created by marriage, and the wife as to the connection itself is in a different position from any other woman, for she has no right or power to refuse her consent. As is said by Lord Hale in his Pleas of the Crown (p. 1629): "By their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract." Such a connection may be accompanied with conduct which amounts to cruelty, as where the condition of the wife is such that she will or may suffer from such connection; or, as here, where the condition of the husband is such that the wife will suffer. To hold that an act in itself innocent becomes a criminal assault by reason of the concealment of a material fact, which, if communicated, might give rise to an objection by the person affected by the act, would, where there is disease, include a variety of cases beyond that which is now under discussion; such as a kiss given by a parent suffering from small-pox or scarlet fever to his child, or even the shaking of a friend's hand by one who is suffering from a contagious disease. On the other hand, to say that the prisoner has been properly convicted would not under all circumstances cope with the evil and moral wrong which it is desired to punish, for I suppose no one would contend that if a wife, being diseased, encouraged her husband to have connection with her she was guilty of an assault. Now all this goes to show that the real offence is not an assault, but the suppression or concealment of that which ought to have been communicated; and that, if it be desirable to bring it within the criminal law, it should be done by legislation. As to the decision of *Reg.* v. *Case* (1 Den. C. C.; 19 L. J. 174, M. C.), and *Reg.* v. *Flattery* (2 Q. B. Div. 410), cited by counsel for the prosecution, in which medical men, who, under the pretence of affording medical or surgical assistance to girls, had connection with them, were held guilty of rape, they afford no assistance. In these cases the intent of the prisoners to commit a rape was clear, though the means by which they accomplished their purpose was fraud, the fraud being of such a nature that, under the pretence of performing an act in itself lawful and beneficial to their patient, they committed an act of a totally different character, which was in itself illegal and criminal. These considerations have led me to the conclusion that this conviction cannot be supported.

Lord Coleridge, C.J.—I was for some time of opinion that this conviction could be sustained; and, of course, everyone, I suppose, would desire to sustain the conviction in this particular case if it could be done without violating the principles of sound law. I confess that the logical deduction drawn from the words of the statute by my brothers Field and Hawkins is one that I find it difficult to contradict. Yet, if in construing a statute a logical construction leads one to a result which it is impossible to believe was intended, that is a reason for making one believe that that is not the meaning of the statute. If this conviction can be sustained it seems to me impossible logically to deny that a conviction could be sustained for inflicting grievous bodily harm on a child by communicating small-pox to it, if its father or a relative, being aware that he had the small-pox, were to kiss the child and so infect it. I give that simply as an example, and upon that ground it is that I am unable to believe that the statute could have contemplated results which nevertheless logically follow the construction placed upon the statute by my learned brothers who would uphold the conviction. I am unable to agree with them; and I am therefore of opinion that this conviction must be quashed, and I agree with the whole or nearly the whole of the judgment of my brother Wills, which I have had the opportunity and satisfaction of reading. I am desired to add that my brother Day agrees with my brother Hawkins, and my brother Charles agrees with my brother Field, while my brother Grantham agrees with the majority of the court. *Conviction quashed.*

Solicitors for the prosecution and the defendant, *The Solicitor to the Treasury.*

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, May 30, 1888.

(Before Lord Esher, M.R., Lindley and Lopes, L.JJ.)

Guardians of Dorchester Union *v.* Guardians of Poplar Union. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Poor law—Settlement—Abolition of derivative settlements—Exception in case of child under sixteen—Meaning of "retain until it shall acquire another"—Divided Parishes Act 1876 (39 & 40 *Vict. c.* 61), *s.* 35.

By sect. 35 *of the Divided Parishes Act* 1876, "*No*

(*a*) Reported by Adam H. Bittleston, Esq., Barrister-at-Law.

person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except . . . in the case of a child under the age of sixteen, which child shall take the settlement of its father . . . up to that age, and shall retain the settlement so taken until it shall acquire another."

Held, that, upon the construction of the above section, any person of whatever age he may be when he becomes chargeable, who has never acquired a settlement of his own and who was under the age of sixteen when his father acquired a settlement, takes his father's settlement.

Guardians of Edmonton *v.* Guardians of St. Mary, Islington (15 *Q. B. Div.* 95, 339), *overruled.*

Guardians of Highworth and Swindon Union *v.* Guardians of Westbury-on-Severn Union (58 *L. T. Rep. N. S.* 839; 20 *Q. B. Div.* 597) *followed.*

THIS was an appeal from the decision of a divisional court, quashing an order of removal upon a special case stated under 12 & 13 Vict. c. 45, s. 11.

It appeared from the special case that the pauper was born in Feb. 1851, in the parish of Fordington, and was the legitimate daughter of Stephen and Susan Bulster. At the time she attained the age of sixteen, her father, who was alive, had duly acquired a settlement in the parish of Plumstead, in the Plumstead Union, by renting a tenement, and occupying and being charged with and paying all rates and taxes for the same. In Sept. 1878 she married at All Saints', Poplar, James George, who was a ship's fireman and native of Africa. James George never had any legal settlement. In Jan. 1887 he deserted his wife, and the pauper Eliza George and her children became chargeable to the Poplar Union.

Upon the application of the guardians of the Poplar Union, two justices of Middlesex made an order adjudging the last legal settlement of Eliza George and her children to be in the parish of Fordington, in the Dorchester Union.

The guardians of the Dorchester Union contended that neither the pauper Eliza George nor her children were settled in the parish of Fordington in the Dorchester Union, and that the pauper Eliza George, being under the age of sixteen years at the time her father had acquired a settlement in the parish of Plumstead, took and retained that settlement by virtue of sect. 35 of the Divided Parishes Act 1876, she not having since acquired or derived any other settlement.

The guardians of the Poplar Union contended that the pauper Eliza George, having been born in the parish of Fordington, in the Dorchester Union, and never having acquired any subsequent settlement, was settled in that parish, and that being at the time of the order of removal above the age of sixteen years, she could not take the settlement of her father in the parish of Plumstead.

The question for the opinion of the court was: Was the order rightly made adjudging the settlement of Eliza George and her children to be in the parish of Fordington, in the Dorchester Union?

The Queen's Bench Division (Mathew and Smith, JJ.) quashed the order.

The guardians of the Poplar Union appealed.

Bosanquet, Q.C. and *F. Mead* for the guardians of the Poplar Union.—The exception in the case of a child under sixteen to the general rule laid down by sect. 35 of the Divided Parishes Act does not apply to this case. Here the pauper is between thirty and forty years old. The provision that a child under sixteen is to take the settlement of its parent and retain such settlement until it shall acquire another, only applies where the question of the child's settlement is dealt with while it is under the age of sixteen. In such a case the child will take the father's settlement (unless such settlement is a derivative one) and will retain that settlement until it has acquired another. But if the person, whose settlement is to be inquired into, is over sixteen, the general enactment applies, and such person cannot be taken to have derived a settlement from any other person, whether by parentage or otherwise, but will take his birth settlement, unless he has acquired one by residence. That was decided in *Guardians of Edmonton* v. *Guardians of St. Mary, Islington* (15 Q. B. Div. 95), which was affirmed in the Court of Appeal (15 Q. B. Div. 339). [Lord ESHER, M.R.—If we decided wrongly in that case, we did so because we were told that it was identical with *Reg.* v. *Guardians of Bridgnorth*, 48 L. T. Rep. N. S. 600; 11 Q. B. Div. 314.] If it is held that a child under sixteen in the exception means any person of whatever age whose father has acquired a settlement by residence while such person is a child under sixteen, there will often have to be a long investigation into what happened seventy or eighty years ago, which it was the object of the Act to prevent. It must be admitted that the decision of the Divisional Court is in accordance with *Guardians of Highworth and Swindon Union* v. *Guardians of Westbury-on-Severn Union* (58 L. T. Rep. N. S. 839; 20 Q. B. Div. 597) in this court, but it is submitted that that case was wrongly decided. They also cited

Guardians of Croydon v. *Guardians of Reigate*, 57 L. T. Rep. N. S. 917; 19 Q. B. Div. 385;
Reg. v. *Guardians of Marylebone*, 50 L. T. Rep. N. S. 442; 13 Q. B. Div. 15.

Bowen Rowlands, Q.C. and *R. Cunningham Glen*, for the Dorchester Union, were not called upon.

Lord ESHER, M.R.—I am almost afraid to express my opinion in this case, lest the language in which I do so should be used in some future case in a sense that I do not intend, and that it is not properly susceptible of. Notwithstanding the argument that has been addressed to us, I think that I can deliver the judgment I am about to do without retracting anything I have ever said, if what I have said in previous cases is read fairly having regard to the context and to the particular circumstances to which I was referring. In the present case we have to deal with the question of the removal of a woman who is over the age of sixteen years. I do not care whether she is a widow or not; the case would be just the same if she was a man. The question before us is, whether the order of removal was right. The woman is married at the present time to a man who never obtained a settlement. Although she is a wife, she is the wife of a man who has no settlement, and never had a settlement. Sect. 35 begins by saying, "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or other-

wise '—therefore, the general rule is, that we cannot ask whether she has derived a settlement at all—"except in the case of a wife from her husband." If her husband had acquired a settlement, we might have derived her settlement from that, but her husband had none. The section goes on, "And in the case of a child under the age of sixteen"—this is not the case of a child under the age of sixteen—"which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age." There cannot be a derivative settlement, therefore, except, in the first place, in the case of a wife from her husband. If the husband has a settlement of his own, the wife takes it; but we held in the *Bridgnorth* case that the wife cannot take the settlement of the husband's father or grandfather. Then a child under sixteen is to take its father's settlement; it can take no other; the words are exclusive. If under sixteen, it must take its father's or its widowed mother's settlement. Then does this section deal with the case of a child after it is sixteen? It goes on, "And shall retain the settlement so taken until it shall acquire another." That cannot mean that the child is to retain the settlement of its father up to the age of sixteen. The section having already said that the child was to take its father's settlement up to that age, the repetition of that would be tautologous nonsense. It must mean that the child is to retain such settlement after it is sixteen until it shall acquire another. It is said that the words mean that the child is to retain its father's settlement up to the age of sixteen only if it has not acquired another before that age; but that suggestion is negatived by the former part of the section, which says that a child under sixteen shall take the settlement of its father up to that age. It is found as a fact in the present case that when this woman was sixteen her father's settlement was at Plumstead. She has never acquired another. She is therefore within the very words of the statute, and is to retain the settlement at Plumstead. In so deciding, do I break through anything that I have said before? I am not inquiring into her derivative settlement at all. I agree that she does not come within the first exception, because her husband had no settlement, nor within the second exception, because she is not a child under the age of sixteen; but she comes within the last words of the section, "and shall retain the settlement so taken until it shall acquire another." What case is there against that conclusion? The only case against it is that of *Guardians of Edmonton* v. *Guardians of St Mary, Islington* (*ubi sup.*). I protest against its being said that our decision in *Reg.* v. *Guardians of Bridgnorth* (*ubi sup.*) is against it. There is nothing said in that case against this last part of the section applying to a person whose father's settlement at the time that such person was a child under sixteen is known, and who has never acquired another. With regard to the decision in *Guardians of Edmonton* v. *Guardians of St. Mary, Islington*, when that case came to the Court of Appeal, it was stated by counsel to be the same as the *Bridgnorth* case. In my opinion the *Bridgnorth* case was right. Therefore, if *Guardians of Edmonton* v. *Guardians of St. Mary, Islington*, is to be taken as simply affirming that case, it is right; but if it is taken apart from the *Bridgnorth* case it is wrong. Moreover, we have the case of *Guardians of Highworth and Swindon* v. *Guardians of Westbury-on-Severn* (*ubi sup.*), which is inconsistent with *Guardians of Edmonton* v. *Guardians of St. Mary, Islington*, if the latter case is to be taken as doing more than affirming the *Bridgnorth* case. In that view there would be two decisions of this court, of which one must be wrong; in such a case we must follow that one which we think to be right. We stand by everything that we said in the most recent case, which is *Guardians of Highworth and Swindon* v. *Guardians of Westbury-on-Severn*. Infinite pains were taken with the judgment in that case, and my brother Lopes authorises me to say that, after having heard the argument in this case, he desires to alter nothing in the passage from his judgment which I am about to read, and which we stand by: "Previously to the passing of this statute great expenses were often incurred by parishes in tracing remote derivative settlements and difficult steps in family pedigrees; and it was with a view to obviate this mischief that the 35th section was introduced into the Act, which at a stroke prohibits any question of a derivative settlement being entered upon beyond the two derivative settlements expressly mentioned." That was what was decided in the *Bridgnorth* case, that no one could ever have a derivative settlement except one of the two mentioned in the section. "But the provision with regard to the child is most important. It is only while the child is under sixteen that it is to be capable of taking the derivative settlement of the father or widowed mother; any settlement acquired by the parents after the child attains sixteen is not to be communicated to the child, but the child is to retain the derivative settlement it had when it attained sixteen until it acquires another." I decide the present case in conformity with that decision. It is admitted that, if the argument is wrong as to the mother, it must be equally so as to the children. That being so, the order removing to her birth settlement the pauper Eliza George and her four children is wrong and must be quashed.

Lindley, L.J.—The question in this case is, what is the settlement of Eliza George, who is between thirty and forty years old, and who is a married woman whose husband has deserted her? It is impossible not to see, upon reading sect. 35 of the Divided Parishes Act, that it is so worded as to be extremely difficult to construe. The difficulty in the present case arises from the way in which the words "child" and "retain" are used in that section. The section says, "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise." Then follow two exceptions to this general rule: "Except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another." A child, therefore, is to take the settlement of its father, and then the child is to retain the settlement so taken until it shall acquire another. What is meant by saying that the child is to retain the father's settlement? It is not to retain such settlement until it ceases to be a child, but until it shall acquire another. That must

mean that it is to retain its father's settlement until it shall have acquired another, whether such other settlement is acquired after childhood or not. The woman, as to whose settlement the present question arises, although not now a child, did when a child acquire her father's settlement, and has never acquired another. Therefore she still retains her father's settlement. This decision does seem to me to be inconsistent with the decision in *Guardians of Edmonton* v. *Guardians of St. Mary, Islington* (*ubi sup.*). But that case was decided on the assumption that it was exactly like the *Bridgnorth* case (*ubi sup.*). I do not think that the *Bridgnorth* case and the *Guardians of Edmonton* v. *Guardians of St. Mary, Islington*, are alike. As, therefore, the ground of the decision in the latter case was a misapprehension, that case ceases to be any authority. The more recent case of the *Guardians of Highworth and Swindon* v. *Guardians of Westbury-on-Severn* (*ubi sup.*) is not only perfectly consistent with our decision in this case, but requires as to decide as we are now doing. I think that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Lucas* and *Ward*, for *A. H. Lock*, Dorchester.

Solicitor for the respondents, *J. W. Marsh.*

Saturday, May 5, 1888.

(Before Lord ESHER, M.R., LINDLEY and BOWEN, L.JJ.)

Ex parte ALICE WOODHALL. (*a*)

Practice—Appeal—"Criminal cause or matter"—Extradition—Extradition Act 1870 (33 *&* 34 *Vict. c.* 52)*—Judicature Act* 1873 (36 *&* 37 *Vict. c.* 66), *s.* 47.

A person, having been committed to prison as a fugitive criminal accused of an extradition crime under sect. 10 *of the Extradition Act* 1870, *appealed from the refusal of the Queen's Bench Division to grant a writ of habeas corpus.*

Held, that no appeal lay to the Court of Appeal, the decision of the Queen's Bench Division being given in a criminal cause or matter within the meaning of sect. 47 *of the Judicature Act* 1873.

THIS was a motion by way of appeal from a refusal of the Queen's Bench Division to grant a rule *nisi* for a writ of *habeas corpus*.

The applicant, Alice Woodhall, was charged with having committed forgery in New York, and was arrested and taken before the magistrate at Bow-street Police-court, under the provisions of the Extradition Act 1870 (33 & 34 Vict. c. 52).

The magistrate committed the accused to prison under sect. 10 of that Act. Thereupon application was made to the Queen's Bench Division for a rule *nisi* for a writ of *habeas corpus* on grounds which are not material to this report, and the application was refused.

By 33 & 34 Vict. c. 52, s. 10:

In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

By sect. 26:

The term "extradition crime" means a crime which, if committed in England, or within English jurisdiction, would be one of the crimes described in the first schedule to this Act.

In the first schedule "forgery" is one of the crimes mentioned.

The applicant now moved the Court of Appeal by way of appeal from the refusal of the Queen's Bench Division to grant a rule *nisi* for a writ of *habeas corpus*.

Finlay, Q.C. (*David* with him) for the applicant.—This court has jurisdiction to hear the motion. An application for a writ of *habeas corpus* is not a criminal cause or matter within the meaning of sect. 47 of the Judicature Act 1873. It is an application to oblige the person detaining the applicant to produce him, and need have no reference to anything criminal. It is submitted that the words "criminal cause or matter" have reference only to criminal causes or matters over which the courts of this country have jurisdiction. The following cases were referred to:

Ex parte Rev. James Bell Cox, 58 L. T. Rep. N. S. 323; 20 Q. B. Div. 1;
Reg. v. *Justices of Central Criminal Court*, 56 L. T. Rep. N. S. 352; 18 Q. B. Div. 314;
Reg. v. *Foote*, 48 L. T. Rep. N. S. 394; 10 Q. B. Div. 378;
Reg. v. *Steel*, 35 L. T. Rep. N. S. 534; 2 Q. B. Div. 37;
Reg. v. *Weil*, 47 L. T. Rep. N. S. 630; 9 Q. B. Div. 701;
Reg. v. *Fletcher*, 35 L. T. Rep. N. S. 538; 2 Q. B. Div. 43.

Lord ESHER, M.R.—In this case a rule *nisi* for a writ of *habeas corpus* to bring up a person in custody whose extradition to America had been applied for was refused by the Divisional Court. The applicant for the rule appealed to this court, and the question to be decided is whether we have any jurisdiction to hear the appeal. That depends upon the construction to be put upon the words "criminal cause or matter" in sect. 47 of the Judicature Act 1873. The question of how wide an interpretation is to be put upon the latter part of that section has been before this court on several occasions, and the Court of Appeal, in the case of *Reg.* v. *Weil* (*ubi sup.*), declined to decide whether an appeal would lie in a case like the present; in that case the writ was refused upon the facts, and no judgment was given upon the question of jurisdiction. I think we might dispose of this case in the same way, because we all agree that no writ of *habeas corpus* ought to be granted upon the facts which are before us; but we think that we ought not any longer to flinch from deciding the question of jurisdiction to hear such an appeal as this, and it is upon that question that our judgment will rest. Now, I think the result of all the decided cases is to show that the words "criminal cause or matter" in sect. 47 are to receive as wide an interpretation as possible. This court was constituted for the hearing of appeals in civil causes or matters, and no appeal in any criminal cause or matter in the widest sense of those words was to come before it. I think the case which puts in the clearest way the true construction to be placed upon the words is *Reg.*

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

v. *Fletcher* (*ubi sup.*), which followed a decision in the case of *Reg.* v. *Steel* (*ubi sup.*). In *Reg.* v. *Fletcher* the Court of Appeal held that an appeal from an order of the Queen's Bench Division discharging a rule for a *certiorari* to bring up and quash a summary conviction by justices was an appeal in a criminal cause or matter within the meaning of those words in sect. 47. Mellish, L.J. said this: "In *Reg.* v. *Steel* we held that that clause was not confined, as was contended, to the High Court when sitting as the court to hear points reserved in criminal cases, but extended to all criminal cases in the High Court, and therefore to criminal cases in the Queen's Bench Division. The question here is somewhat wider —whether the exemption from appeal extends to a proceeding in the Queen's Bench Division, which might be said to be not strictly a criminal proceeding in that court, but a proceeding taken in that court for the purpose of quashing a conviction before justices, which was clearly a criminal proceeding. Was that proceeding in the Queen's Bench Division a proceeding in a criminal matter? Now, the intention of the Legislature appears to me clearly to have been to leave the procedure in criminal cases substantially unaltered. Matters in the peculiar jurisdiction of the Court of Queen's Bench were transferred to the Queen's Bench Division, and in the same way the Court for Crown Cases Reserved was reconstituted of judges of the High Court, but beyond this it was not intended that there should be any practical alterations in the procedure in criminal cases; and I have no doubt that the clause that no appeal shall lie from any judgment of the said High Court in any criminal cause or matter was intended to refer to all criminal matters whatever coming before the High Court." In the same case I said: "In the present case it is said that the judgment must be confined to a judgment in a criminal cause or matter in the High Court itself, and does not extend to a proceeding in a case which has not its inception in the High Court. I cannot agree to that. I should read the clause as meaning no appeal shall lie from any decision of the High Court by way of judgment in any criminal cause or matter." I will try and express my meaning in other words. I think the clause applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject matter of which is criminal at whatever stage of the proceedings the question may arise. If that test is applied here, it is clear that the decision of the Queen's Bench Division was a decision by way of judicial determination of a question raised in or with regard to the proceedings before Sir James Ingham. Those were clearly proceedings the subject-matter of which was criminal, and therefore it follows that this court has no jurisdiction to hear the appeal. It does not, however, follow that this court has no jurisdiction to hear any appeal with reference to the granting or refusing of a writ of *habeas corpus*. It depends upon how the matter arises. If the subject-matter of the proceedings, out of which the application arises is criminal, then this court has no jurisdiction; but if not criminal, then this court would have jurisdiction. I think the motion must be dismissed.

LINDLEY, L.J.—I am of the same opinion. Whether we look at the language of sect. 47, or the cases decided upon it, the result is the same. The true construction is that put upon it by Mellish, L.J., in *Reg.* v. *Steel* (*ubi sup.*), where he said: "No doubt the first part of the section refers to the Court for Crown Cases Reserved; but it goes on and says that no appeal shall lie from any judgment of the said High Court in any criminal cause or matter. Are you to confine this to the Court for Crown Cases Reserved, or is it general, extending the exception or exemption from appeal to all criminal causes or matters? I am clearly of opinion that it is general, and that the saving clause was necessary to retain the former rights of appeal for error on the record. If this were not so there would be an appeal from the Court of Queen's Bench, not only on every judgment, but on any order in a criminal case. The intention of the latter part of sect. 47 was to prevent this; and there appears no reason, but the contrary, why the words 'no appeal shall lie from any judgment of the said High Court in any criminal cause or matter,' should be confined as the appellants contend to the High Court when sitting as a court for the consideration of Crown Cases Reserved." That construction has been approved in subsequent cases. Can it be said that in this case the application is not an application in a criminal cause or matter? In substance it certainly is. Its whole object is to enable a person in custody to escape being sent to America to be tried upon a charge of forgery. I think we have no jurisdiction to hear the appeal, but this must not be taken as a decision that we have no jurisdiction to hear appeals in any *habeas corpus* matters. In many cases applications are made to the Queen's Bench Division for writs of *habeas corpus*, which do not arise out of any criminal cause or matter; in such cases an appeal will lie.

BOWEN, L.J.—I am of the same opinion. I think that we ought to decide the question of jurisdiction, so as not to leave persons who are subject to extradition proceedings in uncertainty as to whether such an appeal as this can be brought. Our jurisdiction depends upon whether the decision of the Queen's Bench Division was a judgment in a criminal cause or matter within sect. 47. Now, that decision was upon an application to obtain the discharge from custody of a person committed to prison under sect. 10 of the Extradition Act 1870. That section is to apply "in the case of a fugitive criminal accused of an extradition crime." The person must be a person who has fled from foreign justice, and the crime must be such a crime as is specified in the schedule and is a crime according to the law of this country. The magistrate has to consider whether the evidence laid before him is such as would be sufficient according to English law to justify the committal for trial of the person accused. Surely the whole matter is criminal from first to last. It is a matter dealt with by persons conversant with criminal law, and competent to decide what is sufficient evidence to justify a committal. The application for a writ of *habeas corpus* depends upon whether there was evidence before the magistrate of the facts upon which he is called on to decide. Such questions certainly arise out of a criminal matter, and it follows that the judgment given upon the application is a judgment in a criminal matter. I need only add that I entirely agree that upon the facts we

ought not to interfere with the magistrate's order.

Motion dismissed.

Solicitors for applicant, *Brooks* and *Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Aug. 8, 9, *and Oct.* 24, 1888.

(Before STIRLING, J.)

LEWIS *v.* WESTON-SUPER-MARE LOCAL BOARD OF HEALTH. (*a*)

Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 4, 16, 51, 54, 189, 190—*Local authority carrying water main through private property*—"*Necessary*"—"*Surveyor*"—*Person acting temporarily as surveyor.*

By the joint operation of sects. 16 *and* 54 *of the Public Health Act* 1875, *a local authority providing their district with water, may, after giving reasonable notice in writing to the owner or occupier* (*if on the report of the surveyor it appears necessary*), *carry their water mains into, through, or under any lands whatsoever within their district.*

Held, that, in the case of a public body charged with the performance of public duties, the word "necessary" might well mean "necessary for the efficient discharge of the duty in the way which was most for the benefit of the public," and it was intended that, if the public interests required it, the local authority should have power to lay their mains under the lands of private individuals, and the person to determine as to the necessity for that was the surveyor.

The duty of the surveyor in such a case is to take all the circumstances of the case into consideration, and come to a conclusion as to the best course to be pursued and report accordingly, and if the court finds that the surveyor has exercised his judgment, and come to a conclusion in good faith, it ought not to interfere, although other courses, to avoid the necessity of entering on private land, might be pointed out and admitted to be practicable, or even although engineers of great eminence might come forward and say that they themselves would have reported in favour of some alternative course.

The "surveyor" in sect. 16 *of the Act is, in the case of an urban authority, the fit and proper person duly appointed by the authority to be surveyor under sect.* 189 *of the Act. A person, therefore, appointed by an urban authority to act as assistant surveyor, and afterwards, during a vacancy in the office of surveyor, to act as surveyor until a permanent surveyor was appointed, is not "the surveyor" within the meaning of sect.* 16, *or sect.* 189.

THIS was a motion for an injunction to restrain the defendants, the urban local authority for the district of Weston-super-Mare, from carrying a water main through certain freehold land of the plaintiff, forming part of the garden of a house known as "Speden Ham," at Weston-super-Mare, and from entering on the plaintiff's land for that purpose. This land was situated in the defendants' district.

(*a*) Reported by A. J. HALL, Esq., Barrister-at-Law.

The defendants had, under the powers given by sect. 51 and the following sections of the Public Health Act 1875, undertaken to provide their district with a supply of water, and for that purpose had made on land of their own adjoining the plaintiff's land a reservoir from which they desired to carry a main into a road between which and the reservoir the plaintiff's land lay.

Previously to March 1888 negotiations had taken place for the purchase by the defendants of a strip of the plaintiff's land, twenty feet wide, for the purpose of laying the main, but no binding agreement had been come to between the parties.

On the 21st March 1888 a report was made to the defendants in the following terms:

Sirs,—I have the honour to report to you, in pursuance of sects. 16 and 54 of the Public Health Act 1875, that it is desirable and advisable that your 15in. water main should be carried from Arundel-road into the south end of your reservoir at Montpelier, and that it will be necessary to lay the said water main through land belonging to one John Lewis at south end of Speden Ham premises within your district, and I therefore recommend that notice from you be forthwith given to him to that effect.—I have the honour to be, Sirs, your Surveyor, ARTHUR POWELL.

Arthur Powell was a civil engineer in the employment of the defendants. In Nov. 1887 he had been appointed to act as assistant to Mr. Willacy, the then surveyor, who was in a bad state of health. Mr. Willacy died in Dec. 1887, and on the 11th Jan. 1888 the following resolution was passed by the defendants:

That Mr. Arthur Powell be appointed surveyor to this board until a permanent surveyor be appointed, at the same proportionate rate of salary as the late surveyor Mr. Willacy received, commencing from the 25th day of December last, and that he be subject to a week's notice to determine such appointment.

Powell's appointment under this resolution was determined on the 25th March 1888 (four days after his report), when Mr. Collins was appointed surveyor to the board. Powell was a candidate for the office, but was not elected. He remained in the service of the board as waterworks engineer, but acted under the supervision of the consulting engineer of the board for carrying out their works for the supply of water.

The report of the 21st March 1888 was taken into consideration by the board and adopted on the 11th April 1888. On the 18th April 1888 notice by the board was served on the plaintiff to the effect that on the report of their surveyor it appeared necessary, and they intended, under the powers given by the Public Health Act, to carry the main through and under the plaintiff's land. A correspondence then passed between the parties, when the plaintiff declined to allow the defendants to lay down their pipes on his land, and on the 5th June 1888 the clerk to the board wrote that if the plaintiff did not voluntarily give possession the board would apply for a magistrate's order under sect. 305 of the Act, authorising them to enter and do the works. This, however, was not done, and the plaintiff, finding that the defendants were carrying their pipes up to his land on each side, on the 16th June 1888 applied for and obtained an *ex parte* injunction, which was afterwards continued on notice, and the question now was, whether this injunction ought to be continued to the trial of the action or further order.

The sections of the Act most material to the case were:

Sect. 51. Any urban authority may provide their district or any part thereof, and any rural authority may provide their district or any contributory place therein, or any part of any such contributory place, with a supply of water proper and sufficient for public and private purposes, and for those purposes, or any of them, may construct and maintain waterworks, dig wells, and do any other necessary acts.

Sect. 54. When a local authority supply water within their district, they shall have the same powers, and be subject to the same restrictions for carrying water-mains within or without their district as they have and are subject to for carrying sewers within or without their district respectively by the law for the time being in force.

Sect. 16. Any local authority may carry any sewer through, across, or under any turnpike road or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriage-way of any street, and after giving reasonable notice, in writing, to the owner or occupier (if on the report of the surveyor it appears necessary), into, through, or under any lands whatsoever within their district.

Sect. 189. Every urban authority shall, from time to time, appoint fit and proper persons to be medical officer of health, surveyor, inspector of nuisances, clerk, and treasurer . . . Every urban authority shall also appoint or employ such assistant collectors, and other officers and servants, as may be necessary and proper for the efficient execution of this Act, and may make regulations with respect to the duties and conduct of the officers and servants so appointed or employed.

Buckley, Q.C. and *Haldane* for the motion.—The question is practically one as to the construction of sects. 16 and 54 of the Public Health Act 1875. There are two points: (1) as to whether it is necessary to carry the main through the plaintiff's land; and (2) whether Mr. Powell was "the surveyor" within the meaning of sect. 16 of the Act. By the joint operation of those sections, when a local authority supply water within their district, they have power to carry water-mains under roads or streets, and "after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary) into, through, or under any lands whatsoever within their district." That does not mean, if it appear necessary to the surveyor, but if on the report it would appear necessary to a court of competent jurisdiction who had to determine the question, so the court must decide. [STIRLING, J. referred to *Stockton and Darlington Railway Company* v. *Brown*, 3 L. T. Rep. N. S. 131; 9 H. L. Cas. 246.] The report of the surveyor would not be conclusive:

Flower v. *London, Brighton, and South Coast Railway Company*, 12 L. T. Rep. N. S. 10; 2 Dr. & Sm. 330.

It is only evidence for the court to consider, and the onus of proving want of *bona fides* in the report no doubt rests upon those who impeach it:

Errington v. *Metropolitan District Railway Company*, 46 L. T. Rep. N. S. 443, 446; 19 Ch. Div. 559, 571.

The report is not very clear as to the necessity; it says it is "desirable and advisable" to lay the main in the way mentioned. "Necessary" cannot mean "convenient." Next, Mr. Powell, who made the report, was not "the surveyor" within the meaning of sect. 16, he was only acting temporarily, and was not appointed to the vacant place. He was not the "surveyor" within the definition of that word in sect. 4 of the Act, which applies to a rural authority only; nor was he a "fit and proper person" appointed to be the surveyor under sect. 189, which is the section applicable in the case of an urban authority.

Graham Hastings, Q.C. and *E. Ford* for the defendants.—The report complies with the Act. Sect. 16 does not say that the word "necessary" must be used in the report, but if on the report it appears necessary, and on this report it does. The local board are the judges as to whether it is necessary to take the main through the land. That appears to have been the intention of the Act in sects. 23 to 25 dealing with the analogous case of sewers:

Ex parte Saunders, 11 Q. B. Div. 191.

The judgment as to the necessity of either the surveyor or the local board is final. Mr. Powell was a person appointed to perform the duties of surveyor under the Act, and so was within the definition of surveyor. The present surveyor, who has been duly elected, and is undoubtedly "the surveyor" within the meaning of the Act, has made an affidavit in which he takes the same view as to the laying of the main that Mr. Powell did, and approves of Mr. Powell's report. The plaintiff has delayed taking proceedings until we have done a portion of the work. If we are restrained from continuing, that work will be thrown away. Compensation in a case like this would be a complete remedy. The defendants are a public body constituted with powers to be exercised for the public benefit.

Haldane in reply.—The plaintiff always resisted the defendants' right to enter upon his land, so much so that they threatened to apply for a magistrate's order under sect. 305 of the Act to obtain power to enter upon it.

Cur. adv. vult.

Oct. 24.—STIRLING, J. stated the facts and continued:—It was objected that the plaintiff was precluded from applying for an injunction by his delay. Having regard to the communications and correspondence which passed between the parties, and the express statement made on behalf of the defendants on the 5th June, that a magistrate's order would be applied for, I am of opinion that this objection ought not to prevail. The defendants claim the power to carry their main through the plaintiff's land, under sects. 51, 54, and 16 of the Public Health Act 1875. [His Lordship read the 51st section, and continued:] The power is permissive, but sect. 299 provides the means by which, on complaint to the Local Government Board, the urban authority may in the proper case be compelled to undertake the duty. [His Lordship then read sect. 54 and sect. 16 of the Act, and continued:] Then by sect. 308, the owner and occupier of the land who has sustained damage by reason of the construction of the sewer, or the exercise of the power, may obtain compensation for the damage done. The injunction was claimed on two grounds: first, it was said that it was not, and did not appear by the report of the 21st March 1888, to be necessary to carry the main through the plaintiff's land; and, secondly, it was contended that Mr. Powell, by whom the report was made, was not the surveyor within the meaning of sect. 16. Both these points raised questions upon the construction of the Act with which I think it is right to deal. As to the first

point, it was not contended that the word "necessary" in the 16th section was to be construed as meaning that any other course was physically impossible. What was urged upon me was, that the route chosen by the defendants must according to that section appear necessary to the tribunal which is to determine questions if raised; that is, I suppose, the court of first instance in the first place, and, I suppose, the Court of Appeal if the decision of the court of first instance be not acquiesced in, and finally the House of Lords if that tribunal should be resorted to. Now, there are few engineering questions on which it is not found that engineers of the greatest eminence take different views, and if it is true that the construction of the enactment be that contended for by the plaintiff, it seems to follow that no local authority can act upon a report of the kind in question without the risk of a protracted litigation, the result of which would depend on the view taken by the court whose decision was ultimately invoked of the conflicting evidence of experts. Although, so far as I can discover, the question now arises for the first time upon this particular Act, analogous questions have often been previously raised on similar enactments in other Acts of Parliament, and it is important to see how such enactments have been dealt with by the court. The law on the subject is thus stated by Lord Cranworth in the leading case of *The Stockton and Darlington Railway Company* v. *Brown*. He says: "I think it clear that, when the Legislature authorises railway directors"—he was there dealing with a railway company—"to take for the purposes of their undertaking any lands specially described in their Act, it constitutes them the sole judges as to whether they will or will not take those lands; provided only that they take them *bonâ fide*, with the object of using them for the purposes authorised by the Legislature, and not for any sinister or collateral purpose. This is the construction to be put on all such legislative powers, whether the language of the Act is that the company may take so much of the lands as is necessary for the undertaking, or so much as is required or is expedient to be taken, or simply (as in this case) that the company may take lands for the purposes of the undertaking. In such cases the Legislature, having provided what it considers sufficient means for securing adequate compensation to the owners of the land, leaves it to those interested in the undertaking to say to what extent it will be useful to them to exercise their statutable powers." Lord Cranworth is there dealing with a railway company, whose directors were the body intrusted with the powers sought to be exercised, and were acting in the interests of their shareholders. But the principle stated may even more readily be applied where the powers are vested in a public corporation charged with the performance of important public duties, and acting for the benefit of the whole community. That is shown, among other cases, by *Galloway* v. *The Mayor and Commonalty of London* (14 L. T. Rep. N. S. 865; L. Rep. 1 H. of L. 34) and *The North London Railway Company* v. *The Metropolitan Board of Works* (Johns. 405). The latter of these cases also shows that it is not, as suggested in argument, necessary for the application of the principle that the lands on which the power is to be exercised should be defined by a reference to plans and books of reference, or otherwise. Having regard to these cases, even if the words were simply "if it should appear necessary," I should be of opinion that the persons to judge were the local authority, or a competent person employed by them to advise them upon the question. The words, however, are, "If on the report of the surveyor it appears necessary," and upon these words I think the person to determine the necessity is the surveyor. As to the mode in which he is to exercise his judgment, the case of *Flower* v. *London, Brighton, and South Coast Railway Company* was referred to on behalf of the plaintiff. In that case the railway company were desirous of taking two pieces of land in such a position that *primâ facie* they would not be required by the railway company. The Vice-Chancellor in his judgment says: "On the face of it"—that is on the face of the plan—"and if there was no evidence on the subject, I should ask, 'What can the company want with those pieces of land?'" Moreover the railway company had not included them in two notices to treat which they had given in the first instance, and there was evidence on behalf of the plaintiff that the railway company did not, and could not, want them for the purposes of the railway. A motion for an injunction to restrain the railway company from taking them was made, and the argument of the counsel for the plaintiff was apparently that the company was not taking them *bonâ fide*, but taking them for some purposes which were not within the scope of their Acts. The only evidence adduced by the railway company on their behalf was an affidavit of the engineer stating simply, in so many words, and without anything more, that the lands were or would be required for the purposes of the company, but it did not specify the purposes for which they would be required. Upon this evidence Kindersley, V.C. came to the conclusion that the lands were not *bonâ fide* wanted for the purposes of the company, and granted an interlocutory injunction. In his judgment he says this: "The plaintiff's counsel insist that the company cannot take them, and they say that, looking at the plans it is evident that it is not possible that the company can want them for their line of railway. On the other hand, on the part of the company, Sir Charles Fox, the engineer of the line, says in his affidavit that, in his opinion, the fragments of the land in question are or will be required for the purposes of the Act. He does not say for what specific purposes, but simply they are or will be wanted; and the question is, whether the railway company has a right to take any lands, or houses, or premises of any kind whatever, simply because their engineer makes an affidavit that they are or will be required for the purposes of the Act, without saying what those purposes are. If that be the law, it is hard to conceive a law more likely to be detrimental to the interests of the public, because the effect would be that no court of justice would have the power to try the question"—now observe what the question is—"whether any given premises are fairly and *bonâ fide* wanted for the purposes of the railway, provided only the engineer will make an affidavit saying that they are or will be wanted. In the present case the engineer who makes the affidavit is above all suspicion of being capable of acting dishonestly;

but there might be cases where the engineer might not be so trustworthy, and might make such an affidavit dishonestly, and even falsely, and it being a matter of opinion only, and not of fact, it could never be proved that he had sworn falsely." Then he refers to the cases, and he refers to the *Stockton and Darlington Railway Company* v. *Brown*, which I have mentioned. Then he says: "In the course of the argument I was pressed to assume, because there appeared nothing in the report to the contrary, that in that case there was no statement of the purposes for which the premises were required; but I have caused search to be made for the pleadings, and it appears that, in the answer and in the affidavits, the purposes for which the company desired to take the land were fully and particularly set out; and the contention raised by the landowner was, that those purposes could just as well be carried into effect by taking a different part of his land from that part which the company proposed to take." Then he states the different stages of the case, and then he says: "The House of Lords decided not that the mere *ipse dixit* of the engineer was conclusive, but that, inasmuch as the purposes were specified, and appeared to be *bonâ fide* required for the undertaking, the question what particular land should be taken for those purposes must be entirely in the discretion of the company." Upon that the Vice-Chancellor granted an interlocutory injunction. But it appears that the case did not stop there, but it went to trial along with two other cases of *Flower* v. *Muspratt* and *Flower* v. *Frowd*. The proceedings at the hearing are reported, so far as I have been able to discover, only in 6 New Reports 200, and what took place there is thus stated: "Fresh evidence was now adduced by the company to show that the land was wanted, and an affidavit of Sir Chas. Fox, their engineer, contained the following clause;" and then it is set out, specifying the purposes for which the pieces of land were wanted. Cross evidence was put in by the plaintiff to show that the lands in dispute were not wanted. In giving judgment the Vice-Chancellor says that he adheres to the opinion expressed on the former occasion in the same case, "that the company ought not to be allowed to take the land under the powers of their Acts, on the merely general affidavit of their engineer that they were wanted for the purposes of the Act. It was for the court to be satisfied that the lands were *bonâ fide* wanted for the purposes of the Act, and to see that the land was not taken merely on speculation, and to make a profit by selling it again. But now the company had given fresh evidence as to the specific purposes for which the land was wanted, and the court had not the means to go beyond this." By that he means, as I take it, that the court would not inquire beyond being satisfied by the *bonâ fide* statement of the engineer, because it was stated that there was cross evidence put in by the plaintiff to show that the defendant's engineer was wrong. The Vice-Chancellor goes on: "To that extent it must trust the oath of the engineer. No doubt there were circumstances to excite suspicion that the land was not *bonâ fide* wanted, viz., the fact that in the original notices to treat the land in dispute was not contained, and the awkward shape of the land; but he thought the company had fairly answered these objections by saying that when the first notices were sent their plans were immatured. As to the shape of the pieces registered, though the company might not have taken such pieces for the purposes required, and though they might have taken one large piece elsewhere, yet, as they found that they would get these pieces cheaper, and that they would do for the purposes required, they had a right to take them." And the injunctions were refused. So that at the trial, upon the further evidence, he declined to continue the injunction. The result of that case appears to be, that the engineer was bound to exercise a *bonâ fide* judgment in the matter; and further, that if the judgment was contested in a court of law, he was bound to give evidence in such a way as to enable the court to judge, and to satisfy the court that he had acted *bonâ fide*, but upon being so satisfied, the court declined to interfere. In the argument before me some stress was laid upon the word "necessary," which occurs in the Act, and it was said that that word was not to be construed as meaning simply "convenient." That, of course, is a question of construction, and upon that I would refer to one case, not as governing this, but as showing the principle upon which the word "necessary" has been construed by the court with reference to similar matters. It is the case of *Sanderson* v. *Cockermouth and Workington Railway Company* (11 Beav. 497, more fully reported 7 Ry. & Can. Ca. 613). The case in its nature was a different one from this, but it relates to the specific performance of an agreement between the plaintiff and the defendants for the sale of certain land, and there was a stipulation that the company should make such roads, ways, and slips for cattle "as might be necessary." The question arose in a suit for specific performance as to the meaning of that word "necessary" occurring in the agreement. Lord Langdale, M.R. says: "The word 'necessary' must receive a reasonable interpretation, having regard to the circumstances and situation of both sides, and I must construe it with reference to what is proper to be done by one for the convenience of the other. I consider the expression to mean such roads, ways, and slips for cattle as might be necessary and proper for convenient communication between the separate portions of the plaintiffs' land." And he directed an inquiry before the master in the terms which he uses there as expressing the meaning which he attaches to the word "necessary." The case was appealed, and came before Lord Cottenham. Lord Cottenham did not discuss the construction, but he affirmed simply the judgment of the Master of the Rolls, stating that, in his opinion, the Master of the Rolls had taken the proper view. I am not citing that case as governing the present one in any way, beyond this, as showing (which perhaps did not want any authority) that, in construing the document before the court, the surrounding circumstances are to be looked at, and a reasonable construction is to be put upon the word "necessary" having regard to those circumstances. Now, here the Legislature is dealing with public bodies, who are charged with the performance of certain public duties. In the performance of these duties the interests of the public are primarily to be regarded; and, in such a case, it seems to me that "necessary" may well mean "necessary for

the efficient discharge of the duty in the way which is most for the benefit of the public." In the natural course of things, the sewers and water mains would generally be laid under streets, and the Legislature evidently contemplated that this would be the case; but, if the public interests required it, if the sewage could be more efficiently removed, or the water be better conveyed, by laying the sewers or mains under the lands of private individuals, it is reasonable, as I think, that the board should have power to adopt such a course, and I think the power to do this was intended to be conferred. I think, therefore, it was the duty of the surveyor to take all the circumstances of the case into consideration, and come to a conclusion as to the best course to be pursued, and to report accordingly, saying what was necessary to be done in order to carry into effect the scheme which commended itself to his judgment. If the court finds the surveyor has exercised his judgment, and come to a conclusion in good faith, I apprehend that, according to the authorities cited, it ought not to interfere, although other courses to avoid the necessity of entering on private land might be pointed out, and might be admitted to be practicable, or even although engineers of great eminence might come forward and say that they themselves would have reported in favour of the adoption of some such alternative course. The second objection by the plaintiff was, that Mr. Arthur Powell was not the surveyor within the meaning of the 16th section of the Public Health Act. The material sections to be considered with reference to this are the 189th, the 190th, and part of sect. 4, which is the interpretation clause. [His Lordship read sect. 189, and continued:] Then the following section deals with the rural authorities, and it differs somewhat in the mode in which it is expressed: "Every rural authority shall from time to time appoint fit and proper persons to be medical officer or officers of health, and inspector or inspectors of nuisances; they shall also appoint such assistants and other officers and servants as may be necessary and proper for the efficient execution of this Act." There is no power to appoint a surveyor, and by the interpretation clause, sect. 4, "Surveyor includes any person appointed by a rural authority to perform any of the duties of surveyor under this Act." So that it appears from that, that under the words "appoint such assistants, and other officers and servants as may be necessary and proper for the efficient execution of this Act," a rural authority has the power to appoint a person to perform part of the duties of the surveyor under this Act, and in the case of the rural authority such person is to be deemed as included in the term "surveyor." But there is no such provision with reference to urban authorities, and, in my opinion, the surveyor mentioned in sect. 16, dealing with the urban authority, is the fit and proper person duly appointed to be surveyor under sect. 189 of the Act, and no other, not even an engineer of great eminence whom the authority may see fit to consult with reference to works on which they are engaged. The question then arises, was Mr. Arthur Powell such a person? In my opinion he was not. The board had never come to the conclusion that he was a fit and proper person to be their surveyor within the meaning of sect. 189. All they had determined was, first, that he was competent to be their assistant surveyor; and secondly, to discharge such of the duties of surveyor as might be necessary or proper to be discharged during the vacancy in the office of surveyor. He was, in fact, as it seems to me, in the language of the Act, an officer or servant "necessary or proper for the efficient execution of the Act," but not the surveyor within the meaning of sect. 189 or sect. 16. It is said that the present surveyor, who is admitted to have been duly appointed, and to be "the surveyor," has made an affidavit in which he takes the same view, and approves of the report of Mr. Powell. I think, however, this is not material for the present purpose. The defendants seek to avail themselves of the powers conferred upon them by the Act to take lands in derogation of the plaintiff's right, and in so doing they must follow strictly the terms of the power. The existence of the report of the "surveyor" on which the acts contemplated by them appear to be necessary is, in my judgment, a condition precedent to the doing of those acts, and, as I think the report of the 21st March, on which the whole of the proceedings are founded, was not the report of the "surveyor" within the meaning of the section, the plaintiff seems to me entitled to an injunction until the trial of the action, or further order, to restrain the defendants from acting on the notice of the 18th April 1888. It becomes unnecessary to express any opinion on the other points of the case, but it may be right I should say that I have not been able to satisfy myself on the existing evidence whether Mr. Powell, supposing him to be surveyor, has done that which I think he would have been bound to do, exercised an independent judgment as to the necessity of adopting the course intended to be pursued by the board, or whether he has not, in truth, without exercising any judgment on the case, adopted the views of Mr. Edward Cousens, under whose supervision he is stated to act. In saying that, I am not at all to be understood as saying that the board or Mr. Powell may not avail themselves of the benefit of Mr. Edward Cousens' opinion; but, as it seems to me, the surveyor of the board is not entitled simply to leave it to Mr. Edward Cousens to say what should be done, but ought in each case to exercise a judgment of his own. I think, therefore, there ought to be an injunction in the terms I have mentioned, and, as regards the costs, having regard to the nature of the case, I think it will be better to reserve them.

Solicitors for the plaintiff, *Underwood, Son,* and *Piper.*

Solicitors for the defendants, *Daubeny* and *Mead,* agents for *William Smith* and *Sons,* Weston-super-Mare.

QUEEN'S BENCH DIVISION.

Monday, Oct. 29, 1888.

(Before Lord COLERIDGE, C.J. and GRANTHAM, J.)

REG. *v.* SHEPLEY AND OTHERS. (*a*)

Poor law—Sturges Bourne's Act (59 *Geo.* 3, *c.* 12) *—Assistant overseer—Election—Warrant of justices—Jurisdiction.*

By Sturges Bourne's Act (59 *Geo.* 3, *c.* 12), *s.* 7, *it is enacted that it shall be lawful for the*

(*a*) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

inhabitants of any parish in vestry assembled to nominate and elect any person to be assistant overseer, and it shall be lawful for any two of His Majesty's justices of the peace, and they are thereby empowered by warrant under their hands and seals, to appoint any person or persons who shall be so nominated and elected to be assistant overseer or overseers of the poor.

Held, that the justices were bound to appoint the person presented to them as having been elected assistant overseer by the vestry, and that they could not withhold their warrant because it was alleged by an unsuccessful candidate for the office that the election had not been properly conducted.

ON the 4th May 1888 a notice was issued by the churchwardens of the parish of Glossop, in the county of Derby, calling a meeting of the vestry for the 11th May to elect an assistant overseer for the parish.

Sect. 7 of Sturges Bourne's Act (59 Geo. 3, c. 12), under which assistant overseers are appointed, provides as follows:

That it shall be lawful for the inhabitants of any parish in vestry assembled to nominate and elect any discreet person or persons to be assistant overseer or overseers of the poor of such parish, and to determine and specify the duties to be by them executed or performed, and to fix such yearly salary for the execution of the said office as shall by such inhabitants in vestry be thought fit; and it shall be lawful for any two of His Majesty's justices of the peace, and they are hereby empowered by warrant under their hands and seals, to appoint any person or persons who shall be so nominated and elected to be assistant overseer or overseers of the poor, for such purposes and with such salary as shall have been fixed by the inhabitants in vestry.

On the 11th May the vestry meeting was held, and, after a chairman had been elected, two candidates, named Bridge and Massey, were nominated for the office of assistant overseer. On a show of hands the chairman announced that Massey was in a majority, and a poll was demanded on behalf of Bridge. The poll was held the following day, and at its close the chairman said that Massey had received 1247 votes and Bridge 1245, and declared Massey duly elected to the office. A protest was made on behalf of Bridge that the votes had not been correctly counted, and that some persons had been allowed to give more votes than they were entitled to. A scrutiny was demanded, and the chairman said he would allow it to take place if a sum sufficient to cover the expense of holding it was deposited, but this offer was not accepted. On Massey being presented to the justices as the person who had been elected at the vestry meeting as assistant overseer, an application was made to them on behalf of Bridge to withhold their warrant on the same grounds as stated in the protest made on behalf of Bridge to the chairman of the vestry meeting. The justices granted the application, and refused to issue their warrant.

A rule *nisi* was obtained for a *mandamus* calling upon the justices to show cause why they should not issue their warrant appointing Massey to the office of assistant overseer.

Asquith, for the justices, showed cause.—Massey was not really elected by the vestry because the poll was not properly taken, and many persons who voted were allowed to give more votes than they were entitled to by 58 Geo. 3, c. 69, s. 3. The justices ought to satisfy themselves, before they issue their warrant, that the person who is presented to them has been duly elected. There is no other way by which an assistant overseer, who has not been duly elected, can be deprived of office. This is not a case in which a *quo warranto* would lie.

Cunningham Glen, in support of the rule, was not called upon.

Lord COLERIDGE, C.J.—I have no doubt that the justices acted in this case without jurisdiction. The Act to which we have been referred was passed in 1819, and deals with the election of parish officers, conducted under the prior Act passed in 1818, which points out the method of voting, and the apportionment of voting power at vestry meetings. The argument that the justices were entitled to question the validity of this election of the assistant overseer would tend also to show that they were entitled to inquire into the validity of the election of the chairman of the vestry meeting. I do not think that is so. When the chairman is elected he has to determine which candidate has the majority of votes. Then certain formalities have to be gone through, the minutes have to be drawn up and signed. That was all done properly, and the chairman concluded with a declaration of the election of Massey, and offered, when Bridge demanded a scrutiny, to allow it to take place if a sufficient sum was deposited to cover the expense. The Act says, that it shall be lawful for any two justices to issue their warrant to appoint the person nominated and elected by the vestry. That does not look as if they were empowered to examine into the nature of the election. The Act seems only to require that they should have regard to the question whether the minutes have been properly entered and signed, and that the person presented to them is the person elected by the vestry. The fact is clear that there is no appeal from such an election, and, indeed, until recent years there was no appeal from the decision of the presiding official in the election of the important office of member of a local board save by the cumbrous method of a *quo warranto*. I do not say that there may not be serious consequences for a person not duly elected who makes himself in any way responsible, and has to plead when taken to task that he has been duly elected by the vestry. But this Act was passed sixty-eight years ago, and during that time, so far as I am aware from my own experience and the confession of counsel, no such suggestion has been made as to the existence of this power which we have been asked to say the magistrates were right in exercising. I think, indeed, that if we were to decide that they were right in their action, we should be introducing a mischievous precedent.

GRANTHAM, J.—I am of the same opinion. The case of *Skingley* v. *Surridge* (11 M. & W. 503) is to some extent in point, for in that case, though the minutes of the resolution of the vestry electing an assistant overseer did not specify the duties to be performed by him, it was held that the appointment was within the statute, and that the justices had no power except to confirm the resolution of the vestry.

Rule absolute.

Solicitors for the justices, *Sharpe*, *Parkers*,

Pritchard, and *Sharpe*, agents for *Tweedale*, Glossop.

Solicitors for the overseer, *Wilkins*, *Blyth*, and *Dutton*, agents for *C. Davis*, Glossop.

Thursday, Aug. 9, 1888.

(Before Manisty and Hawkins, JJ.)

Reg. v. Slade (Metropolitan Police Magistrate); *Ex parte* Yeoward. (*a*)

Dogs—"Goods"—Summons for detaining dog—Power of a metropolitan police magistrate to order the delivery up of a dog as "goods" under 2 & 3 Vict. c. 71 (An Act for Regulating the Police Courts in the Metropolis), s. 40.

Sect. 40 of 2 & 3 Vict. c. 71, enables a metropolitan police magistrate, upon complaint by any person claiming to be entitled to any "goods" (not exceeding 15l. in value), detained by any person within the limits of the metropolitan police district, to summon the person complained of, and inquire into the title to the said "goods," and, if satisfied that such goods are detained without just cause, to order the "goods" to be delivered to the owner thereof.

Held, that the word "goods" in this section includes dogs, and that therefore the magistrate has power, under this section, to order a dog unlawfully detained to be delivered up to the owner thereof.

Rule for a *mandamus* to W. Slade, Esq., metropolitan police magistrate, to compel him to issue a summons against one William Manners, calling on the said William Manners to appear before him and show cause why he should not deliver up to the applicant, Richard Yeoward, a certain dog alleged to belong to the applicant.

The facts, according to the affidavit of the applicant, were as follows:—

On the 18th July 1888 the applicant lost a dog which he had bought on the 21st April 1888, the dog being of less value than 15*l*. A few days after the loss of the dog, William Manners called at the applicant's house, with the collar the dog was wearing on the day it was lost, and said that he had the dog, and that he intended to keep it, as he had lost it some months before. The applicant several times applied to have the dog back, but Manners always refused to give it up. The applicant then applied to Mr. Slade, police magistrate at Southwark Police-court, for a summons under sect. 40 of 2 & 3 Vict. c. 71 (An Act for Regulating the Police Courts in the Metropolis), calling upon the said William Manners to appear before him and show cause why he should not deliver up the dog to the applicant. The magistrate refused to grant the summons, on the ground that a dog does not come within the description of "goods" in the said section, and that he had no power to grant the summons; but he expressed a wish that an application should be made for a *mandamus* to settle the question whether a dog came within the meaning of "goods" in the said section.

Sect. 40 of 2 & 3 Vict. c. 71, provides:

Upon the complaint made to any of the said magistrates [that is, the metropolitan police magistrates] by any person claiming to be entitled to the property or possession of any "goods" which are detained by any other person within the limits of the metropolitan police district, the value of which shall not be greater than fifteen pounds . . . it shall be lawful for such magistrate to summon the person complained of, and to inquire into the title thereto, or to the possession thereof, and if it shall appear to the magistrate that such goods have been detained without just cause, after due notice of the claim made by the person complaining . . . it shall be lawful for such magistrate to order the "goods" to be delivered to the owner thereof . . . and every person who shall neglect or refuse to deliver up the goods according to such order, shall forfeit to the party aggrieved the full value of such goods, not greater than the sum of fifteen pounds, such value to be determined by the magistrates: Provided always, that no such order shall bar any person from recovering possession of the goods or money so delivered or forfeited, by suit or action at law, from the person to whose possession such goods or money shall come by virtue of such order, so that such action be commenced within six calendar months next after such order shall be made.

Mead showed cause against the rule.—Dogs do not come within the meaning of "goods" in this section of the Act. [Hawkins, J.—Then if a dog of mine be taken, how am I to get it back?] In the County Court or in the High Court, according to its value. A man can be indicted for stealing the dog's collar, but not at common law for stealing the dog. The word "goods" is used in the section intentionally, when other words might have been used. [Hawkins, J.—Could you sue in *detinue* for a dog?] Yes; you could sue for many things which are not "goods"—for example, bills of exchange, apes, &c. [Manisty, J.—From the proviso at the end of the section it would seem as if money were goods, there being the words, or "money so delivered." Hawkins, J.—Suppose I make a will and leave all my worldly goods to A. B., would not my dogs, &c., pass under my will?] If it had been intended that the powers of the magistrate should extend to every kind of property, then the more general word "property" would have been used, and not "goods." [Hawkins, J. (referring to the Innkeepers Act 1878).—The landlord may dispose of goods left in his care—could he sell a dog left in his care?] I submit not. "Goods" is a technical expression, and is synonymous with "chattels," and "chattels" is synonymous with "goods," as we see by the definition of chattels as given in the Imperial Dictionary. In *Reg.* v. *Robinson* (Bell's Crown Cases, 34) it was held that dogs, not being the subject of larceny, are not chattels within the meaning of sect. 53 of 7 & 8 Geo. 4, c. 29, and that, consequently, a person cannot be convicted under the above section of obtaining a dog by false pretences. [Manisty, J.—I must say I very seriously doubt whether a dog is a "chattel" in the proper sense of the word, but I should think it is "goods." Is a horse goods?] Yes; because it is not one of the class *ferœ naturæ*. Provision has been made by statute for the stealing of dogs.

Colan, in support of the rule, was not called upon.

Manisty, J.—The fair and reasonable construction of sect. 40 of 2 & 3 Vict. c. 71, seems to me to require that "goods" should include dogs. There may be many instances given in which "goods" ought to be so construed as including dogs, and I think no better example can be given than that given by my brother Hawkins, "I leave all my worldly goods to A. B.," which would seem to me to include dogs. I should have thought it a

(*a*) Reported by Henry Leigh, Esq., Barrister at-Law.

very narrow construction of the section to have held that "goods" did not include dogs.

HAWKINS, J.—I am clearly of the same opinion. Good sense seems to require that we should put this construction on the word "goods" in this statute. All I have to say I have said in the course of the argument.

Rule absolute for a mandamus.

Solicitor for the magistrate, *Solicitor for the Treasury.*

Solicitors for the applicant, *S. M.* and *J. B. Benson.*

CROWN CASES RESERVED.

CORRECTION.—In the second line of the judgment of Huddleston, B., at p. 659, *ante*, the word "must" should have been "cannot."

Saturday, Nov. 24, 1888.

(Before Lord COLERIDGE, C.J., MANISTY, HAWKINS, DAY, and SMITH, JJ.)

REG. *v.* ADAMS. (*a*)

Criminal law — Obscene libel — Letter inciting recipient to act of immorality—Question for jury —Verdict of guilty.

Upon an indictment for writing and publishing to another a letter containing divers false, scandalous, malicious, and defamatory matters and things of and concerning such other person, which letter contained a solicitation to the recipient, a young woman, to commit an act of immorality with the prisoner, and an offer to her of money in the event of the solicitation being acceded to:

Held, that it was for the jury to say whether such letter contained a defamatory libel tending to asperse the character of the person to whom it was addressed and to bring her into contempt, and calculated also to provoke a breach of the peace; and that, as the sending of such a letter to a virtuous young woman might reasonably provoke on her part or on the part of those connected with her a breach of the peace, the jury having found the prisoner guilty must be taken to have found that the letter contained such a defamatory libel, and that the prisoner was therefore rightly convicted.

Quære, whether the writing and sending to a person an indecent and obscene letter with intent to incite such person to commit immoral acts is an indictable offence; and if so, whether the sending of such a letter by post to one person is a publication of such letter, although it in fact is received by another than the person to whom it was addressed.

CASE for the opinion of this court reserved by the Recorder of London, as follows:—

At the sessions of the Central Criminal Court, held on Monday, the 17th Sept. 1888, John Charles Adams was tried before me on an indictment which charged him: In the first count with writing and sending to Emily Susan Yuill an indecent letter, and so endeavouring to corrupt her morals and to incite her to commit immoral acts with him. In the second count, with writing an indecent and obscene letter with intent to incite the said Emily Susan Yuill to commit immoral acts and afterwards uttering and publishing the said letter to her and others. In the third count, with writing and publishing an indecent and obscene libel concerning the said Emily Susan Yuill in the form of a letter directed to her. (*a*) The fifth and sixth counts are similar in form to the first and second, but relate to another letter. A copy of the indictment, which sets out the letters, the subject of the charges, accompanies this case.

Evidence was given that Emily Susan Yuill, the younger, inserted an advertisement for a situation in the *Daily Telegraph*, and that it was stated in it that replies were to be addressed to K. S., 21, Radnor-street, Old-street, E.C.; that the prisoner wrote the letter set out in the first four counts of the indictment, and inclosed it in a sealed envelope addressed as required by the advertisement, and that he posted it; that the letter was received by Emily Susan Yuill, the elder, who opened and read it, and then handed it to her husband, who handed it to a sergeant of police, and that it was never seen by Emily Susan Yuill, the younger. Evidence was also given that the prisoner wrote the letter set out in the fifth and sixth counts of the indictment, and inclosed it in a sealed envelope, addressed to Miss A. Yuill, 21, Radnor-street, City-road, E.C., and posted it; that this letter was received by a sergeant of police, who in accordance with instructions given to him by his superior officers had answered the letter set out in the first four counts in the name of Emily Susan Yuill, the younger, and had continued a correspondence with the prisoner in her name, and that it was never seen by Emily Susan Yuill, the younger.

At the close of the case for the prosecution counsel for the prisoner submitted that there was no case to go to the jury on the grounds: First, that to write and send to a person letters in the form of those set out in the indictment is not an indictable offence; secondly, that the letter set out in the third and fourth counts is neither a defamatory libel nor an obscene libel; and

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

(*a*) The third count of the indictment, which was the count upon which the conviction was upheld, was as follows: The jurors, &c., further present that the said J. C. Adams, on the said 19th of June 1888, and within the jurisdiction of the said court, being a person of an evil, wicked, and immoral mind and disposition, and wickedly, maliciously, and unlawfully minding, contriving, and intending as much as in him lay, to injure, oppress, and aggrieve, and vilify the good name, fame, credit, and reputation of the said E. S. Yuill, a good, peaceable, virtuous, and worthy subject of our said Lady the Queen, and to bring her into great contempt, hatred, infamy, and disgrace, and to cause her to be despised and shunned by others the said subjects of our said Lady the Queen, did frame and make a certain false, scandalous, malicious, and defamatory writing against the said E. S. Yuill, and unlawfully, wickedly, and maliciously did write, publish, and cause and procure to be written and published, in the form of a letter directed to her the said E. S. Yuill, the said letter containing divers false, scandalous, malicious, and defamatory matters and things of and concerning the said E. S. Yuill, and of and concerning the character for virtue, modesty, and morality then borne by the said E. S. Yuill, which said letter is according to the tenor and effect following—that is to say, "I have seen your advertisement in the *Daily Telegraph*" (meaning thereby that the said J. C. Adams had theretofore seen in the newspaper called the *Daily Telegraph* a certain advertisement therein inserted by the said E. S. Yuill). "I have no situation to offer you, but I should like to ask you a thing or two. I am a young man, twenty-five, and . . . " (The rest of the letter, which contained solicitations to acts of immorality and an offer of money should such solicitations be acceded to, was then set out with innuendoes).

thirdly, that there had been no publication of either of the letters.

I declined to stop the case upon the objections which were taken, but intimated that I would, if necessary, reserve the matter for the consideration of this court. I then left the case to the jury who convicted the prisoner on all the counts of the indictment, and I thereupon respited judgment, and admitted the prisoner to bail.

The question for the opinion of the court is whether upon the facts stated the prisoner could be properly convicted on all or any of the counts of the indictment.

Blackwell on behalf of the prisoner.—The first, second, fifth, and sixth counts of the indictment disclose no offence of which cognisance can be taken by a temporal court. They merely consist of letters which it is alleged incite to the commission of immoral acts. An incitement to fornication which is not open and notorious is an offence cognisable only by an ecclesiastical court, who have power to censure for it. If the prisoner in this case had met the young woman, and addressed to her the words he wrote to her, and she had consented to his proposals, no offence would have been committed by him. In *Reg.* v. *Watson* (2 Cox C. C. 376) a prisoner was charged with indecent exposure in a public place to the great injury and corruption of morals, and it was held he was not guilty as the exposure had only been witnessed by one person. The court held that the injury must be to the prejudice of several people, so here it was no offence to attempt to corrupt the morals of one person. *Reg* v. *Webb* (3 Cox C. C. 183; 18 L. J. 39, M. C.) was a similar case; and they both show that the court will not deal with questions of immorality unless they amount to open and notorious lewdness. In the course of the argument in the first case, Coleridge, J. said: "There are numerous offences against morality which the law cannot reach." And can the writing and solicitation to unchastity be worse than the commission of the act itself? With regard to the charge of sending an obscene letter, the sending of such a letter to a single person without any intention of having the contents published has never been held to be an offence. The law with regard to publication has relation to defamatory libels, and originated with the Star Chamber. It has never been satisfactorily argued or determined in the courts of law or received serious discussion except in *Rex* v. *Burdett* (4 B. & A. 314) because wherever it has been discussed it has been in a case where a person has delivered a document to some other person which he intended should be published to the world at large. Again in order that a libel should be a defamatory libel it is necessary that it should tend to a breach of the peace: (*Sir Baptist Hickes's case*, Pop. 139; Hob. 215.) [Lord COLERIDGE, C.J.—Suppose there had been no publication here, will that help you? Is it not indictable to write defamatory matter?] Surely not; and if it is there is no authority that to send a letter to a person which contains obscene matter is a libel, unless the letter also contains matter defamatory of the person to whom it is sent, which tends to cause a breach of the peace. This letter was merely an incitement to private immorality. [Lord COLERIDGE, C.J.—There is the case of *Rex* v. *Sir Charles Sidley*, 1 Sid. 168.] That was a case in which there was open and public indecency. [HAWKINS, J.—Suppose that the prisoner had had the letter printed and circulated.] That would have been a different matter altogether. Obscene publications are in a different category from libels, and are treated as tending to public immorality. [HAWKINS, J.—But suppose that this letter had merely been multiplied and sent to a number of girls, would not that have been indictable?] Yes. But that would be because it was a public nuisance, and the law will deal with that which affects the morality of a number of persons, but not with that which affects the morality of one person only. The first case with regard to an obscene libel was *Rex* v. *Curl* (2 Str. 789), and that was the case of a published book. It was followed, though at first it was doubted, in *Rex* v. *Wilkes* (4 Burr. 2527), and it is true that that was a case in which it does not appear that the prisoner was indicted for publishing more than one copy, which had been stolen from him. He had, however, printed a number of copies of the work complained of. As laid down in Stephen's Digest of the Criminal Law (3rd edit., arts. 172, 268) the publicly selling or exposing for sale anything obscene or indecent is a criminal publication. One test is, whether an action would lie, and it would not here as there was no publication. [Lord COLERIDGE, C.J. —Publication of a libel is not necessary, however, if the libel is such as tends to provoke a breach of the peace. In that case it is a misdemeanour although there is no publication.] Yes, but there was nothing defamatory of the young woman here; and there was no evidence to support the counts of the indictment which treat it as a defamatory libel. Suppose the letter had been written to a third person, it could not be said to have contained anything which would affect the character of the young woman. Putting aside the question of publication, the temporal courts previously to the Criminal Law Amendment Act never attempted to punish incontinence or incitement to fornication. A conspiracy to bring about the seduction of a woman would be different: (*Reg.* v. *Howell*, 4 F. & F. 160.) In *Reg.* v. *Ransford* (13 Cox C. C. 9) the writing a letter inciting to a criminal offence was held to be a crime, but in that case the act, if it had been committed, would have been indictable, while here, if the prisoner's proposal had been carried out, no indictable act would have been committed. The only case in which it has ever been held that mere incitement to private immorality is criminal is the case of *Reg.* v. *Cruikshank* (April number of C. C. Ct. Sessions Papers), where the indictment was similar to that here, but none of the objections raised here appear to have been made in that case. The Legislature have not thought fit to make provision for such a case as this, and to sustain the conviction will be to introduce a dangerous precedent and effect a perilous change in the criminal law; and, as is said by Stephen, J. in the third volume of his History of the Criminal Law, p. 360: "If Parliament is not disposed to provide punishment for acts which are upon any ground objectionable or dangerous, the presumption is that they belong to that class of misconduct which it is not desirable to punish."

Poland (with him *C. W. Mathews*).—This is a common law offence. The offence described in

the third and fourth counts of the indictment is an offence at common law, because the letter with writing and sending which the prisoner is therein charged is written in such language as to create mischief and provoke a breach of the peace. In sect. 227 of the Criminal Code, which was prepared by very learned judges, it is described as a criminal offence; and any writing is a libel and a common law offence, the tendency of which is to promote a breach of the peace. In 1 Hawk. P. C. c. 28, s. 11, it is said: "The sending of a letter full of provoking language to another, without publishing it, is highly punishable; and if the bare making of a libel be an offence, whether it be published or not, as it seemeth to be holden in some books, surely the sending of it to the party reflected upon must be a much greater crime, inasmuch as it so manifestly tends to a disturbance of the peace." In *Reg.* v. *Holbrook* (4 Q. B. Div. 42; 47 L. J. 35, Q. B.) Lush, J. said with regard to libel: "It is ranked amongst criminal offences because of its supposed tendency to arouse angry passion, provoke anger, and thus endanger the public peace." The evidence here was therefore all that is necessary. The letter itself was a gross insult, because it assumed that the young woman was willing to sell her chastity for money. [Lord COLERIDGE, C.J.—Is the asking a person to commit that which, if committed, would not be a misdemeanour, a misdemeanour?] Perhaps not. But here all that was necessary was for the jury to say whether this letter had the tendency which it is said to have had. That is to say, whether the implication that the young woman might be willing for money to have immoral intercourse with the prisoner had not a tendency to provoke a breach of the peace on the part of the woman or on the part of her relatives. [HAWKINS, J.—By sect. 2 of the Criminal Law Amendment Act 1885 it is made a criminal offence to solicit a woman under the age of twenty-one to have intercourse with any other person, and had it been an offence at common law to do so, where was the necessity for such an enactment?]. The first two counts of the indictment charge the publication of an obscene letter, and it is sufficient publication of an obscene libel if one copy is sent by post to one person. It is true there is no direct authority for this. The test of an obscene libel, however, is whether it tends to corrupt the mind of the person into whose hands it comes: (*Reg.* v. *Hicklin*, L. Rep. 3 Q. B. 360; 37 L. J. 89, M. C.) There the publication was to the public, but it cannot be less an offence if the letter is sent to one person only. If a man sends two obscene publications, he commits an offence when he sends the first. Here, however, as the tendency of the letter was to corrupt and debauch the person to whom it was sent, it was a question for the jury whether it tended to create a breach of the peace, and as by their verdict they must be taken to have found all the allegations in the indictment to be true, publication was unnecessary. In the case at the Central Criminal Court already referred to of *Reg.* v. *Cruikshank*, the indorsement on the brief for the prosecution is as to both prisoners, "guilty of publishing defamatory libels and also of publishing obscene libels." [SMITH, J.—Can you, apart from publication, have a criminal libel where it would not be actionable?] Yes, proceedings can be taken criminaliy for libel although an action will not lie, because the question is whether the libel has a tendency to create a breach of the peace: (*Rex* v. *Pettier*, 28 Howell's St. Tr. 617.) For these reasons the conviction should be sustained.

Blackwell in reply.—The result of the argument that it is sufficient if the letter had a tendency to provoke a breach of the peace is to show that, had the proposition contained in it been assented to, no offence would have been committed; and this shows that the incitement itself was no offence. The present case is different from that of a challenge to fight, for there the invitation is to commit a breach of the peace. Suppose the case of an invitation by a widower to his deceased wife's sister to marry him, could it be said that that was a criminal offence; and if not, what is the difference between that case and this? The enactment in the Criminal Law Amendment Act to meet this very case with regard to girls under twenty-one shows that it is not an offence at common law. In *Rex.* v. *Wegener* (2 Starkie, 245) an indictment was held bad which alleged that a libel reflecting upon the prosecutor in his profession as a solicitor was sent to the prosecutor only, and which did not allege that it was sent with intent to provoke a breach of the peace. Here there was no intent to provoke any breach of the peace, and the publication to one person was therefore insufficient to sustain the indictment.

Lord COLERIDGE, C.J.—We do not think it necessary to discuss or determine some of the very interesting questions which have been raised in the argument of this case—questions which are interesting in the law as well as to society at large, and upon which curious considerations may be urged upon both sides. As it is not necessary to discuss them, and as there are at present differences in opinion respecting them amongst us, we desire to abstain from expressing any opinion with regard to them. It appears to me, and I believe to my learned brothers also, that there is a short and simple ground upon which this conviction can be sustained, which is this: The conviction in the present case is upon an indictment which in one count at least, namely, the third, charges that the document in question is a defamatory libel tending to asperse the character of the person to whom it is addressed, and to bring her into contempt, and calculated to bring about a breach of the peace; and if not so calculated I am at any rate of opinion that the sending of such a document might reasonably, and I might say would probably, tend to bring about on the part of those connected with the person to whom it is addressed, or on the part of those having authority over her, a breach of the peace. We are therefore of opinion that all that is necessary to support the conviction, namely, that the document contained a defamatory libel, must be taken to have been found by the jury to have been the fact. Upon this short and simple ground, therefore, we sustain the conviction upon the third count of the indictment.

MANISTY, HAWKINS, DAY, and SMITH, JJ. concurred on the understanding that the conviction was sustained upon the third count alone.

Conviction affirmed.

Solicitors: for the prosecution, *The Solicitor to the Treasury;* for the prisoner, *J. Hayward.*

Saturday, Nov. 24, 1888.

(Before Lord COLERIDGE, C.J., MANISTY, HAWKINS, DAY, and SMITH, JJ.)

REG. *v.* DAWSON. (*a*)

Criminal law—Venue—Undischarged bankrupt—Obtaining credit over 20l.—Credit obtained in county other than that in which indictment laid—46 & 47 Vict. c. 52, s. 31.

An undischarged bankrupt residing in the county of L. while in the county of S. purchased a quantity of fish at an auction, for which he obtained credit. Part of the fish he disposed of in the county of S., and the remainder he sent to the county of L. Upon an indictment laid in the county of L. which charged him with having, while he was an undischarged bankrupt, unlawfully obtained credit to the extent of twenty pounds and upwards without informing the persons from whom credit was obtained of the fact that he was an undischarged bankrupt, contrary to 46 & 47 Vict. c. 52, s. 31:

Held, that the credit was obtained in the county of S., and that the indictment was therefore wrongly laid in the county of L.

CASE stated by the Chairman of the Quarter Sessions for the parts of Lindsey in the county of Lincoln.

The prisoner was convicted at the Court of Quarter Sessions, holden at Great Grimsby on the 10th July 1888, on an indictment which charged him with having on the 1st Nov. 1887, while he was an undischarged bankrupt, unlawfully and with intent to defraud obtained from Thomas Hobson, Thomas White Woodger, Robert Brame Capps, and Frederick Golder Capps, trading as "Thomas Hobson and Company," credit to the extent of twenty pounds and upwards; that is to say, to the extent of forty-one pounds fourteen shillings and sevenpence, without informing them the said Thomas Hobson, Thomas White Woodger, Robert Brame Capps, and Frederick Golder Capps, or any of them, that he was an undischarged bankrupt when he so obtained credit, or previously thereto, against the form of the statute in such case made and provided.

The indictment also charged the prisoner with having on the 31st Oct. 1887, while an undischarged bankrupt, unlawfully and with intent to defraud, obtained from Joseph Edward Burridge and Lancelot Francis Orde, trading as "Peacock and Co.," credit to the extent of twenty pounds and upwards; that is to say, to the extent of forty-two pounds nine shillings and fivepence, without informing them the said Joseph Edward Burrage and Lancelot Francis Orde, or either of them, that he was an undischarged bankrupt when he so obtained credit, or previously thereto, against the form of the statute in such case made and provided.

After setting out the indictment the case stated as follows:

The evidence was that the prisoner on the 31st Oct. and the 1st Nov. 1887, being then an undischarged bankrupt, whilst trading as a fish dealer, and residing at New Clee, in the parish of Clee, in the parts of Lindsey in the county of Lincoln, went to Lowestoft, in the county of Suffolk, and obtained credit from certain fish salesmen carrying on business there for fish which they then supplied to him upon his purchase of the same at a public auction. The prisoner disposed of part of the fish at Lowestoft, and sent the remainder to Great Grimsby. According to the custom of the trade at Lowestoft, fish bought by auction is deemed to be in the sole possession and at the risk of the buyer immediately on the fall of the hammer.

Counsel for the prisoner objected to the jurisdiction of the court, and contended that, inasmuch as credit had been obtained in Suffolk, the indictment was improperly laid in the parts of Lindsey.

Counsel for the Crown contended that the court had jurisdiction.

The Court of Quarter Sessions held that they had jurisdiction, and on a verdict of guilty reserved for the consideration of this court the question whether or not they had jurisdiction to try the indictment.

By sect. 31 of the Bankruptcy Act 1883 it is enacted that,

> Where an undischarged bankrupt who has been adjudged bankrupt under this Act obtains credit to the extent of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanour, and may be dealt with and punished as if he had been guilty of a misdemeanour under the Debtors Act 1869, and the provisions of that Act shall apply to proceedings under this section.

G. G. Kennedy, on behalf of the prisoner, submitted that, credit having been obtained by the defendant in the county of Suffolk, he was improperly prosecuted in the county of Lincoln. The credit was obtained the moment the fish was sold; at that time the offence was complete, and it was not affected by the fish being sent to Grimsby. The moment the fish were sold the property in them passed to the defendant, and was in him when the fish were sent to Grimsby.

Appleton, for the prosecution, contended that, as the defendant carried on business in Lincolnshire, he obtained the benefit of the credit in that county, and therefore part of the offence was committed in Lincolnshire. Though the credit was first obtained in Lowestoft, it was continuous and continued until the defendant reached Lincolnshire. In *Reg.* v. *Peters* (54 L. T. Rep. N. S. 545; 16 Cox C. C. 36; 16 Q. B. Div. 636), though the court did not decide the question, they appear to have thought that where a horse was obtained by a bankrupt in Ireland and sent to England, the credit which had been obtained continued while the horse was in course of conveyance, and that the prisoner there could have been convicted of obtaining credit in England. So here the credit, though obtained at Lowestoft, continued to Grimsby.

Lord COLERIDGE, C.J.—No; we think otherwise, and in our opinion this conviction should be quashed. Credit was obtained by the defendant in the county of Suffolk when the fish were bought at the sale in Lowestoft. The offence was complete at that time, and therefore, as credit was obtained in Lowestoft, there was no jurisdiction on the part of the Court of Quarter Sessions in Lincolnshire to try the case.

MANISTY, HAWKINS, DAY, and SMITH, JJ. concurred.

Conviction quashed.

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

Solicitor for the prosecution, *The Solicitor to the Treasury.*

Solicitor for the defendant, *John Barker*, Grimsby.

Saturday, Dec. 1, 1888.

(Before Lord COLERIDGE, C.J., MANISTY, HAWKINS, DAY, and SMITH, JJ.)

REG. *v.* ALLISON AND OTHERS. (*a*)

Criminal law—Newspaper libel—Indictment of "proprietor, publisher, editor, or person responsible for publication"—Sufficiency of fiat of Public Prosecutor — Generality — Omission of names of defendants—Liability of printers—Newspaper Libel and Registration Act 1881 (*44 & 45 Vict. c.* 60), *s.* 3.

In order to support an indictment for unlawfully writing and publishing a libel in a newspaper, it is necessary that the fiat of the Public Prosecutor, required by sect. 3 *of the Newspaper Libel and Registration Act* 1881, *should mention by name every person against whom the prosecution is authorised to be instituted sufficiently to identify him.*

Where, therefore, the editor and manager of a newspaper, certain of the signatories to the articles of association of an association in which the proprietorship of the paper was vested, and the directors of a limited company incorporated under the Companies Acts, which company merely printed the paper, had been convicted of unlawfully writing and publishing a libel in such paper; and the fiat of the Public Prosecutor omitted to mention the names of any of the defendants, merely authorising the prosecution of the "publisher, editor, or printer" of the paper:

Held (*Day and Smith, JJ. dissentientibus*), *that the fiat ought to have mentioned the name of every person against whom the prosecution was intended to have been allowed; and that it is the duty of the Public Prosecutor to ascertain the persons whom it is intended to prosecute before granting his fiat.*

Held (*by the whole Court*), *that sect.* 3 *of the Newspaper Libel and Registration Act* 1881 *does not authorise the granting of a fiat by the Public Prosecutor in respect of the printer of a paper; and that, as there was no evidence that the directors of the company who printed the paper, assuming a prosecution could lie against them in any case, sold or delivered anything but the bulk of each issue of the paper to the proprietors, or knew of or saw the contents of the paper which contained the libel either before or after its publication, their conviction could not be supported.*

Semble: It is the duty of the Public Prosecutor, under 44 & 45 Vict. c. 60, *s.* 3, *to a certain extent to determine whether a prosecution shall be instituted against particular persons, as well as to determine upon the character of the libel.*

CASE stated for the opinion of the court, by Sir T. Chambers, Recorder of London, which was as follows:—

At the sessions of the Central Criminal Court, held at the Old Bailey on the 1st Aug. 1888, the eight defendants were tried before me for a misdemeanour in unlawfully writing and publishing a libel of and concerning Henry Brougham Doughty, in a newspaper called the *St. Stephen's Review*, on the 24th March 1888.

The defendant William Allison was the editor and manager of the newspaper; Tarry, Harris, and Radclyffe are three of the seven signatories to the articles of association of the Constitutional News Association Limited, proprietors of *St. Stephen's Review*, and publishers of that paper at 21, John-street, Adelphi; James Judd, William James Judd, George Henry Judd, and Andrew Michael Creagh, are directors of Judd and Co. Limited, a general printing company, incorporated under the Companies Acts.

The article on Mr. Doughty in the *St. Stephen's Review* of the 24th March 1888 was a libel, and the points reserved in favour of the directors of Judd and Co. Limited and the Constitutional News Association Limited may thus be briefly stated:

1. Judd and Co. Limited print and deliver the whole issue of *St. Stephen's Review* to the Constitutional News Association Limited, and do not sell or deliver any single copy, the whole of the sales and deliveries to newsagents and others being made by the Constitutional News Company at 21, John-street, Adelphi.

2. There was no evidence of the directors of Judd and Co. Limited knowing the contents of the *St. Stephen's Review*, or seeing such contents either before or after it was printed, and it was contended that such directors could not be criminally liable, without some proofs of individual complicity in the libel, although the company as a corporation might be indicted.

3. The Newspaper Libel Act (44 & 45 Vict. c. 60), s. 3, provides that "no criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England, or Her Majesty's Attorney-General in Ireland, being first had and obtained."

4. The word "printers" does not occur in this section, although it is found in the 9th section, as to making entry in the registry office of the title and the names of all the proprietors, their occupations, places of business, and places of residence. The words "or other persons responsible for the publication of a newspaper" seem to mean representative proprietors under sect. 7 of the Act.

5. It was proved before me that the fiat against the directors of Judd and Co. Limited, obtained from the Public Prosecutor, was against the "printer" of *St. Stephen's Review*, without any name or names of any persons whatsoever.

6. It was contended that the Newspaper Libel Act has no operation when a joint-stock company is either proprietor or publisher of a newspaper, and that, if criminal proceedings are to be taken against a corporation, it can only be by order of a judge of the Supreme Court, Her Majesty's Attorney-General, or the court before which the indictment is returned, according to the provisions of the Vexatious Indictments Acts, and that a corporation cannot be summoned before a magistrate under Jervis's Act and dealt with as an individual.

7. My attention was directed to sect. 18 of the Newspaper Libel Act, expressly providing that

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

registration shall not apply to any newspaper which belongs to a joint-stock company duly incorporated under and subject to the provisions of the Companies Acts 1862 to 1879; and to the reported case of *Pharmaceutical Society* v. *London and Provincial Supply Association* (5 App. Cas. 869, 870) as an authority for the contention that corporations are indictable.

The defendant Tarry was not before the court. It was contended on behalf of the defendants Raymond Radclyffe and Rice Harris, being two out of the seven signatories to the articles of association of the Constitutional News Association Limited (1) that the fiat of the Public Prosecutor against the publisher of the *St. Stephen's Review* was not sufficient to identify them; and (2) that the mere fact of their names being placed upon the list of signatories of the company was not in itself sufficient evidence of guilty knowledge without proofs that they were executive officers of the company.

On behalf of the defendant Allison it was contended that, as the fiat of the Public Prosecutor was against the editor of the *St. Stephen's Review*, and did not mention the name of Allison, it was bad.

I was of opinion that the points of law arising deserved consideration, and counsel for the directors or signatories of the two companies refrained from addressing the jury on the facts; so a verdict of guilty was entered.

If the fiat of the Public Prosecutor necessary for jurisdiction is bad in form for not indicating the persons to be indicted, or if the corporations as corporations are not responsible criminally, or if in the absence of any evidence of complicity in the libel by the directors or signatories I ought to have directed a verdict of not guilty, then the said conviction of the said seven defendants is to be reversed.

Besley (with whom was *E. Beard*) on behalf of Messrs. Judd and Co., contended that, as Messrs. Judd and Co. merely printed the issue of *St. Stephen's Review*, and delivered the whole of it to the Constitutional News Association Limited, and did not sell any copies, they could not be convicted of writing or publishing the libel. Further, a corporation could not be convicted of such an offence; they cannot be summoned under Jervis's Act before a magistrate and dealt with as an individual. In *The Pharmaceutical Society* v. *The London Provincial Supply Association* (43 L. T. Rep. N. S. 389; 5 App. Cas. 857), where it was held that a corporation could not be convicted of unlawfully selling drugs without being registered, it was true that Lord Blackburn, p. 870, expressed dissent from what had previously been said by Lord Bramwell as to the non-liability of a corporation to be tried for libel. But a corporation as a body cannot be guilty of an offence, it is the individual members of the corporation who are liable. However that might be, assuming Messrs. Judd and Co. could be tried, they were entitled to the protection of sect. 3 of the Newspaper Libel Act 1881, and to have the prosecution authorised against them, if at all, by name. It was not sufficient to authorise the prosecution of the printer of the paper without mentioning the names of the persons, or the artificial person, the corporation whom it was alleged were the printers. In *Reg.* v. *Bradlaugh* (15 Cox C. C. 217) it was held that a person on whose premises a paper was published and sold, but who was not proved to have had knowledge of what was written in the paper, was not liable for a libel published in such paper. In *Reg.* v. *Yates* (15 Cox C. C. 272; 11 Q. B. Div. 750) it was held by a majority of the court that the fiat of the Public Prosecutor was not necessary in the prosecution of the proprietor of a newspaper for libel. But that was on the ground that the prosecution was instituted by a criminal information ordered by the court. [SMITH, J.—How do you say that a printer is brought within the protection of the Act?] By reason of his being the publisher. By 2 & 3 Vict. c. 12, s. 2, it is required that every newspaper must have at the end or on the face of it the name of the publisher. [Lord COLERIDGE, C.J.—But is publication necessary in order to justify criminal proceedings? We have recently decided that it was an offence to send a defamatory libel to a person if such libel was likely to produce a breach of the peace, and that it was not essential to prove publication also.] Unless it can be said that the mere fact of compositors setting up type renders their master liable to indictment, there is no evidence here against Messrs. Judd and Co. [Lord COLERIDGE, C.J.—Is there not another objection? The case states that the only sending by Judd and Co. was to the Constitutional News Association, and can that be said to have had any tendency to provoke a breach of the peace?] No; and the Public Prosecutor, by granting his fiat against the printers, they not being mentioned in the Act, cannot make them liable for a criminal offence of which there is no evidence. [He was here stopped by the Court.]

Costelloe, in support of the convictions, contended that the words in sect. 3 of the Newspaper Libel Act 1881, "person responsible for the publication of a newspaper," were sufficiently wide to include the printer and to justify the Public Prosecutor in granting his fiat with regard to the printer. In *De Crespigny* v. *Wellesley* (5 Bing. 392; 2 M. & P. 695) Best, C.J., said that a person who receives a letter containing libellous matter, whether with or without authority, is not justified in inserting it in a newspaper and circulating it. [Lord COLERIDGE, C.J.—But the printer does not publish it.] He delivers the whole issue for publication however. A printer is liable for what he prints, because of the enormous injury he inflicts. In *Rex* v. *Knel* (1 Barnard. 305); and *Rex* v. *Clarke* (1 Barnard. 305), a compositor was held criminally liable for libel. [SMITH, J.—My brother Wills has recently held that a newspaper boy could not be held liable in respect of the contents of the papers he sells, as he has no knowledge of their contents.] That would not apply to the case of the printer. [Lord COLERIDGE, C.J.—But, assuming the printer may be liable, is this fiat sufficient, which does not mention Judd and Co.?] Yes, in *Reg.* v. *Bradlaugh* (*Times*, 7th Nov. 1882), upon a motion to quash an indictment for libel, one of the grounds was that the fiat of the Public Prosecutor followed the words of the statute without mentioning any names, and Field, J. said: "The Public Prosecutor had no means of knowing. The application was *ex parte*, and he had no power to hear evidence as to whether or not a particular person was liable, and he could only so far act up to statements made to him as

to say that the case was a fit one for prosecution against such persons as might be proved at the trial to be liable." Stephen, J. concurred in that decision, and the indictment was upheld. All that sect. 3 requires is, that the Public Prosecutor must be satisfied that someone should be prosecuted; he is not concerned with whether the prosecution have got the right person. [Lord COLERIDGE, C.J.—That would render the necessity for the fiat valueless, surely it must be coextensive with the indictment. Besides, the Public Prosecutor has stated publicly that he never proceeds *ex parte*.] With regard to the fact that Judd and Co. are a corporation, the defendants are members of a corporation, but it cannot be said that the mere fact of a thing being done by a corporation renders the members of the corporation irresponsible. Otherwise, by the proprietors of a newspaper becoming registered as a company, they may evade any criminal liability. The Public Prosecutor has power to grant his fiat against the publisher of a paper whoever he may be, and Judd and Co. are within that term, and it was therefore unnecessary that their names should be in the fiat.

Besley in reply.—The words "any person" in sect. 3 do not authorise the grant of a fiat to prosecute unknown persons. Both the schedule to the Act and the interpretation clause show clearly that by "proprietors" is meant individual proprietors, and the registration of newspapers was required for the purpose of showing who were the persons responsible as proprietors. [He was here stopped by the Court.]

Bowen Rowlands, Q.C., on behalf of the editor, contended that all that had been said on behalf of the proprietors and publishers applied equally to the editor; it was necessary to support an indictment against him that the prosecution should be authorised against him by name. [SMITH, J. —How can the Public Prosecutor find out who the editor is?] He could find it out just as well as he could find out the names of the signatories to the articles of association. His name is disclosed in the articles, and he is always a well-known person. Besides, it is the duty of the prosecutor to ascertain who he is and inform the Public Prosecutor.

SMITH, J.—In this case the first person who is indicted is the editor of the newspaper; in the next place, there are three of the seven persons who signed the articles of association of the Constitutional News Association Limited; and thirdly, there are the four directors of the company who printed the *St. Stephen's Review* for the association. With regard to the four directors of the company who were the printers, the case finds that they did not sell or deliver any single copy, and that there was no evidence that they knew the contents of the paper, or saw such contents either before or after it was printed. It also seems to me that they did not even print the paper for it was the company and not they who printed it. Then with regard to the signatories of the articles of the association, it is said that the mere signing such articles is sufficient to support their prosecution for a criminal libel. In my opinion it is not, and as there was no evidence to fix any of them with any knowledge of the libel, and therefore with criminal responsibility for it, I am of opinion that as against them also the conviction cannot be sustained. As regards the editor, the question is, must the prosecutor name the man against whom the fiat of the Public Prosecutor is to be given, or is it sufficient that he should merely be mentioned in the fiat as "the editor?" In my opinion, it is sufficient, as was held by my brothers Field and Stephen in *Reg.* v. *Bradlaugh* (*ubi sup.*), for the fiat to follow the words of the statute. To my mind the Newspaper Libel Act 1881 was passed for the protection of newspaper proprietors, and it is not the duty of the Public Prosecutor to find out who it is who is to be prosecuted. What can it matter to the Public Prosecutor against whom the prosecution is to go? He has only to satisfy himself of the libel. I therefore think that the fiat against the editor was sufficient.

DAY, J.—I concur with my brother Smith, and as to the editor I think that the fiat is good. In my opinion it is unnecessary that the editor should be named. All that it is the duty of the Public Prosecutor to decide is, whether or not the matter is libellous. He has only to decide upon the character of the libel, and has nothing to do with the person who is responsible for the libel, nor is he required to ascertain who he is. There may be cases in which the editor alone should be prosecuted, but in the case of a newspaper that lives by the publication of libellous matter I can conceive that there may be cases in which the printer, or the publisher, or the proprietor, should be prosecuted. They are all parties in well-known positions, and need not be named, for they can be easily ascertained. It may be that the Public Prosecutor does not know who they are, and it may perhaps be better that he should not know. It is not, in my opinion, desirable that he should concern himself with the names of the parties to be prosecuted, and it is enough if he designates them, so that they can be ascertained and identified. The word "publishers" in the Act is used as an ordinary trade term. For the reasons given by my brother Smith, however, I am of opinion that the convictions of the parties charged as printers and publishers were wrong, but I am of opinion that the conviction of the editor was right.

HAWKINS, J.—I am of opinion that the convictions in this case are bad altogether. In my opinion, the names of the parties whom it is intended to prosecute ought to be ascertained before the Public Prosecutor grants his fiat, in order that the names may be inserted in the fiat, so that the judge at the trial may know against whom the prosecution is authorised. The names must be ascertained in order to be inserted in the indictment, and I can see no difficulty in the way of the Public Prosecutor obtaining them. I also think that he has to some extent—I will not say what—to determine whether a criminal prosecution should go against the particular person or persons.

MANISTY, J.—I agree with my brother Hawkins. This case itself, in my opinion, illustrates the importance of the fiat naming the persons to be prosecuted. The statute is intended to afford newspaper proprietors some protection, which it can only do by requiring the names of the parties to be prosecuted to be specified. The fiat in this case was a roving authority, authorising the prosecution of the publisher, printer, editor, &c.

Now, the word "printer" is not in the Act, and as to seven out of the eight persons prosecuted there ought to have been no prosecution at all. In my opinion, the Public Prosecutor ought to ascertain the names of the persons whom it is proposed to prosecute before he issues his fiat.

Lord Coleridge, C.J. — In this case, with regard to seven out of the eight defendants we are all agreed the convictions cannot be supported. I agree entirely with what my brother Manisty has said as to this case illustrating the importance of the names of the persons to be prosecuted being inserted in the fiat of the Public Prosecutor. With regard to the seven defendants who are prosecuted as the printers or publishers, they were neither printers nor publishers, and the smallest inquiry by the Public Prosecutor would have satisfied him as to this. With regard to the editor, when I look at the Act the words are, to my mind, perfectly clear. Sect. 3 says that, "No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published therein without the written fiat or allowance of the Director of Public Prosecutions." Now, a "criminal proceeding" is a proceeding against an individual or individuals for having broken the law; and therefore the person seeking the fiat must know, or ought to know, whom he is going to indict. He cannot indict "the editor" or "the printer" or "the proprietor." He must indict someone by name; and it follows, therefore, that the fiat must be issued against the individual intended to be prosecuted, by name. There must be some evidence before the Public Prosecutor, and he should ascertain the persons against whom he intends to direct a prosecution. In my opinion, therefore, it follows that the fiat here was bad against all the defendants, and that the whole prosecution fails, and the convictions must be quashed.

Convictions quashed.

Solicitor for the prosecution, *E. Dillon Lewis.*
Solicitors for the editor, *Maddison* and *Co.*
Solicitor for the printers, *Thomas Beard.*

Supreme Court of Judicature.

COURT OF APPEAL

Wednesday, May 9, 1888.

(Before Lindley and Bowen, L.JJ.)

Reg. v. The Licensing Justices of Crewkerne. (a)

Licensing Act 1872 (35 & 36 *Vict. c.* 94), *s.* 49—*Six-day licence—Renewal—Application thereon for seven-day licence.*

A licence was originally granted to the holder, subject to the condition inserted therein, under the 49th section of the Licensing Act 1872 (35 & 36 *Vict. c.* 94), *that the holder shall keep the licensed premises closed during the whole of Sunday.*

Held, that such licence can only be renewed subject to that condition, and cannot be renewed as an ordinary seven-day licence.

(a) Reported by A. A. Hopkins, Esq., Barrister-at-Law.

This was an appeal from a judgment of the Queen's Bench Division (Mathew and Smith, JJ.), reported *ante*, p. 518; and 58 L. T. Rep. N. S. 450.

The facts are fully set out in the report in the court below, and may here be shortly stated as follows:—

At the general annual licensing meeting, held at Crewkerne on the 27th Aug. 1881, one Rugg applied to the justices for and obtained a licence for the sale of intoxicating liquors to be consumed on the premises, subject to the condition under sect. 49 of the Licensing Act 1872, that the premises should be closed during the whole of Sunday. From 1881 to 1883 the licence was renewed to Rugg as a six-day licence. In 1883 the licence was transferred to one Miller as a six-day licence, and as such was annually renewed to him up to the year 1887. In 1887 Miller applied to the justices for a renewal of his licence, and also for its renewal without the insertion of the above condition. Neither of these applications was opposed. The justices granted a renewal of the licence, but refused to entertain the application to renew without the condition. Thereupon Miller obtained a rule *nisi* for a *mandamus* to compel the justices to hear and determine the last-mentioned application. The Queen's Bench Division (Mathew and Smith, JJ.) discharged the rule (see 58 L. T. Rep. N. S. 450).

Miller appealed.

J. Paterson for the appellant.—There is in truth no such thing as a six-day licence; that is merely a short expression for a licence in which at the request of the applicant himself a condition has been inserted. Or rather, that which is called a six-day licence is in form an ordinary seven-day licence having the condition indorsed upon it. The condition can only be inserted at the express request of the applicant himself, and therefore, when the applicant does not request the insertion of the condition, the only licence which the justices have power to grant or renew is the ordinary licence without any such condition. In this case, the applicant being the holder of a licence, the justices are refusing to renew unless he shall submit to have inserted in the licence a condition which he does not ask for. There is no such power given to the justices by the Licensing Acts, and no authority for the exercise of any such power. He cited

Reg. v. *Justices of Kirkdale*, 18 Q. B. Div. 248.

William Wills (*Blake Odgers* with him), for the justices, were not called on.

Lindley, L.J.—It appears to me that the decision of the court below was correct. Since 1881 the house has been a licensed house, and the present tenant as well as his predecessor has held what is called a six-day licence. That is a licence granted in a particular form upon the application of a person who wishes to keep his house closed on Sunday, and it is quite true to say that the condition must be inserted at the request of the applicant himself. But behind all that there is the power of the justices to grant or refuse a licence; the justices have a perfect right to say: "We cannot insert the condition that the house shall be closed on Sunday, but unless you yourself ask for the insertion of that condition, we certainly shall not grant you an ordinary seven-day licence." It this case the licence was a six-day licence, and was annually renewed as such

down to October last, and then the usual application for a renewal was made. What can application for a renewal mean except that the applicant applies to renew that which at that moment exists, but is about to expire; which in the present case is a six-day, and not a seven-day licence? I think the justices were entirely justified in telling the applicant that, if he wanted to keep his house open on Sunday, he must make a new application for an ordinary seven-day licence. Then the justices would be able to exercise their absolute discretion as to granting it. But to say that a six-day licence can be turned into a seven-day licence at the will of the applicant is to practically take away all the discretion vested in the ustices.

Bowen, L.J.—I am of the same opinion. I think the contention was correct, that it is for the applicant to determine whether he shall apply for the insertion of the condition in his licence; but it must always be remembered that the justices have an absolute discretion to grant or refuse in the first instance, and the applicant in making his application will be guided by a consideration of probabilities, and will take that course which seems most likely to be successful. As soon as he has made his election, and has asked for the insertion of the condition, then what is granted to him is a six-day licence, which is something entirely distinct and different from a seven-day licence. It is so treated by the Act of Parliament, and in sect. 49 the very expression "six-day licence" is used, and the holder is liable to pay only six-sevenths of the duty, and a notice is to be affixed to the premises indicating that it is a six-day licence only. When an application is made for the renewal of such a licence what is it that is renewed? Surely what already exists, a six-day licence only. And this view is strengthened by the fact that, according to the Act of Parliament, a licence is renewed by an indorsement on the old licence or the issue of a copy of the old licence. I am therefore of opinion that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant, *Geare, Son,* and *Pease.*
Solicitors for respondents, *Trevenen,* for *Sparks* and *Blake,* Crewkerne.

May 18 *and June* 4, 1888.

(Before Lindley and Bowen, L.JJ.)

Dearle *v.* Guardians of Petersfield Union. (*a*)

*Local government—Guardians of the poor acting as rural sanitary authority — Limitation of actions—*22 *&* 23 *Vict. c.* 49, *s.* 1—*Public Health Act* 1875 (38 *&* 39 *Vict. c.* 55), *s.* 9.

By sect. 1 *of* 22 *&* 23 *Vict. c.* 49, "*any debt, claim, or demand which may . . . be lawfully incurred by or become due from the guardians of any union or parish . . . shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year.*"

By sect. 9 *of the Public Health Act* 1875 *it is provided that the guardians of a rural union shall form the rural sanitary authority of that district, and that "all statutes, orders, and legal provisions applicable to any board of guardians shall apply to them in their capacity of rural sanitary authority under this Act for the purposes of this Act."*

Held, that the limitation of actions contained in sect. 1 *of* 22 *&* 23 *Vict. c.* 49 *applied only to debts contracted by the guardians as such, and was not extended by sect.* 9 *of the Public Health Act to debts contracted by them in their capacity of rural sanitary authority.*

This was an appeal from an order of Butt, J.

The plaintiff, who was a contractor, brought the action to recover from the defendants, the guardians of the poor of the Petersfield Union, certain sums alleged to be due from them in respect of certain contracts made by him with them as the rural sanitary authority of the district for the construction of sewers, the laying of water mains, and other works.

The defendants, by their statement of defence, raised various issues, and in paragraph 10 thereof pleaded that "the plaintiff is suing in respect of a debt, claim, or demand which might be lawfully incurred by or become due from the defendants as guardians of the poor of the Petersfield Union after the passing of 22 & 23 Vict. c. 49, and the plaintiff did not commence any proceedings for the said debt, claim, or demand within the half-year in which (if at all) the same was incurred or became due, or within three months after the expiration of such half-year, as by the said statute required."

The action came on to be tried befcre Butt, J. without a jury, when the learned judge ordered that judgment should be entered for the plaintiff on the 10th paragraph of the statement of defence, and by consent ordered that all other questions in the action should be referred to a barrister.

The defendants appealed against the decision of the learned judge upon the point of law raised by paragraph 10 of their statement of defence.

By 22 & 23 Vict. c. 49 it is recited in the preamble that,

It is expedient to define and limit the period during which any debt hereafter incurred by guardians of unions or parishes, or by district boards of management, in the administration of the laws for the relief of the poor, may be paid, and to make provision, in respect of debts heretofore lawfully incurred by them, for payment of the same.

By sect. 1:

With respect to any debt, claim, or demand, which may, after the passing of this Act, be lawfully incurred by or become due from the guardians of any union or parish, or the board of management of any school or asylum district, such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards.

By 38 & 39 Vict. c. 55, s. 9:

The area of any union which is not coincident in area with an urban district, nor wholly included in an urban district (in this section called a rural union), with the exception of those portions (if any) of the area which are included in any urban district, shall be a rural district, and the guardians of the union shall form the rural authority of such district. . . . Subject to the provisions of this Act, all statutes, orders, and legal provisions applicable to any board of guardians shall apply to them in their capacity of rural authority under this Act for the purposes of this Act; and it is hereby declared that the rural authority are the same body as the guardians of the union or parish for or within which such authority acts.

(*a*) Reported by A. A. Hopkins, Esq., Barrister-at-Law.

Lumley Smith, Q.C. and *G. G. Greenwood* for the defendants.—The 9th section of the Public Health Act extends the limitation of actions imposed by sect. 1 of 22 & 23 Vict. c. 49 to debts incurred by guardians in their capacity of rural sanitary authority. At the time of the passing of 22 & 23 Vict. c. 49, the guardians were only guardians of the poor, and when the Public Health Act extended their capacity it extended also the provisions applying to them in the only capacity they had till then filled. Among those provisions was the limitation of actions imposed by sect. 1 of 22 & 23 Vict. c. 49, and therefore this action is now barred, as the action was not brought within the time limited:

Baker v. *Guardians of Billericay Union*, 9 L. T. Rep. N. S. 486 2 H & C 642;
Reg. v. *Guardians of Stepney Union*, 30 L. T. Rep. N. S. 808; L. Rep. 9 Q. B. 383.

Robert Wallace for the plaintiff. — Butt, J. thought that the preamble of 22 & 23 Vict. c. 49, made it fairly plain that sect. 1 applied only to debts incurred by guardians in their capacity of guardians for the relief of the poor. This debt was contracted by them in their capacity as rural sanitary authority, and therefore is not within sect. 1 at all. It cannot have been the intention of the Legislature to alter, by the very general words of sect. 9 of the Public Health Act, the nature of the debts to which the limitation in the former Act applied.

Lumley Smith, Q.C. in reply.

Cur. adv. vult.

LINDLEY, L.J.—This was an action by a contractor to recover from the defendants as the sanitary authority certain sums which he alleged to be due to him under certain contracts for the construction of sewers and other works. The point which we have now to decide arises upon the 10th paragraph of the statement of defence, in which the defendants say that, "the plaintiff is suing in respect of a debt, claim, or demand which might be lawfully incurred by or become due from the defendants as guardians of the poor of the Petersfield Union after the passing of 22 & 23 Vict. c. 49, and the plaintiff did not commence any proceedings for the said debt, claim, or demand within the half-year in which (if at all) the same was incurred or became due, or within three months after the expiration of such year, as by the said statute required." That raises the question whether the 1st section of 22 & 23 Vict. c. 49 applies to the claim made in this action. Butt, J. decided that it does not, and the defendants appealed. The question really turns upon the construction of sect. 1 of 22 & 23 Vict. c. 49, considered in reference to the 9th section of the Public Health Act 1875. The preamble of 22 & 23 Vict. c. 49, throws some light upon sect. 1, and the first question to be considered is whether this claim is within sect. 1 at all. It is obvious that in 1859, when the Act was passed, the guardians of the poor were not the sanitary authority, and could not enter into any contracts for the construction of sewers, or the laying of water mains; and if that Act had stood alone, I think the general words of the 1st section are so clearly explained in the preamble that it is plain that such contracts could not have been within them at all. It was not until the Public Health Act of 1875 was passed that the guardians of the poor had anything to do with such contracts. But by that Act the guardians are in many cases made the rural sanitary authority of the district, and sect. 9 goes on to provide that "all statutes, orders, and legal provisions applicable to any board of guardians shall apply to them in their capacity of rural authority under this Act for the purposes of this Act." Upon that it is contended for the appellants that the effect is to transfer to the board of guardians in their capacity of rural sanitary authority all the provisions of the former Act, including the limitation of actions which is contained in sect. 1. But I think that the object of sect. 9 of the Public Health Act is misunderstood by the appellants. It does not extend the provisions of previous statutes to all Acts of the sanitary authority, but it only extends those provisions to the Acts which the sanitary authority may do when they are exercising the powers of guardians of the poor. That is the construction which Butt, J. has placed upon sect. 9 of the Public Health Act, and I think it is correct. It seems to me to be fortified by sects. 229 and 230, the effect of which shortly is this, that general expenses are paid out of one fund, and special expenses out of another. We were referred during the argument to sects. 209 and 210, but they seem to me to throw no light upon the matter, nor does the Local Government Board Act 1871. The 264th section of the Public Health Act 1875 is not applicable, because that only deals with actions of tort. I am therefore of opinion that the appeal fails, and must be dismissed with costs.

BOWEN, L.J.—I am of the same opinion. When regard is had to the preamble of 22 & 23 Vict. c. 49, it is clear, I think, that the limitation contained in sect. 1 applies only to debts, claims, and demands incurred by or due from the guardians as such. It is manifest, therefore, that when sect. 9 of the Public Health Act makes applicable to the rural sanitary authority the limitation in sect. 1 of the previous Act which was applicable to them as guardians, it cannot extend the nature of the debts to which the limitation applies. Sect. 1 applies to debts contracted by the guardians as such; sect. 9 of the Public Health Act does not extend it to debts contracted by them in any other capacity; this debt was not a debt contracted by the guardians as such; and therefore this appeal fails.

Appeal dismissed.

Solicitor for plaintiff, *Ernest A. Fuller.*

Solicitors for defendants, *Soames, Edwards*, and *Jones*, for *Soames* and *Caparn*, Petersfield.

Tuesday, June 5, 1888.

(Before Lord ESHER, M.R., LINDLEY and LOPES, L.JJ.)

WHITELEY *v.* BARLEY. (*a*)

Local government—Officer of local authority — Interested in contracts—Penalties—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *s. s.* 150, 189, 193, 326.

A local authority entered into certain contracts for

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

the purposes of the Public Health Act 1875 (38 & 39 *Vict. c.* 55), *by which it was provided that the surveyor to the local authority should receive from the contractors, in payment of certain bills of quantities prepared by him at the request of the local authority, a percentage upon the amounts payable to the contractors under the contracts as certified by him.*

Held, that the surveyor was concerned or interested in such contracts, so as to be liable to penalties under sect. 193 *of the Public Health Act* 1875.

A local authority employed their surveyor as their engineer to superintend the construction of certain drainage works, and agreed to remunerate him by a percentage upon the outlay.

Held, that the surveyor was liable to the penalty imposed by sect. 193 *of the Public Health Act* 1875.

The judgment of Mathew, J. affirmed.

THIS was an appeal from a judgment of Mathew, J.

The action was brought to recover penalties under sect. 193 of the Public Health Act 1875 (38 & 39 Vict. c. 55). The defendant had been appointed town surveyor of Ramsgate by the Ramsgate Improvement Commissioners in 1880, who were then the local authority within the Public Health Act, and he was re-appointed as town surveyor by the Corporation of Ramsgate, after the incorporation of the borough in 1884. By the bye-laws made by the commissioners under the Act, the defendant was "to devote the whole of his time to the duties of his office," and was to prepare the necessary plans and specifications of all works contracted to be done," and "to take care that all such works were duly executed." He was also "responsible for the condition of the streets, both as regards repair and cleanliness, and was to see that the gully-holes, drains, and sewers were kept in an efficient state."

In 1884 and 1885 the Corporation of Ramsgate entered into three contracts for the sewering and paving of certain new streets, and in each contract it was provided that the defendant should prepare bills of quantities, and that the contractors should pay him for so doing 2½ per cent. on the amount payable under the contract as certified by him. In respect of these three contracts the plaintiff claimed from the defendant three penalties of 50*l.* each, under sect. 193 of the Public Health Act 1875. In 1885 and 1886 a drainage scheme was prepared by the defendant as surveyor to the corporation, and was sanctioned by the Local Government Board. Thereupon the corporation appointed the defendant their engineer for the purposes of the drainage scheme, to be paid by commissions not exceeding 780*l.* on the price of the works. The plaintiff claimed two penalties of 50*l.* each in respect of this resolution of the corporation.

In respect of the drainage scheme the corporation entered into five contracts, involving an expenditure of about 20,000*l.*, in each of which there was a provision that the defendant should prepare bills of quantities, and that the contractors should pay him for so doing 1½ per cent. on the amount payable under the contract. In respect of these five contracts the plaintiff claimed five penalties of 50*l.* each.

Mathew, J., on further consideration, gave judgment for the plaintiff (20 Q. B. Div. 196) for three penalties in respect of the paving and sewering contracts, and one penalty only in respect of the drainage contracts.

The defendant appealed.

By 38 & 39 Vict. c. 55, s. 193:

Officers and servants appointed or employed under this Act by the local authority shall not in any wise be concerned or interested in any bargain or contract made with such authority for any of the purposes of this Act. If any such officer or servant is so concerned or interested, or, under colour of his office or employment, exacts or accepts any fee or reward whatsoever other than his proper salary, wages, and allowances, he shall be incapable of afterwards holding or continuing in any office or employment under this Act, and shall forfeit and pay the sum of 50*l.*, which may be recovered by any person, with full costs of suit, by action of debt.

H. Tindal Atkinson and *Crispe* (*Finlay*, Q.C. with them) for the defendant.—The words of the section are so wide that they would include contracts of service entered into with the local authority, including even the original contract of employment of the officer or servant. Some limitation must therefore be placed upon them. Contracts of service entered into with the local authority must be excluded, and that is what has really been done in this case; the corporation has requested the defendant to take out quantities, and he has done so. [Lord ESHER, M.R.—But he is to be paid for doing so by the contractor by a percentage upon the contract price.] He cannot sue the contractor for that payment, as he has no contract with him. It is submitted that the reasonable interpretation to put upon the words of the section is, that the interest must be such an interest as would give the officer or servant a legal claim against the person who makes the contract with the local authority. The defendant is not a party to these contracts; a case might arise in which a man in his position might be absolutely ignorant of the terms of such contracts, and the effect will be that he has had forced upon him by the local authority an interest which brings down upon him the serious penalties of the section. As to the drainage scheme penalty, the method of payment of the defendant was such an allowance as is authorised by sect. 189, and is contemplated by the word "allowance" in sect. 193. They cited

Burgess v. *Clark*, 14 Q. B. Div. 735;
Mellis v. *Shirley Local Board*, 53 L. T. Rep. N. S. 810; 16 Q. B. Div. 446.

Kemp, Q.C. and *Henry Dickens*, for the plaintiff, were not called on to argue.

Lord ESHER, M.R.—In this case the defendant was an officer employed by a local authority within the meaning of sect. 193 of the Public Health Act 1875. A verdict has been given against him in an action for penalties under that section, and the question we have to determine is whether he is brought within the terms of that section or not. Now, he was a surveyor to the corporation of Ramsgate, who were the local authority. They decided to make certain improvements for which the adjacent owners would be liable to pay, but which the corporation were entitled to carry out and recover the costs from the owners. They directed the defendant to take out quantities of the work to be done, so that the contractors might tender for the work, but it is admitted that they had no power to give any such direction because such work was not within

the scope of the defendant's employment, and therefore it only comes to this, that they requested him to do so and he did it. Then advertisements were issued for tenders based on the quantities so taken out, and in the contract made with the contractor whose tender was accepted there was a stipulation that the contractor should pay 2½ per cent. upon the contract price to the surveyor. What then was the position of the surveyor? He could claim nothing from the corporation, for there was no contract between him and them that they should pay him for taking out the quantities; neither was there any contract between him and the contractors, but there was a contract between the corporation and the contractors that the contractors should pay the surveyor 2½ per cent. upon the contract price. The defendant could only get that amount by reason of that contract. I do not think it necessary to decide how he could obtain payment of it; I do not say that he could not himself have obtained payment of it from the contractors, it is at all events clear that if the money were in the hands of the corporation they would hold it as trustees for the surveyor. I also think that the court would have obliged the corporation to lend their name to the surveyor, if necessary, in an action against the contractors. The point, however, is that, however he obtained the amount, he would only get it by reason of the existence of the contract which I have referred to. It seems to me, therefore, impossible to hold otherwise than that the defendant was interested in the contract; the very statement of the case makes it plain that he was so, and it is not necessary that he should be able to sue in his own name, because no such limitation is to be found in the statute. The defendant was to be paid a percentage upon the contract price, therefore the larger the price the larger would be his remuneration; therefore his interest was to make the quantities as large as possible. Without any reflection upon his integrity, his position is the very one aimed at by the statute, which affects all who come within the terms of it. I think that the judgment of the learned judge was right and must be affirmed.

LINDLEY, L.J.—I am unable to come to any other conclusion. The question is whether the case is within the operation of sect. 193 of the Public Health Act 1875. Now the circumstances are such that I think it is impossible to say that this gentleman, who is certainly an officer of the local authority, is not in any way concerned or interested in these contracts. Indeed, his interest in them is palpable and unmistakable. The contractor is to pay him 2½ per cent. upon the quantities supplied by him to the contractor, and whether he could recover the amount in an action for work and labour, or whether he must use the name of the corporation, or whatever his remedy might be, it is perfectly obvious that he has an interest in the contract. I do not understand how the contrary can be argued. It does not matter who the paymaster is, as it seems to me, and a person is not excluded from the operation of the section simply because he gets an "allowance." If the allowance is such as to give him an interest in the contract, then he is within the prohibitory words of the first part of the section. The whole question is a question of being interested or not in the contract, and if a man is entitled to be paid an amount which is to vary with the contract price, it seems to me impossible to argue that he is not interested, and quite immaterial to consider who his paymaster may be. I think this case is beyond all reasonable doubt, and that the appeal must be dismissed.

LOPES, L.J.—I regret being compelled to arrive at a conclusion adverse to the defendant, but the facts are undisputed, and having regard to them I am unable to say that the defendant, who is a surveyor, is not a person interested in a contract made by the local authority within the meaning of the words of the 193rd section. I think that this case is within the language of, and also within the mischief aimed at by the section. If the percentage for the quantities had been payable by the local authority itself instead of by the contractor, I should still have been of opinion that the section equally applied. I am therefore of opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *Kingsford, Dorman, and Co.*, for *W. Hills*, Margate.

Solicitors for the defendant, *Meredith, Roberts, and Mills*, for *W. A. Hubbard*, Ramsgate.

Dec. 11, 14, *and* 15, 1888.

(Before Lord ESHER, M.R., FRY and LOPES, L.JJ.)

SHARPE *v.* WAKEFIELD AND OTHERS (Justices of Westmoreland). (*a*)

Inn—Licence—Renewal—Discretion of justices—Licensing Act 1828 (9 *Geo.* 4, *c.* 61), *ss.* 1, 9, 13, 14, 27—*Licensing Act* 1872 (35 *&* 36 *Vict. c.* 94), *ss.* 36, 40, 42, 74—*Licensing Act* 1874 (37 *&* 38 *Vict. c.* 49), *ss.* 26, 32.

Licensing justices refused to renew the licence of an innkeeper on the grounds of remoteness of the inn from police supervision, and the character and necessities of the neighbourhood.

Held (affirming the judgment of the Queen's Bench Division), that the discretion of the justices as to granting or refusing a licence by way of renewal was absolute, provided it be judicially exercised, and that licensing justices are entitled to inquire into such matters as the situation of the house as regards police supervision, and the character and necessities of the neighbourhood, and, in the exercise of their judicial discretion, to refuse to grant a licence by way of renewal on such grounds.

THIS was an appeal from a decision of the Queen's Bench Division (Field and Wills, JJ.), reported *ante*, p. 526; and at 58 L. T. Rep. N. S. 494, under the name of *Reg.* v. *Wakefield and others* (*Justices of Westmoreland*).

A special case had been stated for the opinion of the court by the chairman of Westmoreland Quarter Sessions by which it appeared that:—

On the 10th Sept. 1887 William Ridding duly applied to the licensing justices for the Kendal Division of Westmoreland for a grant by way of renewal for the sale by him of all intoxicating liquors at the Low Bridge Inn, at Kentmere, in the county of Westmoreland, and was refused such renewal.

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

Susannah Sharpe, the owner of the said inn, and a person aggrieved by such refusal, appealed in due form of law to the quarter sessions of the peace for the county of Westmoreland, holden at Kendal, and such appeal was heard by the Court of Quarter Sessions on the 21st Oct. 1887.

On the part of the appellant it was contended that, on the hearing of an application for the renewal of a licence under the Intoxicating Liquor Licensing Acts of 1828, 1872, and 1874, the court was not by law entitled to inquire into the character and wants of the neighbourhood, or to refuse the grant of a licence by way of renewal upon such grounds.

The Court of Quarter Sessions overruled the said contention, and, after hearing evidence, refused to renew the licence on the ground of the remoteness of the inn from police supervision, and upon the ground that the character and necessities of the locality and neighbourhood in which the said inn was situate did not require it.

The question of law for the court was, Whether the Court of Quarter Sessions was entitled to refuse the said renewal upon the grounds stated.

If it was not so entitled, the order of sessions was to be quashed; but if the court should be of the contrary opinion, the said order was to be affirmed.

The Queen's Bench Division (Field and Wills, JJ.) upheld the order of the Court of Quarter Sessions, and gave judgment in favour of the respondents: (48 L. T. Rep. N. S. 494.)

The appellant appealed to the Court of Appeal.

By sect. 1 of the Licensing Act 1828 (9 Geo. 4, c. 61):

Whereas it is expedient to reduce into one Act the law relative to the licensing by justices of the peace of persons keeping or being about to keep inns, ale-houses, and victualling-houses, to sell excisable liquors by retail, to be drunk or consumed on the premises, in that part of the United Kingdom called England: Be it therefore enacted that . . . there shall be annually holden a special session of the justices of the peace (to be called the general annual licensing meeting), for the purpose of granting licences to persons keeping or being about to keep inns, alehouses, and victualling houses, to sell excisable liquors by retail to be drunk or consumed on the premises therein specified, . . . and that it shall be lawful for the justices . . . to grant licences for the purposes aforesaid to such persons as they, the said justices, shall in the execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper.

By sect. 42 of the Licensing Act 1872 (35 & 36 Vict. c. 94):

When a licensed person applies for the renewal of his licence, the following provisions shall have effect: (1.) He need not attend in person at the general annual licensing meeting, unless he is required by the licensing justices so to attend. (2.) The justices shall not entertain any objection to the renewal of such licences, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such such licence (and stating in general terms the grounds of opposition) has been served on such holder not less than seven days before the commencement of the general annual licensing meeting: Provided that the licensing justices may, notwithstanding that no notice has been given, on any objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given. . . . Subject as aforesaid, licences shall be renewed, and the powers and discretion of justices relative to such renewal shall be exercised as heretofore.

By sect. 32 of the Licensing Act 1874 (37 & 38 Vict. c. 32):

A new licence means a licence for the sale of any intoxicating liquor granted at a general annual licensing meeting, in respect of premises in respect of which a similar licence has not theretofore been granted.

Candy, Q.C. and *Sanderson* for the appellant.

Addison, Q.C. and *Poland* for the respondents.

The arguments used in the court below were repeated, and are sufficiently referred to in the judgments.

The following cases were cited:

Reg. v. *Justices of Market Bosworth*, 57 L. T. Rep. N. S. 482; 11 Q. B. Div. 66;
Reg. v. *Sylvester*, 2 B. & S. 322;
Reg. v. *Justices of Lancashire*, 23 L. T. Rep. N. S. 461; L. Rep. 6 Q. B. 97;
Smith v. *Justices of Hereford*, 39 L. T. Rep. N. S. 604;
Ex parte Martin, 40 J. P. 133;
Ex parte Rendall, 42 J. P. 88;
Reg. v. *Kay*, 10 Q. B. Div. 213;
Reg. v. *Justices of Liverpool*, 49 L. T. Rep. N. S. 244; 11 Q. B. Div. 638;
Marwick v. *Codlin*, 30 L. T. Rep. N. S. 719; L. Rep. 9 Q. B. 509;
Reg. v. *Huddersfield*, 1 Q. B. Div. 52;
Rex v. *Hann*, 3 Burr. 1716;
Garrett v. *Justices of Middlesex*, 12 Q. B. Div. 620;
Reg. v. *Justices of Over Darwen*, 39 L. T. Rep. N. S. 444.

Lord ESHER, M.R.—It appears to me to be clear that very large interests are involved in this question, and it is equally clear that the nature of those interests is that of a money or business interest, and that therefore one ought to attend to them carefully, and see clearly what the law is before jeopardising them or bringing them into peril. I have listened with the greatest care to all the arguments which have been addressed to us on both sides; I have attentively examined all the statutes that have been referred to, and all the cases that have been cited; and I have had regard to the nature of the interests which may be said to be put in jeopardy; but I have come to the conclusion that in the decision of this case we must be bound by the ordinary rules of construction, and if the construction of these Acts of Parliament leaves us in no doubt, it is clear that all the questions of hardship and all the questions of danger fall to the ground; on the other hand, it is clear that, if the justices have the absolute discretion that is contended for, unless they exercise it with the greatest care, they may do irreparable injury, and, though not injustice in law, still injustice in fact, to people who are, on the whole, exceedingly meritorious. It is upon the construction of the statutes that our decision must depend, because a case has been stated by the justices, and in that case they state the grounds upon which they refused the renewal (although if they have an absolute discretion they need not have stated their grounds), and they ask the court whether they had jurisdiction to refuse it on those grounds, which were "the remoteness of the inn from police supervision and the necessities of the neighbourhood," under the Acts of 1828, 1872, and 1874. That raises the question for us whether they had jurisdiction under those Acts to refuse the renewal in respect of both or either of the objections, for if they could refuse either on one or on the other, our answer must be in their favour. Then what is the true construction of these three

statutes? The first of them is the Act of 1828. We must first deal with that according to the ordinary rule of construction, which is that you must deal with an Act as if you had to construe it the day after it is passed. Subsequent legislation may alter it, but, unless it assumes to alter it, it cannot affect it otherwise than by what amounts to a legislative interpretation of its meaning. Then, looking at the Act of 1828, the first section constitutes a tribunal which was not in existence before, but which is to continue in the future, for the purpose of granting licences —not Excise licences — to persons keeping or about to keep inns, ale-houses, or victualling-houses. The Legislature must have foreseen that if these licences were to be granted after the passing of this Act, and to be granted annually, the case must obviously arise in which the justices would have to deal both with a house which is to be licensed for the first time and with one which is to be licensed for a second time. It is true that in one sense these cases are the same, but in another and a practical sense it is obvious that they are very different. It was suggested that the word "keeping" had reference only to persons who were keeping inns at the time when the Act was passed; but when you come to the enacting words of the section you find that the meetings of the justices are to be holden annually for the purpose of granting licences to persons keeping inns, and this must be done just as much ten years after the Act was passed as in the first year, and still those who are keeping inns are pointedly distinguished from those who are about to keep them; and it seems to me clear that if the justices are to grant licences to persons keeping inns and those about to keep them, after the first year after the passing of this Act the person keeping an inn could only be keeping it as a licensed house, and what is his application for a licence but the very case of a renewal which we have now to deal with? Therefore this section, by necessary implication and by the ordinary use of the words, gives the justices power to renew licences as well as to grant them for the first time. The word used with regard to what is now called a renewal is "grant"—the justices are to "grant" a licence—but by necessary implication that extends to a person who has had a licence granted to him before. The words of the section go on "to grant licences for the purposes aforesaid to such persons as they, the said justices, shall, in the execution of the said powers herein contained, and in the exercise of their discretion, deem fit and proper." This is applied to the justices for the purpose of granting licences, which phrase includes both new licences and renewals. With regard, therefore, to both cases there is given to the justices a discretion, and to my mind it is impossible to construe the words otherwise than to say that this discretion, given to them in both cases, is the same in both cases, and that in both cases it is unlimited. If you tell me that the discretion is to be judicial, you tell me nothing. Of course it is not to be mere caprice; but, if the phrase is to be made strictly accurate, I will say that in both cases they have an unlimited judicial discretion. Then there is given an appeal to the quarter sessions, but they have by way of rehearing to exercise the same discretion as the justices below, and that discretion is unlimited. The next question is, whether we can find in any subsequent legislation a legislative declaration that the interpretation I have put upon the Act of 1828 is not the meaning of it, or anything which alters the law contained in it. The principal enactment to which we have been referred is the 42nd section of the Act of 1872. It begins, "Where a licensed person applies for the renewal of his licence." Where, how, and to whom can he apply? He can only apply under the 1st section of the Act of 1828; for in this Act there is no new power to apply, no power to anyone else to hear the application; he can only apply under the words enabling the justices to grant licences. Then, when he applies, the 1st sub-section enacts that "he need not attend in person at the general annual licensing meeting unless he is required by the licensing justices so to attend." How does that affect what the magistrates have to do when they come to adjudicate upon his application? A section of the Act of 1828 (the 12th) was quoted to us as implying, and I think it did imply, that all applicants for licences must attend in person. This provision, then, is for the relief of a person applying for a renewal from that necessity. It recognises, if you will, the distinction between a person applying for a new licence and a person applying for a renewal; but it does not relieve the latter from applying for his renewal—he must apply, but he need not attend in person. Formerly he could, if he chose, have an attorney or counsel, but he had to attend himself as well; now he need not attend in person. The 1st sub-section gets rid of nothing but that. Then the 2nd sub-section is not in relief of the person; it says that "the justices shall not entertain any objection to the renewal, &c., unless written notice of an intention to oppose the renewal of such licence has been served." But that does not affect the adjudication of the justices, except by taking away their power to deal with the matter by way of adjudication unless a notice has been served. The notice is merely a notice of opposition; it need not state the grounds of opposition—that provision is left out, and is not supplied till afterwards, nor does it call upon the applicant to attend in person. Then there is a proviso as to what is to be done when no notice has been served. But all these are matters preceding the moment when the justices have to hear and adjudicate upon the application, and there is nothing to limit them as to the subject-matter of their adjudication at all. Then the section concludes: "Subject as aforesaid licences shall be renewed, and the powers and discretion of justices relative to such renewal shall be exercised as heretofore." To what does that word "heretofore" take us back? It seems to me that it obviously takes us back to the 1st section of the Act of 1828, and if upon the true construction of that section the discretion of justices relative to renewal is unlimited, then under this section, subject to the notices being given, they still have the same discretion. But under this section some hardship must have arisen, for we find it dealt with and amended by the 26th section of the Act of 1874. That section recites the 42nd section of the Act of 1872, the first words of which are remarkable, because they deal with the man who is applying for a renewal as a "licensed person." I have shown that he must be. Now, under the 42nd section, the justices might require the appli-

cant for a renewal to attend in person for any reason, without stating the reason, or even without any reason existing. This was felt to be a hardship, and by the 26th section of the Act of 1874 a limit is put upon the power of the justices to require him to attend in person, but it does not touch the matters with which they have power to deal when they come to hear him. Then the same section requires the grounds of objection to be stated in the notice of objection, but it does not in any way limit those grounds. These are all matters preliminary to the hearing, and the only other provision is that in the 42nd section, that the evidence must be on oath. I should suppose, though I do not feel sure, that this evidence must be limited to the grounds stated in the notice of opposition; but it is not necessary to decide that, nor is it necessary to decide whether the justices might refuse a licence if they had knowledge of their own as to the requirements of the neighbourhood. If I am right in my interpretation of the Acts, the case is at an end, and wants no more, even if it does end in hardship. For, whether the result will be hardship or no hardship, probable injustice or no probable injustice, we cannot interfere with what the Legislature has clearly said. I may say that sect. 19 of the Act of 1869 does, in my view (though I do not think the argument is a very strong one), contain an assumption of the existence of an absolute discretion in the justices with regard to renewals; and if the interpretation of the Act of 1828 wanted assistance, this Act would give it. But it does not want assistance, for the intention of the Legislature is clearly stated, and there is no doubt what is the true construction of the Act of 1828. As to the subsequent Acts, there is nothing to be inferred from them which limits the discretion of the earlier Act; and I therefore think that the decision of the court below was right, and this appeal must be dismissed.

FRY, L.J.—This case is one of so large and great importance that it is fit that I should add a few words to give expression to my own opinion. With the conclusions of the Master of the Rolls I entirely concur. For the decision of this case there is no need to inquire into the earlier statutes or to go behind the Act of 1828. We find, then, that the justices are required annually to hold a special session for the purpose of granting licences to two classes of persons—viz., those who at the time of the sessions are actually keeping inns, ale-houses, victualling-houses, and desire to remain in that occupation, and those applying to the justices for the first time to be allowed to keep licensed houses; and the section goes on to enact (to read it shortly) that it shall be lawful for the justices to grant licences for the purposes aforesaid to such persons as they shall in the exercise of their discretion deem fit and proper. Nothing to my mind could be more plain than that this discretion is the same as to both classes. No distinction is drawn between the two classes; their existence is recognised, if you will, but there is no difference of jurisdiction or of discretion in regard to them. The only doubt in my mind has arisen from the contention that the collocation of the words in this section seems to show that it was intended to confine the discretion of the justices to the character of the person applying to them; but when the 9th section is looked at it is seen at once that this contention is not tenable for a moment. The matter was most fully and satisfactorily explained by Lush, J., in the case of *Reg.* v. *The Justices of Lancashire* (*ubi sup.*), where he says, referring to the contention I have just noticed: "It is, therefore, obvious that the words relied on by the appellant point not merely to the merits of the applicant, but must be read in a wider sense, as referring to the merits of the application: and they authorise, and therefore by implication require, the justices to govern their discretion in granting or withholding the licences, by reference not only to the qualification of the person applying and to the suitableness of the house, but to other considerations also. These considerations must include the nature of the locality, the population, the number of houses already licensed, and all other circumstances bearing on the question, whether it is fit and proper in the interest of the public, for whose benefit these Act are passed, that an additional licence should be granted." Now that the discretion conferred on the justices is the same in regard to renewals as in regard to new licences is not only apparent on the face of the section itself, but is treated as undoubted law by Cockburn, C.J., in the case of *Smith* v. *The Justices of Hereford* (*ubi sup.*), where he says: "According to 9 Geo. 4, c. 61, the justices had the same discretion to refuse a renewal as they had to refuse a grant of a new licence." This, then, was, under the Act of 1828, the undoubted and indubitable law. If I required any confirmation in that opinion, I should find it in the Act of 1869, because, notwithstanding what Mr. Candy has said about the 8th and 19th sections, it does appear to me from them that the Legislature conceived the justices as being vested with an unlimited discretion with regard to renewals. It is plain therefore that this was the case under the Act of 1828. We have therefore to consider whether this state of things has been altered by subsequent legislation. Until the Act of 1872 there is nothing that throws any light on the matter except the Act of 1869, to which I have already referred. Now, one of the sections, the 12th, of the Act of 1828 made it necessary for all applicants for licences to attend the meeting in person, and when in 1869 beerhouse-keepers were brought under the Act of 1828, they also, by parity of legislation, had to attend in person, and this was found to be inconvenient, no doubt in the manner described. Then we come to the Act of 1872. That altered the law with regard to licences in many important particulars. It took away the right of appeal against a refusal to grant a new licence, and preserved it in the case of a renewal. It introduced a new principle in the disqualification of premises, and enacted corresponding clauses protecting the owner in cases where his property might be disqualified. I call attention to these, because Mr. Candy asked us to infer from them that it was the intention of the Legislature to give the owner a vested interest in licensed property. But nothing of the sort can be predicated of them, for they are merely part of the machinery used in introducing a new disqualification affecting the property of the owner. But what we have really to deal with is the 42nd section of this Act of 1872. The object of that section is simply to alter the procedure upon

application for renewals. First, it gets rid of the crowd that every year thronged the Brewster Sessions. Secondly, it provides that an applicant for a renewal shall have notice of an intended opposition. Thirdly, it enacts that all evidence must be on oath. Then it proceeds: "Subject as aforesaid . . . the powers and discretion of justices relative to renewal shall be exercised as heretofore." In other words, the discretion given to the justices by the Act of 1828, which in my judgment was the same in regard to the renewals as in regard to new licences, shall still be exercised in regard to renewals. The last matter with which it is necessary to deal is the Act of 1874, which is an amending statute passed to get rid of the difficulties and heal the defects which had been discovered in the Act of 1872, with which it is to be construed as one Act. Sect. 26 recites the 42nd section of the Act of 1872, and enacts that the requisition to attend shall not be made "save for some special cause personal to the licensed person to whom such requisition is sent." These are the only words which have caused me any perplexity in this case. It might seem that the word "personal" here is used in its proper sense as meaning peculiar to the individual character, in which case the words would shut out the character of the house and all surrounding circumstances pertinent to the application except only the individual character of the applicant himself. But I think that is not the meaning in which the words are used. It is impossible to suppose that so marvellous a revolution in the matter of granting licences should be brought about by such words as those. I think their true meaning is that the justices shall not give the requisition to attend upon grounds which relate generally to all applicants, but only to each individual, upon grounds which relate particularly to the individual himself or his house. Another reason for rejecting the construction of the words contended for is that, in the following clause, the grounds of objection are required to be stated in the notice of opposition. If it be true that the personal ground only can be taken, then these grounds are all reduced into one, and yet the Legislature still speaks of them as "grounds," and speaks of them without any limitation. Thirdly, this section and the 42nd section of the Act of 1872 must be read together, and when they are read together the clauses of the 42nd section as amended by the 26th section of the amending Act, are still followed by the words, "Subject as aforesaid, the discretion of justices relative to such renewal shall be exercised as heretofore." I cannot but think that, if the Legislature had intended to limit the discretion which it had conferred on the justices, it would have used plain words to do so; but it has not done so, and I am therefore of opinion that the discretion of the justices remains unlimited, and that the judgment of the court below was right.

LOPES, L.J.—It is always difficult to deliver a third judgment, and it is particularly difficult in this case, where such elaborate judgments have been already delivered. But I think I may state in a few words the conclusions at which I have arrived. In my view, the case mainly depends upon the construction of the Act of 1828. It is said that upon an application for a renewal the justices can refuse it on the ground that the applicant has misconducted himself, or that his premises are unsuitable; but that they have no right to do so on the ground of the necessities of the neighbourhood and its remoteness from police supervision. Now I am of opinion that the justices have jurisdiction to refuse the renewal on this ground. The framers of the Act of 1828 were looking not only to the time at which it was passed, but to all future time until it should be repealed. In giving the justices power to grant licences to persons keeping, as well as to persons about to keep inns, the 1st section of the Act, to my mind, clearly refers to renewals. Then it goes on, "It shall be lawful for the justices to grant licences for the purposes aforesaid to such persons as they . . . shall . . . in the exercise of their discretion, deem fit and proper." I cannot imagine any words more calculated to convey an intention to vest in the justices a wide and absolute jurisdiction and discretion, and that whether the application be for an original licence or for a renewal. But it is said that subsequent legislation has limited and controlled that discretion. What is relied on for this? The 42nd section of the Act of 1872. But that section does this—it provides that it shall be no longer necessary to make the application for a renewal in person. It provides that notice of opposition shall be served upon licensed persons, and provides for adjournments in certain cases, and it enacts that all evidence shall be on oath. These are all merely matters of procedure. Then follow the words, "Subject as aforesaid . . . the discretion of justices relative to such renewal shall be exercised as heretofore." "As heretofore:" under what Act? This Act of 1826 was the only one. It seems to me that these words comprise as complete a reservation and declaration of the absolute discretion of justices relative to renewals as could possibly be made. Then as to the 26th section of the Act of 1874, that makes no other alteration than by enacting that, unless for a cause personal to the applicant, he shall not be required to attend in person, and that the notice of opposition shall state the grounds of objection. I am quite satisfied, apart from authority, that this interpretation of the statute is the right one; but if authority were needed, it is to be found in the case of *Smith* v. *The Justices of Hereford* (*ubi sup.*). For these reasons I am of opinion that the judgment of the court below was right, and that the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant, *Sykes*, for *Watson*.

Solicitors for respondents, *Nicol, Son*, and *Jones*, for *Bolton*, Kendal.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Thursday, Nov. 29, 1888.

(Before KAY J.)

THE CORPORATION OF WEST HAM *v.* GRANT. (*a*)

Urban authority—Estimated expenses of paving, &c., private street—Right to charge on adjoining premises—Public Health Act 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 150, 257, 313; 30 *Vict. c. lvi., ss.* 1, 30, 31.

Sect. 150 *of the Public Health Act* 1875 *empowers*

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

the urban authority to give notice to the owners and occupiers of premises to pave, &c., private streets, and in case of non-compliance to execute the work and recover the expenses incurred from the owners and occupiers. Sect. 257 *provides that where any local authority have incurred expenses of this kind, until recovery, the same shall be a charge on the premises in respect of which they were incurred.*

By a local Act, 30 *Vict. c. lvi., the plaintiffs were empowered to apportion the estimated expenses of paving, &c., any street among the owners or occupiers of premises in the street, and such expenses so apportioned might be recoverable either before the work should be commenced, during its progress, or after its completion, either by action at law or in a summary manner before justices of the peace, at the option of the plaintiffs; and it was provided that in case the actual expenses of paving, &c., should be less than the estimated cost the difference should be paid by the plaintiffs to the owners of the houses or property, who might have paid such sum, or whose houses or property might have been "charged therewith." The local Act was to be construed with the Public Health Act* 1875 *together as one Act. The plaintiffs duly apportioned the estimated expenses of certain works in a street, and demanded payment from, among others, the defendant (who was the owner of premises in the street) of the proportion payable by her. The defendant did not pay the amount demanded, and the plaintiffs, after having obtained a magistrates' order, which was not complied with, brought an action to establish their rights to a charge on the defendant's premises for the amount, under sect.* 257 *of the Public Health Act* 1875. *No work had been actually done or expenses incurred.*

Held, that the local Act had not the effect of so extending the general Act; and that the plaintiffs were only entitled to a charge in respect of expenses actually incurred.

Where a special Act incorporates and is to be construed together with a public general Act, the special Act does not, by its provisions, modify those of the incorporated statute unless the language of the special Act in express terms alters the general Act, and it is also apparent that the Legislature, in passing the special Act, meant to alter the provisions of the general Act.

THE plaintiffs in this action were the mayor, aldermen, and burgesses of the borough of West Ham, acting by the council of such borough, and the defendant was Susan Elizabeth Grant.

Until the 9th Nov. 1886 the West Ham Local Board of Health was the urban sanitary authority for the local government district of West Ham, in the county of Essex, and was subject to the provisions of the Public Health Act 1875, and the Acts amending the same, and a local Act, 30 Vict. c. lvi. and other local Acts (not material to the matters in question in this action), all of which Acts are in pursuance of the statute 13 & 14 Vict. c. 21, s. 7, deemed to be public Acts, and are judicially taken notice of as such.

The plaintiffs' claim accrued, as they alleged, by virtue of sects. 150, 257, and 313 of the Public Health Act 1875, and the following sections of the Local Act 30 Vict. c. lvi.:

Sect. 1. This Act and the Public Health Act 1848, as altered or amended or supplemented by the Local Government Act 1858, the Local Government Act (1858) Amendment Act 1861, the Local Government Amendment Act 1863, or any other Act now in force amending such Acts, or any of them, or incorporated therewith, shall be construed together as one Act.

Sect. 30. When the said board shall, under the provisions of the 69th section of the Public Health Act 1848, have given notice in writing to the owners or occupiers of the premises fronting, adjoining, or abutting on any street, or any part thereof, requiring them to sewer, level, pave, flag, or channel such street, or any part thereof, and such notices or any of them, have not been complied with, it shall be lawful for the board to direct their surveyor to apportion the estimated expenses of sewering, levelling, paving, flagging, or channelling such street, or the part or parts thereof requiring to be so sewered, levelled, paved, flagged, or channelled, including the cost of paving the points at the intersection of streets, and all other incidental costs and charges, among the said owners or occupiers of the premises so fronting, adjoining, or abutting on the said street, or such parts thereof, so requiring to be sewered or otherwise made good as aforesaid, and such expenses so apportioned may be recoverable either before the work shall be commenced, during its progress, or after its completion, and the same may be recoverable from the present or any future owner, either by action at law, or in a summary manner before a justice or justices of the peace, at the option of the said board.

Sect. 31. Where the actual cost of so sewering, levelling, paving, flagging. or channelling, any such street, as is mentioned in the preceding section, shall exceed the estimated cost, the difference or cost shall be apportioned by the said surveyor among the said various owners, and shall be recoverable from them in the same manner as thereinbefore provided with respect to the recovery of the proportion of the estimated cost; but in case the actual expenses shall be less than such sum, the difference shall be paid by the local board to the owners of the houses or property who may have paid such sum, or whose houses or property may have been charged therewith.

The defendant was the owner, within the meaning of the Public Health Act 1875, of a certain house and premises known as No. 4, Exeter-terrace, Frederick-road, Victoria Docks, within the said district.

On the 4th Feb. 1885 the said house and premises fronted, adjoined, or abutted on certain parts of Frederick-road, then being a street within the said district, and not being a highway repairable by the inhabitants at large, and the parts of the said street (as well as other parts thereof) were not then sewered, levelled, paved, metalled, flagged, channelled, and made good, and were not lighted to the satisfaction of the local board; and thereupon the local board, by a notice in writing, dated the 14th Feb. 1885, and addressed to the owner or occupier of the said house and premises, required the said owner or occupier to sewer, level, pave, metal, flag, channel, and make good, and provide proper means for lighting the said parts of the said street within the space of one month from the date thereof, and in the manner therein described.

On the 26th Aug. 1885 the said house and premises fronted, adjoined, or abutted on certain parts of Adamson-road, Victoria Docks, then being a street within the said district, and not being a highway repairable by the inhabitants at large, and the parts of said street (as well as other parts thereof) were not then sewered, levelled, paved, metalled, flagged, channelled, and made good, and were not lighted to the satisfaction of the local board, and thereupon the local board, by a notice in writing, dated the 26th Aug. 1885, addressed to the defendant as and being the owner or occupier of the said house

and premises, required the defendant to sewer, level, pave, metal, flag, channel, and make good and provide proper means for lighting the said parts of the said street within the space of one month from the date thereof, and in the manner therein described.

Before such notices were given all such plans, sections, and estimates as were authorised and required by the said Acts, or some of them, were duly made and deposited.

The notices were not complied with, and thereupon the local board directed their surveyor to apportion the estimated expenses of sewering, levelling, paving, metalling, flagging, channelling, and making good the said streets, or the part or parts thereof, requiring to be so sewered, levelled, paved, metalled, flagged, channelled, and made good, including the cost of paving the points at the intersection of streets, providing proper means of lighting, and all other incidental costs and charges, among the owners of premises fronting, adjoining, or abutting on the said streets respectively, or such parts as aforesaid.

The apportionments were duly made by the surveyor, and the amounts of the estimated expenses so apportioned to be paid by the defendant, as and being such owner as aforesaid, were 8*l.* 5*s.* 4*d.* in respect of Frederick-road, and 26*l.* 7*s.* in respect of Adamson-road; and on the 20th Oct. 1885 the local board served on the defendant notices of the amounts so apportioned to be paid by the defendant as aforesaid, and the defendant did not, within three months from the service of the notices, or at any time, dispute the apportionments. The local board at the time last aforesaid demanded from the defendant payment of the said sums, but the defendant did not pay the same.

The local board thereupon, by a resolution in that behalf, duly authorised their officer to take proceedings to recover the sums.

Summonses were accordingly issued in the West Ham Police-court, then having jurisdiction in the said matters, and were heard by the magistrate of that court, who on the 12th Feb. 1886 adjudged and ordered the defendant to pay to the local board the sums of 8*l.* 5*s.* 4*d.* and 26*l.* 7*s.*, and two sums of 16*s.* 6*d.* each for costs, and further ordered a levy by distress and sale of the defendant's goods in default of payment. A minute of the order was duly served on the defendant, who made default in payment of the moneys, and the same were still unpaid.

The local board then resolved that the sums should be made a charge on the said house and premises, and that proceedings should be taken to enforce the charge.

On the 9th July 1886, by Royal charter of incorporation, the local government district was created a municipal borough by the name of the borough of West Ham, and by virtue of the charter and a scheme made and settled by a committee of the Privy Council, and confirmed by Her Majesty, and by virtue of the Acts of Parliament in such case made and enacted, the municipal borough created by the charter was placed immediately on from and after the 9th Nov. 1886 within the jurisdiction of the mayor, aldermen, and burgesses of the borough of West Ham, acting by the council of the borough as sanitary authority of the borough, and immediately from and after the day last aforesaid the local board were dissolved and ceased to exist, and all powers, rights, duties, capacities, liabilities, obligations, and property immediately before the day last aforesaid exercisable by, attaching to, or vested in the local board under any local, personal, or general Act of Parliament were exercisable by, attached to, and vested in the mayor, aldermen, and burgesses of the borough, acting by the council as the sanitary authority of the borough.

The plaintiffs claimed: 1. A declaration that they were entitled to a charge upon the said house and premises for the two sums of 8*l.* 5*s.* 4*d.* and 26*l.* 7*s.*, and interest thereon at the rate of 5*l.* per cent. per annum from the 20th Oct. 1885 until payment. 2. Sale of the said house and premises, and payment to the plaintiffs of the said two sums and interest, and the costs of this action out of the proceeds of the sale. 3. An injunction restraining the defendant from selling, conveying, or disposing of the said house and premises or any part thereof. 4. A receiver of the rents and profits of the said house and premises.

The action now came on for trial.

W. Phipson, for the plaintiffs, referred to the decision of the Court of Appeal in the case of *The Midland Railway Company* v. *Watton* (54 L. T. Rep. N. S. 482; 17 Q. P. Div. 30), as being an authority in the plaintiff's favour; and contended that the effect of the local Act was to extend the charge conferred by the general Act, for expenses incurred, to estimated expenses. He referred also to

Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 150, 257, 313;
30 Vict. c. lvi., ss. 1, 30, 31.

[KAY, J.—The authority cited has no bearing upon the present case, inasmuch as the question there was simply as to the recovery of the estimated expenses, and not as to any charge upon land in respect of them.]

The defendant did not appear.

KAY, J.—In this case I have not the least doubt that, if the court were to make the order as asked, it would in effect be to repeal a provision of a public Act of Parliament. The general Act of Parliament, the Public Health Act 1875, provides as follows (sect. 257): [Reads it.] Now, there is no doubt whatever that that means, as it says, expenses incurred by the local authority. I need not pause to say what "incurred expenses" might possibly mean, whether the term would involve the actual payment of the expenses or not. But it certainly means that the local authority have paid, or become at least liable to pay, the expenses. I do not now intend to give that definition, but it must mean that at least. Now, in the case before me the local authority have not "incurred"—that is to say, they have not paid, or become liable to pay—any expenses, and yet they have brought an action in the Chancery Division, asking that the estimated expenses of doing certain works, which expenses at present they have not incurred, may be made a charge on the premises. I can only say that that is not said by the general Act. That is not within the section which I have referred to. The section is carefully drawn, and it only mentions expenses which have been incurred by the local authority as being chargeable. Then it is said: "There is a special Act, which special Act incorporates the general Act, and read with the general Act

it alters that section." All I can say is that it would be a most startling thing to say that a special Act of Parliament could alter the meaning of a general Act of Parliament like the Public Health Act 1875. Speaking for myself, I should never hold that, unless the words of the special Act of Parliament did in express terms alter the general Act, and unless I saw from the words and could not help coming to the conclusion that the Legislature in passing the special Act of Parliament, and having regard to the purpose for which the special Act was passed, meant to alter the provisions of the general Act. Now, as far as this special Act has been drawn to my attention, there is nothing of the kind. It provides by sect. 1 that the Local Act and Public Health Act, as altered and amended by the Local Government Act and certain other Acts, shall be construed together as one Act. Sect. 30 of the special Act, which is the section relied upon, is as follows: [His Lordship read it, and continued:] That section does not say, "Notwithstanding sect. 257 of the Public Health Act 1875, the estimated expenses shall be a charge on the property and not only the expenses incurred." It leaves that out, and, I suppose, deliberately and designedly leaves it out. The other section referred to (sect. 31) provides as follows: [His Lordship read it, and continued:] It is said that I must infer from the concluding words of the section "charged therewith," that the meaning of this special Act was to do that which it does not expressly do in terms—namely, to alter or to extend the provisions of the Public Health Act 1875 by making, not the actual expenses, but the estimated expenses, a charge upon each house. I can only say that such a violent construction as that I should not be forced to without words a great deal more specific than anything I can find here. Just think of the result of that contention. The local board may estimate the expenses of doing this work, and they may then apportion them among the owners of certain houses. Those houses might be charged with the estimated expenses, and the expenses might be recovered at any time before the work had been done, and then, after all, it might turn out that the expenses were twice too large, or very much larger than they ought to have been. Then the owner might find that if the actual expenses only had been charged he would have paid, and willingly have paid, the amount, and that his houses had been sold because he has not paid twice the amount which he ought to have paid. It would be monstrous to say that that is the effect of this Act of Parliament without finding express words there. I conceive the Legislature deliberately intended not to make "the estimated expenses" a charge, but only "the actual expenses" a charge, for that reason which I have stated, amongst other very good reasons. It is obviously the scheme of all these Acts of Parliament not to allow the local boards to proceed against property itself until they have exhausted the other more simple remedies given, namely, by summary proceedings or by action. The summary proceedings and action are contemplated by this special Act of Parliament as the modes by which "estimated expenses" may be recovered even before the work is done. But it does not contemplate proceeding against the land and recovering estimated expenses by selling the land or the house before the work is done. It seems to me that this action is misconceived, and must be dismissed with costs.

Solicitor for the plaintiffs, *Hillearys*.

QUEEN'S BENCH DIVISION.

Tuesday, June 19, 1888.

(Before CAVE and WILLS, JJ.)

COLE (app.) *v.* MILES (resp.). (a)

Railway company—Public right of way—Railway passing over public footpath—Whether right of way is extinguished — Person on railway in assertion of right of way—Conviction for trespassing on railway—Jurisdiction of justices at petty sessions—Whether the claim of right ousts such jurisdiction—The Regulation of Railways Act 1868 (32 *&* 33 *Vict. c.* 119), *s.* 23—*The Railways Clauses Consolidation Act* 1845 (8 *&* 9 *Vict. c.* 20), *s.* 46.

The appellant was convicted (1) *under sect.* 38 *of* 45 *&* 46 *Vict. c. ccxiv., of unlawfully trespassing upon a railway in such a manner as to expose himself to danger;* (2) *under sect.* 23 *of* 31 *&* 32 *Vict. c.* 119 (*the Regulation of Railways Act* 1868) *of being upon the railway after having received warning not to go thereon. Prior to the making of the railway, and prior to the passing of the Acts authorising the same, there existed a public footpath over the land now occupied by the railway at the place where the appellant crossed, and the appellant, with others, went upon and crossed the railway at the place in question in the bonâ fide assertion of the right of way which existed before the railway was made. The railway company had not complied with the provisions of sect.* 46 *of the Railways Clauses Consolidation Act* 1845 (8 *&* 9 *Vict. c.* 20) *by making a proper provision for the public to pass over or under the railway.*

Held, that the conviction was wrong and must be quashed on two grounds: (1) *because the jurisdiction of the magistrates was ousted by the claim of right or title which was set up, and they had no jurisdiction to adjudicate upon the case;* (2) *because, as the public right of way existed before the making of the railway, such right of way was not extinguished by the making of the railway over it, as the railway company had not complied with the provisions of* 8 *&* 9 *Vict. c.* 20 *in making proper provision for the public to pass over or under the railway.*

CASE stated by two justices of the peace for the county of Pembroke pursuant to 42 & 43 Vict. c. 49, s. 33, setting forth the facts and grounds upon which the appellant Alfred Cole was summarily convicted by them upon the 28th Jan. 1888: (1) Of an offence under the statute 45 & 46 Vict. c. 214, s. 38 (as amended by 46 & 47 Vict. c. 193, s. 50) (Great Western Railway Acts.) (2) Of an offence under 32 Vict. c. 119, s. 23 (the Regulation of Railways Act 1868) as amended by 34 & 35 Vict. c. 78, s. 14.

CASE.

1. The said appellant was summoned and charged before us on the complaint of Salisbury Miles, an inspector of the Great Western Railway, hereinafter called the respondent: (1) For that

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

the said appellant, on the 30th April 1887, at the parish of Llanstadwell, in the county aforesaid, did unlawfully and wilfully trepass upon a certain railway there situated, to wit the Great Western Railway, in such manner as to expose himself to danger or risk of danger contrary to the form of the statute in such case made and provided. (2) For that the appellant on the same day, at the parish aforesaid, unlawfully was upon the said railway there situate, not being there for the purpose of crossing the same at any authorised crossing, and after having once received warning from the Great Western Railway Company, or one of their agents or servants, not to go or pass thereon contrary to the form of the statute in such case made and provided.

2. After hearing the said summonses and the evidence taken thereon on the 22nd Dec. 1887, we reserved judgment, and having duly considered the same and the arguments adduced before us, we gave judgment on the 28th Jan. 1888, convicting the appellant on each of the said summonses, and ordering him to pay on each conviction 1*s.* fine and 17*s.* 6*d.* costs, and in default of payment or sufficient distress to be imprisoned for fourteen days. There were numerous other summonses before us against the appellant and against other persons, and these summonses were selected and treated as test cases.

3. It was sufficiently proved, and we found as matters of fact: (1) that the appellant did on the day mentioned wilfully and unlawfully (subject to what hereinafter appears) trespass upon the Great Western Railway, in the parish and county mentioned, in such manner as to expose himself to danger and risk of danger—that is to say, by intentionally going, being, and crossing upon and over the said railway at a part thereof where there was no authorised level crossing, at such time and under such circumstances as to expose himself to danger; and (2) that he did so and was thereon, not being there for the purpose of crossing the same at any authorised level crossing, and after having once received warning from one of the servants or agents of the Great Western Railway Company.

4. In answer to the charges evidence was given to establish, and we found as a fact that there did exist, prior to the making of the railway and prior to the passing of the Acts authorising the making of the same (which was referred to and cited before us), that is to say, the South Wales Railway Act 1852, the South Wales Railway Act 1855, and the Great Western Railway (South Wales Amalgamation) Act 1863, amalgamating the Great Western Company and the South Wales Company, a public right of way for persons on foot over the land now occupied by the said railway and taken by and vested in the Great Western Railway Company and used by them for and as a railway, under the Acts authorising them in that behalf, at the place where the appellant crossed; and we further found that the said appellant went upon and crossed the said railway as aforesaid, in the assertion of the right of way which formerly existed, and believing that he was entitled so to do by virtue thereof.

5. A considerable body of evidence was given both in support and in opposition to the existence of, and as to the nature of, the alleged right of way (which appeared to have been exercised by persons landing from or going to boats at a spot where the railway embankment now runs and crossing the land now occupied by the railway); and it was also proved that the railway company had, in accordance with the powers and requirements of their Acts above mentioned (particularly sect. 13 of the Act of 1852 and sect. 77 of the Act of 1855) constructed and maintained a certain landing slip, with reasonable access and approach by road thereto, for the use of the public, the locality and situation thereof being proved by plans which were put in evidence before us.

6. It was contended by counsel on behalf of the appellant on the above facts: (*a*) that our jurisdiction was ousted, and that the summonses must be dismissed on the ground that a *bonâ fide* claim of right was set up and that such *bonâ fide* claim of right was an answer to each and both of the charges; and (*b*) that the original right of way subsisted by virtue of 8 & 9 Vict. c. 20, sect. 74, and otherwise, and that the appellant was entitled to cross the railway as aforesaid, the said right of way not being extinguished or physically destroyed.

7. It was contended by counsel on behalf of the respondent: (*a*) that under each and both of the statutes under which the appellant was charged the question whether the appellant acted under a *bonâ fide* claim of right was immaterial, inasmuch as the said statutes made it an offence for any person to cross or be upon a railway as specified for any purpose and without regard to his intention, the provisions in question being enacted for the safety of the individual and of the public; (*b*) that the alleged claim of right was a claim of right which could not possibly exist at law—that is to say, a right to cross and be upon the railway notwithstanding the provisions of the said statutes; (*c*) that a *bonâ fide* claim of right to oust the jurisdiction of justices must be a claim of a right in the nature of title or property, or under some person claiming title or property, and that the suggested right here was not of that nature; (*d*) that 8 & 9 Vict. c. 20, s. 74 did not apply, inasmuch as it was not suggested that the company had failed or omitted to make any of the bridges and communications which they had been required to make under that Act and the Acts incorporated therewith, and the period within which they could be required to make further bridges or communications had long elapsed, and that the alleged right of way was impliedly taken away and destroyed by the substitution of other ways and roads constructed under and in pursuance of the said Acts, and by the provisions of the said Acts authorising the company to construct their line and embankment at a place and in a manner which involved the physical destruction of the roadway, if any, over which the alleged right had prior thereto been exercised and enjoyed.

8. Upon the above contentions we held and found: (1) that there was not such a claim of right as to oust our jurisdiction on either summons; (2) that the right of way claimed, even if the right of way still existed for other purposes, would not be an answer to either charge; (3) that a public right of footway as claimed did exist (at the place where the appellant crossed the railway) prior to the making of the railway, and that the appellant acted in supposed assertion

thereof; (4) that the contentions (*d*) of respondent were established so far as they were matters of fact, subject to our finding hereinafter stated; (5) that the said public right of way was intended to be, and was in fact, extinguished by the Acts authorising the making of the railway, and we found as a fact, upon the evidence adduced before us, as mentioned in the 5th paragraph hereof, that other and reasonable means of access and communication, viz., the said landing slip, and the access and approaches thereto, had been provided within a reasonable distance from the spot where such right of way was claimed, sufficient to take the place of such right of way, though such right of way was not mentioned expressly, nor any such substitution expressly directed in any of the said Acts.

9. In accordance with the said findings we convicted the appellant on each of the said summonses as stated in the 2nd paragraph hereof.

10. The question for the opinion of the court is: Whether we were wrong in law in so convicting the appellant upon either or both of the said summonses? If the court should be of opinion that we were wrong in law in so convicting the appellant, then the conviction or convictions as to which the court shall be of such opinion is or are to be quashed; otherwise the said convictions are to stand.

Sect. 38 of the Great Western Railway Act 1882 (45 & 46 Vict. c. 214) provides that,

> Any person who shall trespass upon any of the railways or stations of the company in such manner as to expose himself to danger or risk of danger, shall, without having received any personal or other warning, be liable to a penalty not exceeding 40*s*.

Sect. 23 of the Regulation of Railways Act 1868 (31 & 32 Vict. c. 119) provides that,

> If any person shall be or pass upon any railway, except for the purpose of crossing the same at any authorised crossing, after having received warning . . . not to go or pass thereon, he shall be liable to a penalty not exceeding 40*s*.

Sect. 46 of the Railways Clauses Act 1845 provides that,

> If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, . . . and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and maintained at the expense of the company: Provided always, that, with the consent of two or more justices in petty sessions, it shall be lawful for the company to carry the railway across any highway, other than a public carriage road, on the level.

Bowen Rowlands, Q.C. and *R. C. Glen* for the appellant.—The jurisdiction of the magistrates was ousted as soon as it appeared that a claim of right was set up on the part of the appellant. The provisions against trespassing on railways apply only to cases where a person is trespassing in the ordinary sense of the word, that is, being on a part of the railway where he has no right at all to be, and where he claims no right to be. That case is entirely different from the present, where the appellant *bonâ fide* sets up a claim to be on, or to cross, the railway in the assertion of a public right of way. There being then this *bonâ fide* claim of right the magistrates had no jurisdiction; but, even if they had jurisdiction, they have exercised it wrongly, as this right of way existed before the making of the railway, and the mere fact of the making of the railway over it does not destroy the right of way, as by sect. 46 of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20), where a line of railway crosses a public highway, the railway company must either carry the railway over the road or the road over the railway, by a bridge, or (with the consent of two justices) make a level crossing. This has not been done here, so that the public footway still subsists.

Finlay, Q.C. and *Asquith* for the respondent.—This right of way is extinguished. It is not necessary that there should be express words in the statute to extinguish the right of way, as a public right of way may be extinguished by statute, by necessary implication as well as by express words:

> *Corporation of Yarmouth* v. *Simmons*, 38 L. T. Rep. N. S. 881; 10 Ch. Div. 518; 47 L. J. 792, Ch.; 26 W. R. 802.

As to the claim of right ousting the jurisdiction of the magistrates, the case of *White* v. *Feast* (26 L. T. Rep. N. S. 611; L. Rep. 7 Q. B. 353) shows that this is not so. There a person was convicted of wilfully damaging property, and the court held that the conviction was right, although the person convicted was exercising what he considered a public right. In the present case it is clear, by sect. 38 of 45 & 46 Vict. c. 214 (the Great Western Railway Act 1852), that the assertion of a right of way can be no answer to a charge under that section of wilfully trespassing upon the railway.

CAVE, J.—I am of opinion that the conviction in this case was wrong, and must be quashed; and I come to that conclusion on two grounds. In the first place, I am of opinion that there was a question of title raised here which the magistrates ought not to have adjudicated upon. Summonses were taken out against a considerable number of persons under two sections of two different Acts of Parliament. The first is the Great Western Railway Act 1882, "And whereas accidents frequently arise by persons trespassing on the railways of the company, and many persons so trespassing have been killed and others have been severely injured, and it is necessary that more effectual remedies should be provided for the prevention of trespass on the railways and stations of the company, be it, therefore, enacted that any person who shall trespass upon any of the railways or stations of the company in such a manner as to expose himself to danger, or risk of danger shall, without having received any personal or other warning, than hereinafter mentioned, forfeit and pay" a certain penalty. Then there is a proviso that no person lawfully crossing the railway at any level crossing thereof shall be liable to any such penalty as aforesaid. Now, I understand that section to mean that where persons are trespassing on the railway in the ordinary sense of that term, wandering where they have no right to be at all, the railway company may summon them before the magistrates, and the magistrates may convict them. But then, in order that the rights of the public may not be interfered with, there is a proviso that no person lawfully crossing the railway at any level crossing thereof shall be liable to any such penalty, and it seems to me that when a man invokes the protection of that proviso, and says, I was lawfully crossing the railway at a level crossing, he raises,

provided that it is done *bonâ fide*, a question of title, which it is not for the magistrates to go into. What was done here was, that the defendants claimed that there was a right of way existing over the place on which they were alleged to have been found trespassing, and, thereupon, they claimed that the jurisdiction of the magistrates was ousted by that claim of right. I think the jurisdiction of the magistrates was ousted by that claim; that the Act, within the language of Lord Blackburn in *White* v. *Feast* (*ubi sup.*), did not intend to give the magistrates power to deal with any such question as that, but only to deal with cases where people were trespassing on the line without any ground of right for doing anything of the sort. Just let us consider what would be the evil consequences of holding that the magistrates were entitled to decide whether or not a particular way which was claimed existed or not. The way is claimed as a public way, and a way, therefore, in which every subject in the realm has an interest, and an interest in having it kept open and maintained. According to the view taken for the respondent, the railway company may summon some miserable creature, who has no means of defending himself, and may obtain, on such summons, a decision of the magistrates. I cannot think that that could possibly be the intention of the Legislature. Now, the other section is to be found in a different Act, in the Regulation of Railways Act 1868, which provides by sect. 23 that, "if any person shall be or pass upon any railway, except for the purpose of crossing the same at an authorised crossing, after having received warning not to go or pass thereon, he shall forfeit and pay a sum not exceeding 40*s*." Now, here again it appears to me that the intention of the Legislature was to give the magistrates jurisdiction in cases where a person is on the railway without any pretence to any lawful right to be there, and this very exception, "except for the purpose of crossing the same at an authorised crossing," does prevent the magistrates from hearing the case. It takes all the persons who are there for the purpose of crossing on an authorised crossing out of the jurisdiction of the magistrates, and the magistrates, unless they are of opinion that the claim is a frivolous one, have no business to decide upon it, and say, "we will go into this question, we will decide whether or not you were crossing on an authorised crossing, and having come to the decision that you were not crossing on such an authorised crossing we will convict you." It is quite clear to my mind that questions of that gravity and importance were not intended to be decided, and decided without appeal, by two magistrates sitting at petty sessions. Let me go a step further. I think there is a second ground that is equally fatal to the contention which is set up on behalf of the respondents. It is found as a fact by the magistrates that there was a right of way, and consequently, if there was a right of way, unless that right of way has been extinguished by some Act of Parliament, or by some means provided and pointed out by an Act of Parliament, that right of way still remains, and these persons were doing no more than exercising their just and lawful rights. Now then there comes, with regard to that, sect. 46 of the Railways Clauses Consolidation Act 1845 [the learned Judge then read the section]. Now, that appears to me to be a perfectly clear and distinct intimation of the Legislature, that a road is not to be stopped up because a railway has been authorised to cross it, and when I use the word "road" I use it in its usual sense of a highway. In this case it was a highway for foot passengers, and no such highway of that kind can, as it appears to me, be stopped up solely by the fact that the railway company have been authorised to make a way across it, but that they must carry either the railway over the footpath, or the footpath over the railway, unless they obtain the consent of two justices to carry the railway across the footpath on the level. That is very often done as we all know. One has often seen in a deep cutting a footpath carried down the side of the cutting, across the line with no defined crossing at all, and then up the side of the cutting again; or, at other places, when it was an embankment, the footpath is carried up the side of the embankment and across the line, and down the side of the embankment on the other side; and I suppose it has never occurred to anybody up to the present time to suggest that by merely obtaining an Act of Parliament, and without anything in the Act to stop the road, that road can possibly become stopped up because of the passing of the Act of Parliament authorising the formation of the railway. It is said, however, by Mr. Finlay, that in this particular case, though there is not any provision in express terms in the special Act, yet, at all events, there is an implied provision to that effect. Now, for a moment I pause to illustrate what I was saying a short time ago. Imagine trusting two magistrates at petty sessions to discover, from the perusal of a long railway Act, whether there is or is not an implied stopping up of a public highway. To my mind the notion that they should have any power to do anything of the kind is perfectly monstrous. I entertain some doubts as to whether an implied stopping up would be sufficient in the absence of some provision in the special Act, which I should expect to find to be more or less specific; but, assuming for the moment that an implied provision for the stopping up of the path is sufficient, what is suggested here? Absolutely nothing, except that the Act authorised the construction of an embankment twenty feet high across the line of this public highway. It is done in numerous cases throughout the whole of England, and to say that therefore, whenever there is an embankment twenty feet high, every public highway over which that embankment has to pass is thereby stopped up, is to my mind the most outrageous contention that it is possible to conceive. It is said with regard to the second Act of Parliament that was relied upon (the Regulation of Railways Act 1868), that, "even supposing the Act has not specially stopped up the particular line, yet we are entitled to convict these persons because they were not crossing the same at any authorised crossing," and it is said that an authorised crossing must be one that the directors have chosen to make convenient for the public, and that they have got nothing to do but to disregard the obligation of the Act of Parliament and refuse to give those conveniences which the Act requires them to give; that is to say, to make a bridge over the highway in the case of

an embankment, and immediately the whole of the neighbourhood may be put to the greatest inconvenience and all the traffic stopped, and everybody who proceeds to use that roadway which it was their right to use before the railway came there, and which no provision of the Act of Parliament had ever taken from them, is to be immediately hailed before the magistrates and fined 40*s*. I think it is hardly necessary to do more that state such an argument to show how untenable it is. In my judgment the defendants are entitled to succeed on both these points. First, upon the point that the questions raised before the magistrates were not such as they ought to have taken upon themselves to decide; and, secondly, if they were such as they were authorised to decide, that they decided them wrongly, because in my judgment no provisions in the Act of Parliament have been pointed out, though we called on Mr. Finlay to tell us what such provisions were, which are in the least degree inconsistent with the preservation and maintenance, in accordance with sect. 46 of the Railway Clauses Consolidation Act, of that which the magistrates have found to be an old public highway.

WILLS, J.—I am of the same opinion. The question was, whether, under an Act of Parliament which creates offences, or which gives a jurisdiction, the magistrates are or are not entitled to entertain questions of title, because it is undoubted that there are many cases in which the magistrates exercise the jurisdiction conferred upon them without entering into a question of this kind. Undoubtedly, the general tendency of construction should be to require that, upon the Act itself, it must be seen and made out that the magistrates have jurisdiction to enter into questions of title; and if that is not necessarily conferred upon them by the nature of the jurisdiction, then I think the general rule must prevail, and that where questions of title or right to land or property seriously and *bonâ fide* arise, the Court of Petty Sessions is not a proper tribunal to adjudicate upon such questions, when they arise incidentally, in respect of an offence alleged to have been committed, and as to which the answer is, "It is no offence, because it is an act done in the exercise of a perfectly legal right." Under the legislation which applies here, the two sections, sect. 38 of the Great Western Railway Company's Act of 1882, and sect. 23 of the Railway Regulation Act of 1868, substantially the same exception is made in respect of the jurisdiction of the magistrates in each case, and substantially it comes to this: The magistrates are to adjudicate, and to impose a penalty upon the trespasser, if it be a trespass, but they are not authorised to convict, in case the person crossing the railway, the person doing that which would otherwise be a trespass upon the railway, is lawfully crossing, or using the railway as a place of crossing. In the Great Western Railway Act of 1882, the expression is "lawfully crossing;" in the Regulation of Railways Act 1868, the expression is crossing at any "authorised crossing." Practically they are the same, because an authorised crossing must be a crossing authorised specially by the Act of Parliament, or authorised in the sense of being lawful at common law, and in virtue of a common law right. It seems to me that that brings the question of their jurisdiction under the ordinary law, and that there is nothing in this Act of Parliament which renders it necessary for them to enter into this inquiry before they can exercise their jurisdiction. I therefore agree with my brother Cave that the magistrates were wrong in entering into this inquiry. But with him I go further. I think if they were not wrong in so doing, and if they had power to enter into the inquiry, that they have gone very wrong indeed in the decision which they have come to. I take it to be a fundamental rule that the authorities and rights conferred upon railways by their special Acts, and by the general Acts which are usually incorporated with them, do not, as a general rule, interfere with rights, whether public or private, and obliterate those rights, unless either there is an express warrant for their so doing, in the language of the Act of Parliament, or unless it is impossible to give effect to its terms under the powers conferred by the Act without considering those rights destroyed. It is of course of very great importance that no doubt should be cast on that principle, because these powerful companies, which are created for making great public works, unless they are confined within the powers which are conferred by Act of Parliament, may become the instrument of great oppression and private wrong; and with regard to the legislation here, there is certainly no express legislation taking away the public footpath or public right of way which was existing upon the *locus in quo*, at the time the railway company got powers under the Act of Parliament to do what it has done. Mr. Finlay says it was impossible for them to exercise their powers and to construct the railway without considering that the right of way was destroyed. I am quite unable to follow him. It seems to me that sect. 46 of the Act of 1845 is the strongest possible ground for saying that rights of this kind were carefully preserved by the Legislature, and that, instead of being destroyed, liabilities were imposed upon the railway companies which, if observed, would protect the public in the use of rights which might be made dangerous by the existence of the railway works interfering with them. And there seems to me to be no trace of any intention that the right of public passage from place A to place B crossing the railway should be destroyed; but, on the contrary, every indication of the intention that the right should be preserved and rendered safe and commodious to the public. It cannot for a moment be tolerated that the contention should be put forth that, because the railway company do not fulfil their statutory obligation, therefore they have got rid of a right of passage, which they have not made physically impossible, but which they have made dangerous. Great reliance was placed upon the case decided by Fry, J. in 1878, the *Corporation of Yarmouth* v. *Simmonds* (*ubi sup.*). It seems to me that that case does not decide anything of the kind which was suggested. In that case power was given to the corporation of Yarmouth to construct a pier, and it seems that, if that pier were constructed in the way which the Act of Parliament gave them power to construct it, they must necessarily put up a structure which would make it physically impossible for the old right of passage to exist; but Fry, J. goes much further than that, and he says that, inasmuch as he finds that there is a power given to levy tolls for passing along the pier at all, and

inasmuch as persons who, if it were physically possible to exercise the right of way in the old direction, must cross the pier and upon doing so would at once be liable to a toll, it is clear that the ancient right of way was not intended to be preserved, and it is to be noticed that in that case there was no statute analogous to the Railway Clauses Consolidation Act incorporated in the special legislation. There was no indication that steps should be taken by the body empowered by the special Act to construct the works, to preserve the old rights of way and to render them commodious and safe, but, on the contrary, as powers and rights were given which were inconsistent with the free exercise by the public of the old rights of way, Fry, J. held that, under these circumstances, there was an implied obliteration of the ancient rights of passage. In the present case there is nothing of the kind to be found in the legislation; on the contrary, sect. 46 of the Act of 1845 says that these rights shall be maintained and protected, unless specially provided for otherwise by the special Act. The special Act here does nothing more than is done by every railway company's Act, which gives power to make a railway either upon an embankment or in a cutting at places where it is crossed by existing rights of way. It seems to me, therefore, that the magistrates were quite wrong in saying that there was anything in the legislation, or in what had been done under it, to take away the ancient right of passage, which they found to exist over this ancient *locus in quo*. In my opinion this appeal must succeed, and judgment be given for the appellant with costs.

Judgment for the appellant with costs; conviction quashed.

Solicitors for the appellant, *G. Thompson* and *Son*, for *Eaton, Evans*, and *Williams*, Haverfordwest.

Solicitor for the respondent, *R. R. Nelson.*

Friday, Nov. 2, 1888.

(Before Lord COLERIDGE, C.J. and CAVE, J.)

GILBART (app.) *v.* THE WANDSWORTH DISTRICT BOARD OF WORKS (resps.). (*a*)

Metropolis Management Acts — General line of buildings — House at corner of two streets — House facing one street, but within building line of another street — Jurisdiction of magistrate to order its demolition — Metropolis Management Amendment Act 1862 (25 *&* 26 *Vict. c.* 102), *s.* 75.

The appellant's house was built at the corner of S.-road and C.-road. The superintending architect of the Metropolitan Board of Works gave his certificate under the 75th section of the Metropolis Management Amendment Act 1862, *that the building line in the C.-road exceeded fifty feet from the highway. At the date of this certificate all the houses on the west side of the S.-road, including the appellant's house, had a uniform line of frontage to that road only, and there was no access to the appellant's house from any other road. The appellant's house was within fifty feet of the C.-road, and it was found as a fact that the site on which the appellant's house was built was in the C.-road.*

Held, that, although the appellant's house faced to the S.-road, as it was within the building line of the C.-road, it was bound to follow the building line in C.-road, and that the magistrate had power to order the removal of the house, or so much of it as projected beyond the building line in the C.-road.

Barlow *v.* The Vestry of St. Mary Abbotts, Kensington (*in the House of Lords*) (55 *L. T. Rep. N. S.* 221; 11 *App. Cas.* 257; 55 *L. J.* 680, *Ch.*) *distinguished.*

CASE stated by Mr. Curtis Bennett, metropolitan police magistrate.

1. The respondents, being the local authority within the Wandsworth District for the execution of the Metropolis Management Amendment Act 1862, as complainants, issued a summons before me for erecting a building or structure in a certain street, place, or row of houses, to wit, at the northern side of Clapham Common between Sisters-avenue and Sugden-road, in the parish of Battersea, within fifty feet of the highway, and beyond the general line of buildings in which the same was situate, without the consent in writing of the Metropolitan Board of Works, and contrary to the 75th section of the 25 & 26 Vict. c. 102.

2. Upon the hearing of the said summons the following facts were either proved or admitted:

3. In the year 1887 the appellant became possessed, under a building agreement with the freeholder, of a building estate lying on the north side of a road called Clapham-road, which runs along the northern side of Clapham Common. This estate had been laid out for building purposes by the formation, with the approval of the Metropolitan Board of Works, of two new roads, called Sugden-road and Marney-road, running north from Clapham-road, and parallel, or nearly so, with Sisters-avenue.

4. On the 6th Dec. 1887 the appellant gave notice to the respondents of his intention to build rows of shops and private houses.

5. On the 16th Jan. 1888 the respondents applied to the superintending architect of the Metropolitan Board of Works, under section 75 of the Metropolis Management Amendment Act 1862, to decide the general line of buildings in the road on the northern side of Clapham Common, between Sisters-avenue and Marney-road.

6. On the 13th Feb. 1888 the said superintending architect gave his certificate with a plan attached thereto.

7. At the date of the said certificate the entire row of houses on the west side of Sugden-road, including No. 139, had a uniform line of frontage to that road only, and there was, so far as was ascertained at the time of the hearing, no access or approach to No. 139 from any other road.

8. The distance of the general line of buildings laid down in the certificate of the superintending architect from Clapham-road exceeded fifty feet. The house referred to in the said complaint, and numbered 139, was within fifty feet of Clapham-road.

9. On the part of the appellant it was contended that, as the distance of the general line of buildings in the Clapham-road, as laid down by the superintending architect, from the said road exceeded fifty feet, I had no jurisdiction under the 75th section of the 25 & 26 Vict. c. 102

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

(Metropolis Management Amendment Act 1862) to order the demolition of any part of the building of the appellant mentioned in the said complaint. The contrary of this proposition was contended by the respondents. I held, upon the foregoing contention, that I had jurisdiction under the said 75th section to order the demolition of the building in question, or so much thereof as was within fifty feet of the highway.

10. It was further contended on the part of the appellant that the superintending architect had not any power or authority, under the above-cited Act and section, to fix a general line of buildings at a distance exceeding fifty feet from the highway. I did not accede to this contention, but I held that the aforesaid certificate of the superintending architect was good and valid, and I further found as a fact that the said building was within fifty feet of the highway, and that the said building was situate in the highway running along the northern side of Clapham Common.

11. It was further contended on the part of the appellant that, to give me jurisdiction to deal with the appellant's building under the above-cited Act and section, it was necessary for me to find that the said building, and not merely the site thereof, was situate in a line of buildings or row of houses in the Clapham-road, and that, upon the facts hereinbefore stated, the said building was situate in a line of buildings or row of houses in Sugden-road. The respondents, on the contrary, contended that the said building was in fact situate in a street, place, or row of houses in the Clapham-road.

12. Thereupon I found as a fact that the site or piece of land on which the house or shop numbered 139 was built, was situate in the street, place, or row of houses in the Clapham-road, between Sisters-avenue and Sugden-road, and, being of opinion that the facts hereinbefore stated, as admitted or proved, were sufficient to bring the said house or shop, No. 139, within the 75th section of the Metropolis Management Amendment Act 1862, I ordered and directed the demolition of so much thereof as projected beyond the general line of buildings in the Clapham-road, as defined by the superintending architect's certificate, and was within fifty feet of the highway.

13. If the court shall be of opinion that my said rulings and determination on the aforesaid contentions of the appellant mentioned in the 9th, 10th, and 12th paragraphs respectively of this case were correct in point of law, then my said order is to stand; but if the court be of opinion that my said rulings and determination on the said contention, or on either thereof, were wrong in point of law, then the aforesaid summons against the appellant is to be dismissed, or the court is requested to remit the case to me with the opinion of the court thereon, or to make such other order as to the court may seem fit.

Sect. 75 of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102) provides:

> No building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, &c.

And the section gives power to a magistrate, on the complaint of the vestry of the parish or the board of works for the district, to order the demolition of any building or erection erected contrary to the provisions of the section, or so much of such building or erection as may be beyond the general line of building.

R. O. B. Lane for the appellant.—Here the house faced Sugden-road, and was therefore in Sugden-road, and was consequently bound to follow the general line of buildings in Sugden-road, which it did. As it did not face Clapham-road it was not in Clapham-road, and was, therefore, not bound to follow the general line of buildings in Clapham-road, and the magistrate had no power to order the demolition of the building upon the ground that it projected beyond the building line in Clapham-road, as it was not bound to follow the building line in Clapham-road. This case is precisely similar to the case of *Barlow* v. *The Vestry of St. Mary Abbotts, Kensington* (55 L. T. Rep. N. S. 221; 11 App. Cas. 257), where the appellant's house was built at the corner of the K.-road, and a new street called D.-gardens. The side of the house abutting on the eastern side of D.-gardens projected beyond a row of houses on that side of D.-gardens. The architect certified that the main fronts of that row of houses was the general line of buildings on the eastern side of D.-gardens, but did not decide that that was the general line of buildings, either of the row of houses or of the street in which the appellant's house was situate, and the House of Lords, reversing the Court of Appeal, held that no offence had been committed under the 75th section, and that the magistrate had no power to order the demolition of the projecting part of the house. Also, before the section can apply, it is necessary to find that the building itself, and not merely the site thereof, should be situate in the line of buildings in Clapham-road, but here the finding of fact is that the site of the building was in Clapham-road.

M. White, Q.C. and *Earle*, for the respondents, were not called upon.

Lord COLERIDGE, C.J.—If the contention for the appellant were correct, a change in the law would be necessary. The architect has certified to the building line, and this house has been found to be within the building line of Clapham-road. It was said that the house was in Sugden-road, as it faced to Sugden-road, and that it would not be in Clapham-road, as it did not face to Clapham-road, and that, therefore, the building, not being in Clapham-road, was not bound to follow the building line in Clapham-road, and that the magistrate had no power to order its removal. If that were so, the provisions of the Act would be useless. It was found as a fact in the case that the house in question was situate in the street called Clapham-road, and also that it projected beyond the building line in Clapham-road, and that clearly brought it within the 75th section of the Act. Then it was contended that the case found that the site of the house was in Clapham-road, but that it was not found that the building itself was in Clapham-road, and that it was necessary that the building itself, as well as the site, should be in Clapham-road in order that the section might apply; but the distinction between the site of a building and the building itself being in a certain road, is too subtle. This

decision does not in any way conflict with the case in the House of Lords of *Barlow* v. *The Vestry of St Mary Abbotts, Kensington* (*ubi sup.*), by which, even if we differed from it, we should be bound. But I may say that we entirely concur with that case. The decision there was sensible and sound, for it was held that the house which was said to encroach on the building line of De Vere-gardens, was not in De Vere-gardens at all, and was not bound to follow the general building line of De Vere Gardens, and that, consequently, no offence had been committed under the 75th section of the Act. The present case is wholly different, for this building has been found to be within the general building line of Clapham-road, and that building line has been ascertained by the certificate of the architect, which certificate is final, as appears by the case of *Spackman* v. *The Plumstead Board of Works* (53 L. T. Rep. N. S. 157; 10 App. Cas. 229; 54 L. J. 81, M. C.). The magistrate, therefore, had power to make the order, and the order based on the architect's certificate is right. I think, therefore, this appeal must be dismissed.

CAVE, J. concurred.

Appeal dismissed.

Solicitors: for the appellant, *Corsellis* and *Mossop*; for the respondents, *W. W. Young*.

Monday, Dec. 10, 1888.

(Before Lord COLERIDGE, C.J. and MANISTY, J.)

MURRAY *v.* THOMPSON. (*a*)

Practice—Police magistrate—Keeping dog without licence—Conviction for second offence—Prior conviction proved at hearing, but not set out in summons—Whether second conviction is in respect of a "first offence"—Summary Jurisdiction Act 1879 (*42 & 43 Vict. c.* 49), *s.* 4—*7 & 8 Geo.* 4, *c.* 53, *s.* 78.

On the hearing of a summons for keeping a dog without a licence, it was proved that the defendant had previously been convicted of the same offence. This previous conviction, though proved at the hearing, was not set out in the information or summons. The magistrate, who treated the case as a first offence, as the previous conviction was not set out in the summons, reduced the penalty of 5*l.* to 9*s.* 6*d.*, *under the powers of sect.* 4 *of the Summary Jurisdiction Act* 1879, *which gives power to reduce a fine, if imposed "in respect of a first offence."*

Held, that, as the previous conviction was proved at the hearing though not stated in the summons, it was a case of a second conviction, and that the magistrate had not power to reduce the penalty below one-fourth part thereof, in consequence of the provisions of sect. 78 *of* 7 *&* 8 *Geo.* 4, *c.* 53.

CASE stated by Mr. Biron, metropolitan police magistrate, as to the power of a magistrate to reduce a penalty on a second conviction under the Dogs Licensing Acts.

In June 1888 the respondent was summoned before Mr. Biron for keeping a dog without a licence, contrary to the provisions of sect. 4 of the Act 30 & 31 Vict. c. 5 (an Act to repeal the duties of assessed taxes on dogs, and to impose in lieu thereof a duty of Excise).

On the hearing of this summons it was proved that the respondent had previously, in Aug. 1887, been convicted and fined in the sum of 2*s.* for the same offence—namely, keeping a dog without a licence. This previous conviction, although proved at the hearing, was not set out in the information and summons; and the learned magistrate held that, as the previous conviction was not set out in the information and summons, although proved at the hearing, the case was one of a first offence, and that he had power to reduce the penalty as for a first offence under the 4th section of the Summary Jurisdiction Act of 1879 (42 & 43 Vict. c. 49).

The fine imposed for keeping a dog without a licence is, by sect. 8 of 30 & 31 Vict. c. 5, 5*l.* The learned magistrate, treating the case as a first offence, reduced the fine to 9*s.* 6*d.*

Sect. 4 of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) provides that,

> Where a court of summary jurisdiction has authority under this Act, or under any other Act, whether past or future, to impose imprisonment, or to impose a fine for an offence punishable on summary conviction, that court may, in the case of imprisonment, impose the same without hard labour, and reduce the prescribed periods thereof, or do either of such acts; and in the case of a fine, if it be imposed as in respect of a first offence, may reduce the prescribed amount thereof.

Sect. 78 of 7 & 8 Geo. 4, c. 53, gives power to Commissioners of Excise and justices of the peace to mitigate penalties incurred for any offence relating to the revenue of Excise. . . . "so as such mitigation shall not reduce such penalty to less than one-fourth part thereof."

Sir *R. E. Webster*, Q.C. (A.-G.) (with him *R. S. Wright*) for the Crown.—The magistrate thought that, as the summons or information did not state the fact of the previous conviction, the case was to be treated as a first offence, and that he had power to reduce the fine as for a first offence, under the 4th section of the Summary Jurisdiction Act 1879. The question is, whether this was a first offence. It was not necessary to charge the previous conviction in the summons; it was sufficient to have proved it at the hearing, as was done in this case. Under these circumstances, what is there to enable the magistrate to reduce the fine? The magistrate acted under the 4th section of the Act of 1879, but that is when the fine is imposed as in respect of a first offence. By sect. 78 of 7 & 8 Geo. 3, c. 53, the magistrate had no power to reduce the fine below one-fourth part thereof, which, in this case, would have been 25*s.* This fine ought to be increased to 25*s.*

The respondent did not appear.

Lord COLERIDGE, C.J.—I think the Attorney-General is right. It seems to me that the magistrate had, on the occasion of the first conviction, power to mitigate the penalty as he liked, but on the second occasion, as the former conviction was proved, he could not, having regard to the terms of sect. 78 of 7 & 8 Geo. 4, c. 53, mitigate the penalty below one-fourth part of the 5*l.*, and it does not matter that the first conviction was not stated in the summons, it being sufficient that such first conviction was proved at the hearing. This fine must be increased to 1*l.* 5*s.*

MANISTY, J.—I am of the same opinion.

Fine increased to 1*l.* 5*s.*

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

June 1, *Nov.* 13 *and* 15, 1888.

(Before Wills and Grantham, JJ.)

Smith (app.) *v.* The Churchwardens and Overseers of Birmingham (resps.). (*a*)

Poor rate—Rateable value—House let by the week — Deductions claimed by owner — The Poor Rate Assessment and Collection Act 1869 (c. 41).

The owner of a certain house which was let at a weekly rent of five shillings, entered into an agreement, under the provisions of the 3rd section of the Poor Rate Assessment and Collection Act 1869, *with the respondents, under which he became liable to pay the poor rates, and was allowed a commission on the amount thereof. The respondents rated the owner in respect of his house at a gross estimated rental of 9l. 10s. and at a rateable value of 7l. 5s. The owner appealed and claimed that, in order to ascertain the gross estimated rental certain deductions should be made for "voids," and losses by non-payment of rent, for the cost of collecting rent, and for water rate.*

Held, that, as the hypothetical yearly tenant was for rating purposes to be treated as an occupier, the only deduction to be allowed was in respect of the water rate, which was a charge for water sold and supplied, and not a rent, and therefore a deduction should be made for it.

This was a case stated by the Recorder of Birmingham, on the hearing of an appeal from the decision of the special sessions of the justices of the borough of Birmingham, holden under the statute 6 & 7 Will. 4, c. 96, ss. 6 and 7, confirming a rate for the relief of the poor, made by the respondents, and allowed on the 26th March 1866 in respect of a house belonging to the appellant, known as 40, Alexandra-street, in the parish and borough of Birmingham. The appeal was heard at the October Quarter Sessions 1887, when that court confirmed the rate appealed against, subject to the opinion of the Queen's Bench Division on a case, which was, so far as material, as follows:

Case.

The house in question was of the character and description known as artisans' or work-people's dwellings. It was let at a weekly rent of five shillings, and the appellant as landlord paid all the outgoings in respect of it, including water rate, poor and other local rates, and the sums required for repairs.

The rate appealed against in respect of this house was as follows:—No. of house, 40; name of occupier, Philip Edward Baker; name of owner, William Benjamin Smith; description of property, house; gross estimated rental, 9l. 10s.; rateable value, 7l. 5s.

The contention of the appellant was: That the following deductions ought to have been made in ascertaining the gross estimated rental, namely: (1) A percentage on fifty-two times the weekly rent in respect of "voids" and losses (fixed, as hereinafter appears, at 5 per cent.). (2) For cost of collecting rent 5 per cent. on the sum of 12l. 7s. being fifty-two times the weekly rent, less 5 per cent. for voids and losses. (3) Ten shillings the full value of the water rate as if paid by the tenant. (4) In the alternative, eight shillings, the amount of the water rate actually paid by the landlord in pursuance of his agreement to compound as hereinafter explained. (5) Poor and other local rates at six shillings and eightpence in the pound.

With reference to all the foregoing deductions, the appellant contended that the hypothetical tenant from year to year contemplated by the Parochial Assessment Act of 1836 must for the purpose of ascertaining the gross estimated rental be deemed not to occupy personally but to sublet the tenements to weekly tenants as occupiers, himself paying all the outgoings as hereinbefore mentioned, and that the propriety of the several deductions claimed must be decided on the footing of that interpretation of the statute. In other words, that the question must be determined precisely as if the appellant's reversionary interest in the premises occupied by his sub-tenants was a tenancy from year to year, and the problem to be determined was what deductions should be made in ascertaining the rent he should pay to his ground landlord.

The respondent, on the other hand, contended that such hypothetical tenant must be deemed to be in actual occupation of the tenement, and the gross estimated rental fixed in accordance with the rent which he might reasonably be expected to give as a tenant from year to year under a landlord who paid in respect of it all the outgoings hereinbefore mentioned. The learned recorder held that the appellant's construction of the statute was erroneous, and that of the respondents was correct, and all his findings of law and fact in regard to the propriety of the several deductions claimed, and in regard to the amount of the rent at which the said house might reasonably be expected to let from year to year if so let, proceed on the footing of that decision.

It was agreed that, in order to arrive at the rateable value, a deduction of 25 per cent. for repairs must be made from the gross estimated rentals.

According, therefore, to the contention of the appellants the proper mode of calculating the rateable value would be as follows:

	£	s.	d.	£	s.	d.
Fifty-two weeks' rent at 5s. per week				13	0	0
(1) Deduct 5 per cent. on 13l. on account of voids and losses	0	13	0			
(2) Deduct 5 per cent. for cost of collecting the rent actually collected as above, viz., 12l. 7s. ...	0	12	4			
(3) Deduct the amount of the water rate if the full amount be allowed	0	10	0			
(4) Deduct poor and other local rates at 6s. 8d. in the pound on 6l. 14s. 10d.	2	4	11			
				4	0	3
Gross estimated rental ...				8	19	9
(5) Deduction for repairs, &c., estimated at 25 per cent. of the gross estimated rental				2	4	11
Rateable value				6	14	10

The respondents, on the other hand, contended that the appellant was not entitled to the deductions so claimed by him in respect of voids and losses, collection, and water rate. They contended that voids and losses of rent were inseparable from the enjoyment of all rateable hereditaments, and in no way affected the rateable value of such hereditaments, inasmuch as rates were payable only for so long as the hereditaments were

(*a*) Reported by Alfred H. Lefroy, Esq., Barrister-at-Law.

let, unless provided for by the statutes relating to the compounding for rates.

In regard to voids and losses it was proved that it was practically impossible to let houses of the description to which that in question belongs on other terms than by the week, the landlord paying all outgoings as hereinbefore stated; that the persons to whom such tenements were usually let were artisans or workpeople; that owing to fluctuations in trade, change of employment, and other causes, such persons from time to time moved to other districts, and the houses formerly occupied by them were often left void, and were unable to be relet for several weeks, while at other times from like causes the occupiers fell out of employment and were unable to pay their rents; that as a result of such voids and losses the landlord of such tenements did not receive on an average in the course of the year fifty-two times the amount of the weekly rent reserved, but some smaller amount. The learned recorder assumed, for rating purposes, that a tenant from year to year could be obtained, and found that the house 40, Alexandra-street, could reasonably be expected to be let from year to year at the rent of 13*l.* a year, the landlord paying all usual tenant's rates and taxes, and water rates. The learned recorder further found, that with respect to house property of this description whether let by week or by the year the landlord would be unable by reason of voids and of losses by nonpayment of rent to collect more than 95*l.* per cent. of the rent, and held, that the appellant was not entitled to the deduction claimed by him for voids and losses, on the grounds contended for by the respondents as hereinbefore stated, and also because he was of opinion that the rental at which the premises might be expected to let from year to year and not the amount of rent actually received for them was the proper criterion to be taken into consideration in the rating of such premises.

With regard to the cost of collection, it was proved that the rents of houses let on weekly tenancies were usually collected by agents or collectors on behalf of the landlord, and that the usual remuneration for the labour and cost of so collecting them was 5 per cent. on the amount collected, and that the appellant's rents in respect of the property in question were so collected for him on those terms. It was also proved that the usual remuneration for collecting the rents of houses let by the year or the quarter was 2½ per cent. on the amount collected. The learned recorder found on the evidence before him that 5 per cent. was a reasonable remuneration for collecting the rents of weekly houses, but held, that no deduction at all was allowable on this account.

With regard to the water rate: The borough of Birmingham was supplied with water by the corporation of Birmingham, under and by virtue of the provisions of the Birmingham Corporation (Consolidation) Act 1883 (46 & 47 Vict. c. lxx.), and the Acts incorporated therewith, and there was practically no other source of water supply, although taking a supply of water from the corporation was not made compulsory by the statute. Owners of houses of the description in question were liable to the corporation for the payment of the water rate, and the amount paid by the occupiers as rent was accordingly proportionately greater than it would have been if the occupiers provided directly for their own supply. The owners were, on the other hand, enabled and permitted, in consideration of their agreeing to pay the water rate in respect of their houses, whether the same were occupied or not, to compound for its payment at a reduced rate, and the appellant had so compounded in respect of the house in question. The amount of the water rate in respect of No. 40, Alexandra-street, which would be payable, if not compounded for, was 10*s.* The amount actually paid by the appellant in pursuance of his agreement to compound for the same was 8*s.* The respondents contended that the appellant was not entitled to either deduction on account of water rate. The recorder held, that the respondents' contentions were correct, being of opinion that in point of law the payment for water was in the nature of a rent, and was not a tenant's rate within the meaning of the statute.

The poor and other local rates to be deducted were 6*s.* 8*d.* in the pound on the rateable value of the premises rated.

The questions for the opinion of the court were as follows: (1) What was the proper hypothesis to be made in applying the Parochial Assessment Act to a tenement of the description in question? (2) Was the appellant entitled to the deduction of 5 per cent. on account of voids and losses? (3) Was he entitled to the deduction of 5 per cent. for collection? (4) Was he entitled to the deduction of the full amount of the water rate as if not compounded for? (5) Alternatively, was he entitled to the deduction of the amount actually paid by him in respect of water rate?

If the court should be of opinion that the appellant was entitled to all or any two of the deductions claimed for voids or losses, collection of rent and water rate, then the order of the recorder was to be quashed; but if the appellant was not entitled to any of the deductions claimed for voids and losses for collection and water rate, or to one only of such deductions, the order of the recorder was to be affirmed.

Jelf, Q.C. and *W. Wills* for the appellant.—The Parochial Assessment Act (6 & 7 Will. 4, c. 96) lays down a clear test of the mode in which the value is to be arrived at, the "estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rentcharge, if any," and the other part, deducting therefrom the annual average costs of repairs and insurance, is the further deduction which changes the gross estimated rental into the rateable value. The first thing to be arrived at is the net annual value of the premises, and that is what a landlord can get net from a hypothetical tenant from year to year for the land as land alone. The gross estimated rental is what a landlord can get as simple rent for the land as land, with his outgoings and his incomings, whatever they are, and that is what we have to arrive at in this case. In order to have a measure the Parochial Assessment Act took a tenancy from year to year as a standard test. Now, if you have not got the actual letting of the thing, if you have not a standard of comparison with other things close by, similar things which you can get

at it from, then you must arrive at it the best way you can, and you must, when the owner and occupier are the same person, find out by trying to make a bargain and trying to arrive at the elements. Here is a property where you have not got an actual tenant from year to year, and you have not the standard of comparison of a tenant from year to year, because the houses are not let in that way; therefore the landlord must take it, and make what he can out of it, and what he gets out of it net—that is to say, less what he has to pay to get it—is the value of that property to him as rent. According to this view a deduction for voids must necessarily be made in order to arrive at the net annual value, and also a deduction for the cost of collection, as if a house is let from year to year the rent is collected at very little expense, but if by the week to artisans, as in this case, the cost of collection, which is a necessary expense, is considerable. The value to the landlord would be the rent coming to him for the land as land, and would be the amount he would receive as weekly rents not only after the deduction for voids and losses, but also for collection. If the hypothetical tenant from year to year is assumed to be a person who sublets the premises, then the water rates, cost of collection, and voids and losses, ought all to be estimated in calculating the amount that he would pay to his landlord. If, however, the hypothetical tenant is assumed to be a person himself occupying the house, then all these matters would be taken into consideration in fixing his rent. Now, as regards the water rate. [WILLS, J.—There ought to be a deduction for that. The *Attorney-General*. —I assent to that deduction, as it rests upon a different principle.] The following cases were cited in the course of the argument:

Dobbs v. *The Grand Junction Waterworks Company*, 49 L. T. Rep. N. S. 541; 9 App. Cas. 49;
Reg. v. *Wells*, 16 L. T. Rep. N. S. 790; L. Rep. 2 Q. B. 542;
Reg. v. *Grand Junction Railway Company*, 4 Q. B. 18.

The *Attorney-General* (Sir Richard Webster, Q.C.) and *Alfred Young* (with them *Hugo Young*) for the respondents.—Voids and losses of rent are inseparable from the enjoyment of all rateable hereditaments, and in no way affect the rateable value of such hereditaments, inasmuch as rates are payable only for as long as the hereditaments are let, unless provided for by the statutes relating to the compounding for rates. There ought not to be a deduction for collection. The landlord, instead of receiving his rent himself, as a landlord from year to year is supposed to do, chooses to have it collected for him, and there is no authority for saying that the particular way which this landlord adopts to receive his weekly payment is the standard of rateable value. The following cases were referred to:

Reg. v. *Great Western Railway Company*, 20 L. T. Rep. N. S. 481; L. Rep. 4 Q. B. 323;
Reg. v. *Llantrissant*, L. Rep. 4 Q. B. 354.

Cur. adv. vult.

Nov. 15.—WILLS, J.—The appellant in this case is the owner of certain small tenements for which he has compounded under the Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict. c. 41). In a poor rate for the parish of Birmingham, he has been rated at a gross estimated rental of 9*l.* 10*s.*, and at a rateable value of 7*l.* 5*s.* The appellant claimed before the learned Recorder of Birmingham to have certain elements of diminution, in order to ascertain the gross estimated rental, introducted into the calculation, all of which the learned recorder has disallowed. They are shortly as follows. The house selected by way of illustration is let to weekly tenants at 5*s.* a week. It is found that it is practically impossible to let it for longer periods. It is also found that, owing to voids and losses by nonpayment of rent, the landlord receives in the year at least 5 per cent. less than the aggregate of the weekly rents for fifty-two weeks. He employs a collector, and it is the common practice with respect to such tenements for landlords to do so. The appellant also pays the water rate. It is in respect of these items that the questions in the present case are raised. With respect to the deduction claimed for water rates, I am clearly of opinion that it is a charge for water sold and supplied, and in no sense rent. The premises of themselves do not afford water, and the tenant would get none but for the supply through the company's pipes, and it presents therefore no analogy to the case of premises comprising a well, which being part of the actual land occupied must be taken into account when estimating the rent. This deduction, therefore, will have to be made from the 13*l.* The next contention of the appellant relates to the allowance for voids and losses by nonpayment of rents, in respect of which he claims that he ought to be rated at that portion only of the 13*l.* which actually finds its way into his pocket. He argues that, inasmuch as the only practical way of dealing with the property is to let it to weekly tenants, if he had a tenant from year to year that tenant would be obliged to sublet it in the same way as he does, and that as the tenant could not in that way make 13*l.* out of it, he never would give 13*l.* a year for it, and therefore the amount of hypothetical yearly rent cannot be higher than the 13*l.* less the deductions in question. In order to clear the ground for the discussion of this question I will notice, in order to get rid of them, certain statutory provisions which I must not be supposed to have overlooked, but which, in my judgment, do not affect the principles upon which this case must be decided. The Act of 59 Geo. 3, c. 12, s. 19, contains very peculiar provisions for rating the owners instead of the occupiers of such tenements, and introduces in cases which fall under it a standard of rating which has nothing to do with the net annual value, as interpreted by the Parochial Assessment Act 1836 (6 & 7 Will. 4, c. 96), s. 1. That Act, however, has nothing to do with the present case, and it is clear that under the Poor Rate Assessment and Collection 1869 (32 & 33 Vict. c. 41), which is the Act relating to the rating of owners instead of occupiers under which the present case falls, no special provisions are made for arriving at the value of property, and although the owners are the persons to be rated, and are entitled to certain deductions on the amount which would be payable if the occupiers were rated, the general principles of rating apply, and the value for the purpose of the rate must be ascertained in the same way as if the occupiers were rated. Certain statutory provisions were made also for the cases in which occupiers for short periods, being rated, are exempted from payment of more than the proportion of the rate due for one quarter of a

year, and enabling them to deduct the amount paid by them from the rent due to the owner (32 & 33 Vict. c. 41, ss. 1 and 2); and provision is further made that an outgoing tenant shall be liable only for the portion of the rate corresponding to his period of occupation (32 & 33 Vict. c. 41, s. 16). These, however, are mere statutory qualifications and exemptions engrafted upon the general system, and do not go beyond the specific instances to which they are made applicable. They do not affect the question with which we have to deal; and in order to see what the principle is upon which the amount of the rating is to be calculated, we must look at the state of things existing before these or similar enactments (all of which are long subsequent to the origin of our rating system) were passed. Now, nothing can be clearer than that, apart from the special enactments referred to, the person to be assessed is the person in actual occupation. It was until those statutes, and still is the case where they do not apply, that the weekly tenant who may be in actual occupation of the tenement when the rate is made was or is the person liable. Until the Act of 17 Geo. 2, c. 38, s. 12, he was at once liable for the whole amount, and even under that Act he was liable for the whole amount until an incoming tenant stepped into his shoes; and it was held that, where a tenant only occupied for a fortnight after the rate was made, and the succeeding tenant did not come in for some months, the first tenant was liable for the apportioned part of it, the total rate answering to the period when there was no occupation. The mere fact, therefore, that the tenant upon whom the rate is properly made is only a weekly tenant has, apart from the statutes mentioned, no bearing upon the question how much of the rate, calculated upon proper principles, when made, he ought to pay, and it seems to me that the only bearing it has upon the question of what the quantum of the hypothetical yearly rent ought to be, is that it may or may not render the amount of his weekly rent a bad test of what the natural rent by the year would be; or rather, I should say, it may or may not, according to circumstances, render the amount of his weekly rent a bad test of what the rent by the year would be. It is to no purpose to say that such property cannot in practice be let by the year; no more can railways, canals, docks, or gasworks. The Act of Parliament requires the assumption of a tenancy from year to year to be made, and you can no more impugn the hypothesis of such a tenancy in rating matters than in logic you are permitted to deny your opponent's hypothetical premise. You must assume a landlord willing to let and a tenant willing to take by the year, and having done so, you must get in the best way you can at the rent which, by agreement arrived at by the compromise of the conflicting interests of the man who wants to receive as much as he can and the man who wants to pay as little as he can, would be arrived at under such circumstances. There are many cases in which statutory limitations upon the mode of enjoyment of the tenant exist. In such cases the hypothetical tenant is treated as holding subject to the same statutory restrictions; but there is no case that I am aware of in which those limitations are other than incidents to the occupation, or in which they have destroyed the power of actual occupation, and they therefore afford no support to the view put forward here, that the practical impossibility of finding a tenant from year to year justifies a resort to a new principle in rating law by which the theory of actual occupation is discarded. The person to be rated then being the occupier and not the owner, the hypothetical tenant is brought upon the scene, not for the purpose of changing one of the cardinal conditions of rating, but simply for the purpose of giving, or perhaps it might be more correctly said of illustrating, the principle by which quantum is to be arrived at. The tenant whose supposed dealing with the landlord is to be the test of quantum is still to be a tenant or occupier, and there is, as far as I can see, no warrant either in principle or authority for the claim of the appellant in this instance to turn him into a hypothetical landlord sub-letting the tenement of which he could only be rated as the actual occupier. To treat the hypothetical tenant, who, although a supposititious person, is still *ex hypothesi* a tenant or occupier, as himself a landlord and not in occupation, appears to me to be a contradiction of terms, and at variance with everything that I have ever understood to be the law upon this subject. It is true that by the Parochial Assessment Act 1836 (6 & 7 Will. 4, c. 96), s. 1, you have to get at the "net annual value," after which words comes the interpretation of the phrase, "that is to say, the rent at which the same might reasonably be expected to let for from year to year free of" various specified charges usually paid by the tenant, and deducting certain specified items of expense, &c., which the landlord generally incurs, and which enable him to maintain the premises in a state to command such rent as aforesaid. With such words to deal with it is quite useless to consider what has been said in the case of *Dobbs* v. *Grand Junction Waterworks Company* (49 L. T. Rep. N. S. 541; 9 App. Cas. 49), or elsewhere, as to the meaning of "annual value" in Acts in which the defining words of the Parochial Assessment Act 1836 (6 & 7 Will. 4, c. 96), s. 1, are not to be found. In the Act now under consideration the words "net annual value, that is to say," are superfluous and might just as well be left out. "Net annual value" means just as much and no more and no less than the words which follow that expression, and which I have already cited. It seems to me to follow that, if you are compelled to assess the occupier, whatever his actual period of past or prospective occupation, upon the assumption that there is a tenancy for a year, it is idle to talk of his being assessed at a less sum than he otherwise would be assessed at because he may, in fact, occupy for a week only. The hypothetical tenant and the actual tenant are two separate and distinct entities. The hypothetical tenant will give neither more nor less for his year's occupation because the actual tenant only wants to occupy for a week or a fortnight. The tenant who, *ex hypothesi*, is to occupy for a year, cannot be put as a person who ought to pay a rent less than the fair rent for a year, on the ground that there will be a week or a fortnight out of the year when the occupation will cease; that would be to contradict the hypothesis which you are bound to assume. This is the view which I understand the learned Recorder of Birmingham to have acted upon. He says in effect: "I see no reason why, if there were a tenant from year to year, he

should not be willing to pay for the year at the same rate as the actual tenants pay for the week." So far it is a pure question of fact, and whether the decision be one at which I should myself arrive, if the question of fact were before me, or not, is a matter I have nothing to do with. I must not be supposed, when I put it in this way, to be suggesting that there is anything unreasonable or improper in the view he has taken of this question of fact, but it is simply out of place for this court, which is not a court of appeal on the question of fact, to express any opinion about it, either one way or the other. It is said, however, that the finding of the learned recorder, after the case was remitted to him for further statement, shows that 5 per cent. ought to come off this initial amount of 13*l*. He says that upon property of this description the landlord would be unable by reason of voids and nonpayments of rent to realise more than 95 per cent. of the value. As far as voids are concerned, they are excluded, in my opinion, by the statutory hypothesis of a tenancy from year to year. It is the old point over again. Unless I am wrong in holding that the hypothetical yearly tenant is to be treated as an occupier, the deduction for voids can have no place in the estimate. Nor does it seem to me that the fact that this class of tenant is often impecunious is material. The question is, what a tenant might be reasonably expected *bonâ fide* to bind himself to pay. Mr. Wills, in his able contribution to the argument for the appellants, treated the finding of the learned recorder as equivalent to saying that the full sum was a mere paper rent, and not the real sum supposed to be arrived at between the parties as the rent intended to be paid. I do not so understand him. There is an inherent difficulty in applying statutory hypotheses which are unreal in fact. It is exemplified by the difficulties which have arisen under the Bills of Sale Act 1878, where the Act of Parliament requires a receipt, which is not in any ordinary sense an assurance, to be dealt with as an assurance; and under the Employers' Liability Act, which says that a servant shall in certain cases have the same right as if he were not a servant, without saying whether he is to be regarded as an absolute stranger or outsider, or as a person present by invitation, or as a person lawfully upon the premises; and it is not very easy to say whether this is a circumstance which would find its way into the amount of rent, or whether it is, apart from that, a loss which, in respect of a rent fairly arrived at between the parties, would, notwithstanding the fact that it might be expected from the outset, really fall upon the landlord without affecting the rent. I can equally well conceive circumstances under which it might not affect the bargain between the parties. It might induce the landlord to ask more, but I do not see that it would lead the tenant to be willing to give more than he would if he was likely to have no difficulty in paying. A landlord will often be willing to let to an exceptionally careful or solvent tenant at a rent less than that which he would ask from a more uncertain paymaster or a less conscientious person. But no one ever heard of the introduction of such a question into the calculation of what a yearly tenant might be expected to give. It is a matter, as it seems to me, far too remote and speculative to be a necessary element in the estimation, and I think the learned recorder was quite justified in discarding it. The cost of collection I am quite clear is no deduction. It is only claimed, and can only be claimed, on the hypothesis that the rated occupier can be treated as himself a landlord and not in occupation. It is conceded that the allowance of the deduction for water rate alone is not sufficient to reduce either the gross or the net rateable value below the respective amounts appearing in the present rate; and, as all the other items in dispute are, in my opinion, erroneously claimed as deductions, it follows that the rate must stand. So far I have dealt with the matter without reference to the fact that the present appellant compounded for the rates as landlord, and is accordingly rated under the Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict. c. 41); and what has been said would have applied to King's appeal, had it been necessary to go into his case. It is sufficient, with respect to this fact, to point out that the case of the landlord so compounding is one less favourable for the appellant than that of the tenant paying the rates, inasmuch as to the landlord compounding very large deductions are made under the Act in question, as to which it is very difficult to see what they are for unless they embrace some, at all events, of the deductions now claimed. The order of sessions, therefore, must be confirmed and the appeal dismissed.

Grantham, J. concurred. *Appeal dismissed.*

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